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A TREATISE
ON THE
LAW OF DAMAGES,

EMBRACING
AN ELEMENTARY EXPOSITION OF THE LAW,
AND ALSO
ITS APPLICATION TO PARTICULAR SUBJECTS OF
CONTRACT AND TORT.

BY
J. G. SUTHERLAND,
AUTHOR OF A TREATISE ON "STATUTES AND STATUTORY CONSTRUCTION."

SECOND EDITION,
REVISED, SECTIONIZED AND ENLARGED,

BY
THE AUTHOR
AND
JOHN R. BERRYMAN,
AUTHOR OF A "DIGEST OF THE LAW OF INSURANCE," ETC.

VOL. I.

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PREFACE TO FIRST EDITION.

The law of damages is now, and for many years has been, in the course of rapid and expansive growth; its former applications have been subjected to frequent forensic and judicial review, with the advantage of the experience and learning of the past, and the stimulus as well as the suggestive aid of new and diversified interests demanding protection, and new forms of injury invoking redress.

It is therefore desirable that the law be often rewritten to incorporate in its structure the results of the latest adjudications, not only for the light they reflect upon the earlier cases, but to derive the full benefit of these accretions, which embody the contribution of contemporary jurists and master minds of the profession.

The administration of justice is committed to so many independent tribunals, that it is not surprising their determinations, especially of questions of first impression, have not proceeded in a very harmonious current. Differences of judicial opinion, more or less radical, under such circumstances, are unavoidable. These are liable to result in permanent divergencies; and to beget local exceptions and peculiarities so numerous as to greatly mar the symmetry and impair the authority of our general jurisprudence.

Frequent elementary expositions of the law, embracing a discussion of the discordant cases with reference to the general principles which all acknowledge, are of great importance; for, to the extent that they are influential, they will counteract this centrifugal tendency.

It is believed that the work now offered will be found useful in these respects, notwithstanding that excellent works on the same subject are now in general use. It has extended to three volumes by being made to embrace a wide range of

topics germane to the general subject, and by an elementary and a minutely practical treatment of them.

The First Part is elementary, and designed to aid the inquiries of the student, and to facilitate the investigations of the practitioner. In it are stated and illustrated the general principles upon which damages, recognized under various names, are allowed by law; their scope relatively to the injury to be redressed; the principles by which the elements of damage may be tested, and the amount to be allowed therefor determined; by which facts may be legitimately weighed to enhance or mitigate damages; how they may be juridically or conventionally liquidated and satisfied; and the pleadings, evidence and procedure suitable and necessary for their recovery.

The Second Part contains a particular discussion of these principles in their practical application to the subjects of contract and tort, which give rise to actual demands for damages.

The whole is copiously elucidated by decided cases and apposite quotations; and the supporting authorities will, it is believed, be found to embrace all the decisions of any importance on the subject.

The author submits his work with its faults — for he dare not hope it will be found faultless — to the indulgent judgment and fair criticism of the profession.

J. G. S.

SALT LAKE CITY, September, 1882.

PREFACE TO SECOND EDITION.

A ~~new~~ edition of this work has been deemed necessary to incorporate into it the results of the numerous adjudications during the ten years which have elapsed since the publication of the first edition. A thorough revision has been made, and about four hundred pages of new matter added as the fruit of nearly seven thousand later decisions. By a judicious condensation of the old matter and the exclusion of some redundancies, the additions have not so materially increased the size of the volumes as to make them inconveniently large. The text has been divided into sections for easier reference; but the side-paging will serve to direct the reader to the matter indicated in the frequent references in judicial opinions and by text-writers and practitioners to the first edition.

The editors submit their work to the profession with the assurance that they have spared no pains to make it *comprehensive and accurate*.

J. G. S.

J. R. B.

NOVEMBER, 1892.

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THE LAW OF DAMAGES.

PART I.

AN ELEMENTARY EXPOSITION OF THE SUBJECT.

CHAPTER I.

A GENERAL STATEMENT OF THE RIGHT TO DAMAGES, THEIR LEGAL QUALITY AND KINDS.

- § 1. General observations.
- 2. The right to damages; how amount ascertained.
- 3. *Damnum absque injuria; injuria sine damno.*
- 4. Public wrongs.
- 5. Illegal transactions.
- 6. Contractual exemption from liability for damages.
- 7. Nature of the right to damages; its survival.
- 8. Injuries to unborn child.

§ 1. General observations. The chief practical value of any system of law is in its adaptability and efficiency to secure the individual in the full enjoyment of his rights, and in giving him adequate relief when they are violated. The common law defines them, and professes to afford a remedy for their every infraction. In the nature of things, this remedy cannot consist in so annulling by adjudication an act which violates a right that the injured party will be restored to its enjoyment as though there had been no interruption.

The consequences of an act which is an invasion of another's right may be arrested; in some cases partial restoration is practicable. But unless compensation can be made as a substitute for that to which a party is entitled, and of which

he has been more or less deprived, there will be an irreparable injury, and a corresponding failure of justice. This compensation the law provides for; and it is the principal object of legal actions to ascertain what it should be, fix the amount, and enforce its payment. In some actions the paramount purpose is to compel the defendant to yield up possession of specific property which the plaintiff claims to own, and incidentally to obtain compensation for its detention, as in ejectment and replevin. So in actions on contracts for the direct payment of money, the effect of recovery is apparently to compel the defendant to do the very thing he agreed to do; [2] compensation for the delay in the form of interest is a subordinate matter.

§ 2. **The right to damages; how amount ascertained.** In contemplation of law, every infraction of a legal right causes injury; this is practically and legally an incontrovertible proposition. If the infraction is established, the conclusion of damage inevitably follows.¹ This deduction is made though it actually appears and is recognized in the case that there was in fact no injury, but a benefit conferred.² This legal conclusion of damage is generally indeterminate as to amount; it is that *some* damage resulted; if no proof is made of the actual damage, judgment can be given only for a minimum sum — nominal damages. In cases of contract it may occur that for any breach a large and determinate sum will become due, for which judgment without proof may be rendered. But generally, within certain limits, the actual injury is to be established by proof as matter of fact. In many cases of tort, however, the injury complained of is of such a nature that compensation cannot be awarded by any precise pecuniary standard, and there is no legal measure of damages, because the injury does not consist of pecuniary elements, or elements of which the value can be measured or expressed in money. The compensation which shall be allowed for an injury of this character is by the common law referred to the sound discretion and dispassionate judgment of a jury. Where there is a legal measure of damages the jury must determine the amount as a fact according to that measure, otherwise the law

¹ New York Rubber Co. v. Rothery, 182 N. Y. 293.

² Murphy v. Fond du Lac, 23 Wis. 365. See §§ 9, 10.

which measures the compensation would be of no avail; and whether they have done so or not in a given case may be proximately seen by a comparison of the verdict with the evidence.¹ Courts of general jurisdiction have power over verdicts, and may set them aside when the jury have been influenced by passion or corruption, or have disregarded the legal measure of compensation. By the course of modern decisions, whether compensation for the actual injury in actions for torts is subject to legal measure or not, if the injury was done maliciously, fraudulently, oppressively or with wanton violence, such measure, if any, while not entirely ignored, ceases to be the limit of recovery. The jury are at liberty, in the exercise of their judgment, on finding such malice or [3] other aggravation, to give additional damages as a *solatium* to the party so wronged, and as a punishment to the wrongdoer. The sums so allowed by law and found by a jury for tortious injuries, or losses from breach of contract, are *damages* — the pecuniary redress which a successful plaintiff obtains by legal action. They are for the most part compensation for civil injury — exemplary damages being an exception; therefore, the law relating to the subject of damages is principally directed to defining and measuring compensation. The civil injury for which damages may be recovered must be one which is recognized as such by the law; it must result from the violation in some form of a legal right. No damages can be recovered for failure to fulfill a merely moral obligation, nor for any wrong or injury which consists in a neglect of social amenities.

§ 3. *Damnum absque injuria; injuria sine damno.* The right to damages constituting a legal cause of action requires the concurrence of two things: that the party claiming them has suffered an injury, and that there is some other person who is legally answerable for having caused it. If one suffers an injury for which no one is liable it gives no legal claim for damages: it is *damnum absque injuria*; so if one does a wrong from which no legal injury ensues, there is no legal cause of action: it is *injuria sine damno*.² That no act char-

¹ *Parke v. Frank*, 75 Cal. 364, citing *Wittich v. First Nat. Bank*, 20 Fla. 843.
the text.

² *McAllister v. Clement*, 75 Cal. 182; Acts done with reasonable care

acterized by these negations is actionable is, in the abstract, a truism. When we say that a person who suffers an injury which does not arise from any other person's fault has no cause of action, a self-evident proposition is stated; and equally so when we say that no person has a cause of action against another for the latter's wrongful act unless he is injured by it. The former precludes any action for lawful acts lawfully done, though some actual hurt or loss results to some person therefrom. Thus, for example, adjoining land-owners have a mutual right of lateral support to the soil in its natural state, but not under the pressure of buildings. When one has so loaded down his soil near the line, the other still has the right to make any use he pleases of his premises, and may excavate to the line, if he does so with due care, upon proper notice to the other; and if by such excavation the stability of the buildings [4] of the adjoining proprietor is endangered, or they are in fact destroyed, it is an injury for which no action lies.¹ The exercise of one's right to dig in his own land may have the effect of diverting an underground stream of water which is beneficial to another, or of draining his well, but the act of digging which causes either result not being wrongful if done without malice, there is no redress for the injury.² The owner of property may thus and otherwise, whilst in the reasonable exercise of established rights, casually cause an injury which the law regards as a misfortune merely, and for which the party from whose act it proceeds is liable neither at law nor in the forum of conscience. No legal liability is incurred by the natural and lawful use of his land by the owner thereof in the absence of malice or negligence.³ Thus one opening a coal mine in the ordinary and usual manner may, upon his

pursuant to valid statutes will not render those who perform them liable for damages resulting. *Highway Com'rs v. Ely*, 54 Mich. 173.

¹ *Wyatt v. Harrison*, 8 B. & Ad. 875; *Thurston v. Hancock*, 12 Mass. 220; *Panton v. Holland*, 17 Johns. 92; *Lasala v. Holbrook*, 4 Paige, 169; *McGuire v. Grant*, 25 N. J. L. 356; *Hay v. Cohoes Co.*, 2 N. Y. 159; *Winn v. Abeles*, 35 Kan. 91.

² *Acton v. Blundell*, 12 M. & W. 324; *Chasemore v. Richards*, 7 H. L. Cas. 849; 2 H. & N. 168; *Mosier v. Caldwell*, 7 Nev. 363; *Chase v. Silverstone*, 62 Me. 175; *Greenleaf v. Francis*, 18 Pick. 117; *Trustees, etc. v. Youmans*, 50 Barb. 316; *Ellis v. Duncan*, 11 How. Pr. 515; *Lybe's Appeal*, 106 Pa. St. 626.

³ *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126.

own land, drain or pump the water which percolates into his mine into a stream which forms the natural drainage of the basin in which the mine is situate, although the quantity of the water may thereby be increased and its quality so affected as to render it totally unfit for domestic purposes by the lower riparian owners.¹ In cases of this nature a loss or damage is indeed sustained, but it results from an act which is neither unjust nor illegal done by another free and responsible being.² The prosecution in good faith of a groundless action may give the defendant great annoyance, and cause him loss of time and money; but the plaintiff in such case is exercising a legal right, and the defendant, according to the weight of authority, if there has been no interference with his person or property, is entitled to no compensation for the injury he suffers beyond the costs which may be taxed in his favor.³ Every man is entitled to come into a court of justice and claim what he deems to be his right; if he fails he shall be amerced (according to the old principle) for his false claim; and the defendant is entitled to his costs, and with these he must be content.⁴ But if the suit be malicious, as well as false or groundless, the party bringing it is answerable in an action at law by the party injured.⁵ The making *bona fide* of defamatory statements, though they are harsh, untrue and injurious, in the assertion of rights, in the performance of a duty, or in fair criticism upon a matter of public interest, is also *damnum absque injuria*.⁶ Private houses may be pulled down in [5] the interest of the public to prevent the spread of fire,⁷ and bulwarks may be raised on private property as a defense against a public enemy. So owners of land exposed to the

¹ Id.

² Broom's Max. 151.

³ Woodmansie v. Logan, 2 N. J. L. 67; Canter v. Am. & O. Ins. Co., 8 Pet. 307; Muldoon v. Rickey, 103 Pa. St. 110; Eberly v. Rupp, 90 id. 259. See vol. 3, ch. 35.

⁴ Id.; Henry v. Dufilho, 14 La. 48; Davies v. Jenkins, 11 M. & W. 745.

⁵ Id. See vol. 3, ch. 25.

⁶ Todd v. Hawkins, 8 C. & P. 88; Huntley v. Ward, 6 C. B. (N. S.) 514; Mackay v. Ford, 5 H. & N. 792; Revis

v. Smith, 18 C. B. 126; Barnes v. McCrate, 32 Me. 442; Henderson v. Broomhead, 4 H. & N. 569; White v. Nicholls, 8 How. 266; Lawson v. Hicks, 38 Ala. 279; Calkins v. Sumner, 13 Wis. 193; Allen v. Crofoot, 2 Wend. 515; Lawler v. Earle, 5 Allen, 22.

⁷ American Print Works v. Lawrence, 23 N. J. L. 9; S. C., 21 id. 248; Surocco v. Geary, 3 Cal. 69; Russell v. Mayor, 2 Denio, 461; Field v. Des Moines, 39 Iowa, 575.

inroads of the sea, or commissioners having a statutory power to act for a number of such owners, have a right to erect barriers, though they are consequentially prejudicial to others.¹ Owners of land adjoining streets are often subjected to temporary inconvenience while work is being done thereon for their improvement, or to change their grade, or by their temporary use for the deposit of building material or the delivery of merchandise; yet there is no right to compensation therefor; no legal injury is recognized.² The construction of a new way or the discontinuance of an old one may very seriously affect the value of property; the same may result from the removal of a state capital or county seat; but persons suffering loss from such causes have no legal remedy.³ A new business may, by competition, greatly impair the productiveness of an old one, but there is no redress for the loss.⁴ These instances will serve as examples of *damnum absque injuria*.⁵

[6] The futility of cases of *wrong without injury* is illustrated by cases in which damages are the gist of the action and none are shown.⁶ A statute making it a misdemeanor

¹ King v. Pagham, 8 B. & C. 355.

² Reading v. Kepplemann, 61 Pa. St. 233; Griggs v. Foote, 4 Allen, 195; Benjamin v. Wheeler, 8 Gray, 409; Green v. Reading, 9 Watts, 382; O'Connor v. Pittsburgh, 18 Pa. St. 187; Macey v. Indianapolis, 17 Ind. 267; Terre Haute v. Turner, 36 Ind. 522; Radcliff v. Mayor, etc., 4 N. Y. 195; Mills v. Brooklyn, 32 N. Y. 489; Rome v. Omberg, 28 Ga. 46; Hovey v. Mayo, 43 Me. 322; Denver v. Bayer, 7 Colo. 118.

³ Cooley's Const. Lim. 384. See Weeks' Dam. Absque Injuria, ch. 1; Stout v. Noblesville & E. Gravel R. Co., 33 Ind. 466.

⁴ Masterson v. Short, 3 Abb. (N. S.) 154; Hanger v. Little Rock J. Ry., 52 Ark. 61.

⁵ See Macomber v. Nichols, 34 Mich. 212; Waffle v. Porter, 61 Barb. 130; Farmer v. Lewis, 1 Bush, 66; Pontiac v. Carter, 32 Mich. 164; Michigan C. R. Co. v. Anderson, 20

Mich. 244; Winters' Appeal, 61 Pa. St. 307; Tinicum Fishing Co. v. Carter, id. 21; Conger v. Weaver, 6 Cal. 548; Baker v. Boston, 12 Pick. 184; Winchester v. Osborn, 62 Barb. 337; Ellis v. Duncan, 11 How. Pr. 515; Gould v. Hudson R. R. Co., 6 N. Y. 522; Benedict v. Goit, 3 Barb. 459; Rood v. New York, etc. R. Co., 18 Barb. 80; Tyson v. Commissioners, 28 Md. 510; Tonawanda R. Co. v. Munger, 5 Denio, 255; Gardner v. Heartt, 2 Barb. 165; Radcliff v. Mayor, etc., 4 N. Y. 195; Botsford v. Wilson, 75 Ill. 132; Mitchell v. Harmony, 13 How. 135; Cleveland, etc. R. Co. v. Speer, 56 Pa. St. 325; Frankford & B. T. Co. v. Philadelphia & T. R. Co., 54 Pa. St. 345; Snyder v. Pennsylvania R. Co., 55 Pa. St. 340; Hollister v. Union Co., 9 Conn. 436; Runnels v. Bullen, 2 N. H. 532.

⁶ Ford v. Smith, 1 Wehd. 48; Badeau v. Mead, 14 Barb. 328; Kimball v. Connolly, 3 Keyes, 57; 33 How. Pr.

for any citizen to assign or transfer a claim for debt against any other citizen for the purpose of having the same collected out of the wages or personal earnings of the debtor, in courts outside of the state of the parties' residence, was held in Indiana to be designed merely to promote the public welfare and not to redress private grievances. The violation of it, though the consequence is the collection of the debt, is not an injury in a legal sense to the debtor, though such collection could not have been enforced under the exemption laws of the state in which the debtor and creditor resided.¹ It is not easy to harmonize this doctrine with that which gives a right of action against a creditor who seizes his debtor's exempt property or garnishes his exempt wages;² or with that which enjoins a citizen from prosecuting an attachment in the courts of another state against a co-citizen for the purpose of enforcing the payment of a demand out of earnings which are exempt by the law of the domicile.³ In a late case it is held that a citizen who sues a debtor in another state for the purpose of evading the exemption laws of the state of which they are both residents is liable for such damages as may result.⁴

§ 4. Public wrongs. The law does not give a private remedy for anything but a private wrong.⁵ A public wrong, though the perpetrator of it may be subject to prosecution by the public, may also have the nature and consequences of a private wrong, and be actionable as such in behalf of a person who sustains an injury differing in kind from that which the public

237; *Hutchins v. Hutchins*, 7 Hill, 104; *Pollard v. Lyon*, 91 U. S. 225; *Knickerbocker L. Ins. Co. v. Ecclesine*, 42 How. Pr. 201; *Bessil v. Elmore*, 65 Barb. 627; *Covert v. Gray*, 84 How. Pr. 450; *Kendall v. Stone*, 5 N. Y. 14; *Swan v. Tappan*, 5 Cush. 104; *Anonymous*, 60 N. Y. 262; *Dung v. Parker*, 52 N. Y. 494; *Cook v. Cook*, 100 Mass. 194; *Allen v. Addington*, 7 Wend. 9; *Millard v. Jenkins*, 9 Wend. 298; *Butler v. Kent*, 19 Johns. 223; *Stark v. Chitwood*, 5 Kan. 141; *Commercial Bank v. Ten Eyck*, 48 N. Y. 305; *McGee v. Roen*, 4 Abb. 8; *Frank-*

lin v. Smith, 21 Wend. 624; *Mayer v. Walter*, 64 Pa. St. 288; *Birch v. Benton*, 26 Mo. 153; *Speaker v. McKenzie*, *id.* 255.

¹ *Uppinghouse v. Mundel*, 103 Ind. 238. A debtor is not defrauded by being induced by a false representation to pay his debt. *Brown v. Blunt*, 72 Me. 415.

² *Albrecht v. Treitschke*, 17 Neb. 205; *Haswell v. Parsons*, 15 Cal. 266.

³ *Snook v. Snetzer*, 25 Ohio St. 516; *Zimmerman v. Franke*, 84 Kan. 650.

⁴ *Stark v. Bare*, 39 Kan. 100.

⁵ 3 Black. Com. 219.

at large suffers.¹ A land-owner who has a right of egress in a given direction by way of a street may have an injunction to restrain the closing of the street, on the theory that, by being obliged to take a circuitous route to reach a place or object, he suffers special damage.² On grounds of public policy, and because judgments cannot be impeached in collateral proceedings, a party to a suit cannot maintain an action against his successful adversary for suborning a witness whose false testimony tended to produce the judgment;³ nor for the adverse party's fraud and false swearing, so long as the judgment stands.⁴ For like reasons a defeated suitor cannot maintain an action for damages against a witness for falsely testifying in favor of the adverse party.⁵

§ 5. **Illegal transactions.** It may be assumed as an undisputed principle, say the Massachusetts court, that no action will lie to recover a demand, or a supposed claim for damages, if, to establish it, the plaintiff requires aid from an illegal transaction, or is under the necessity of showing and depend-

¹ *Chicago v. Union Building Ass'n*, 102 Ill. 379, 398; *Whitsett v. Union Depot & R. Co.*, 10 Colo. 243; *Rose v. Miles*, 4 M. & S. 101; *Greasly v. Codling*, 2 Bing. 263; *Mayor, etc. v. Henley*, 1 Bing. N. C. 222; *Goldthorpe v. Hardman*, 13 M. & W. 377; *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 281; *Crommelin v. Coxe*, 30 Ala. 318; *Lansing v. Wiswall*, 5 Denio, 213; *Hay v. Cohoes Co.*, 3 Barb. 42; *Lansing v. Smith*, 8 Cow. 146; S. C., 4 Wend. 9; *Pierce v. Dart*, 7 Cow. 609; *Mills v. Hall*, 9 Wend. 315; *Mayor v. Furze*, 3 Hill, 612; *Myers v. Malcolm*, 6 Hill, 292; *Gates v. Blincoe*, 2 Dana, 158; *Yolo Co. v. Sacramento*, 36 Cal. 193; *Shulte v. Northern P. T. Co.*, 50 Cal. 592; *Cole v. Sprowl*, 35 Me. 161; *Baxter v. Winoski T. Co.*, 23 Vt. 114; *Seeley v. Bishop*, 19 Conn. 128; *Barden v. Crocker*, 10 Pick. 383; *Stetson v. Faxon*, 19 Pick. 147; *Francis v. Schoellkopf*, 53 N. Y. 152; *Venard v. Cross*, 8 Kan. 248; *Hughes v. Heiser*,

1 Bin. 463; *Pittsburgh v. Scott*, 1 Pa. St. 309; *Runyan v. Bordine*, 14 N. J. L. 472; *Hatch v. Vermont C. R. Co.*, 23 Vt. 142; *Brown v. Watson*, 47 Me. 161; *Bruning v. New Orleans, etc. Co.*, 12 La. Ann. 541; *Clark v. Peckham*, 10 R. L. 85; *Gordon v. Baxter*, 74 N. C. 470; *Dudley v. Kennedy*, 63 Me. 465; *Hamilton v. Mayor, etc.*, 52 Ga. 435. See *Shaubut v. St. Paul, etc. R. Co.*, 21 Minn. 502; *Proprietors, etc. v. Newcomb*, 7 Met. 276; *Pekin v. Brereton*, 67 Ill. 477.

² *Sheedy v. Union Press Brick Works*, 25 Mo. App. 527; *Glasgow v. St. Louis*, 15 id. 112; S. C., 87 Mo. 678; *Belcher Sugar R. Co. v. St. Louis Grain E. Co.*, 82 Mo. 121; *Cummings v. St. Louis*, 90 Mo. 259.

³ *Bostwick v. Lewis*, 2 Day, 447; *Smith v. Lewis*, 3 Johns. 157.

⁴ *Curtis v. Fairbanks*, 16 N. H. 542; *Lyford v. Demeritt*, 32 N. H. 234; *Damport v. Sympton*, Cro. Eliz. 520; *Revis v. Smith*, 18 C. B. 125.

⁵ *Stevens v. Rowe*, 59 N. H. 578.

ing in any degree upon an illegal agreement to which he was a party.¹ But it does not follow from this rule that if two persons are engaged in the same unlawful enterprise, each of them while so engaged is irresponsible for wilful injuries done to the property of the other. If, in such a case, the plaintiff can maintain his action without being obliged to show that he was unlawfully engaged when his right to bring it accrued, he may recover; his action cannot be defeated because the defendant makes proof of the illegal act. The latter cannot be relieved from the consequences of his unlawful conduct by showing the wrong-doing of the plaintiff and his own participation therein.² In Massachusetts, if the injury is sustained on the Lord's day, and results from the negligence of the defendant, no element of wilfulness existing, the violation of the statute concerning the observance of that day is regarded as contributory negligence, though the plaintiff is otherwise free from fault.³ As applied to actions which are not based on contract the rule stated is disapproved in some jurisdictions.⁴ "The cases may be summed up," said Dixon, C. J., "and the result stated generally to be the affirmance of two very just and plain principles of law as applicable to civil actions of this nature, namely: first, that one party to the action, when called upon to answer for the consequences of his own wrongful act done to the other, cannot allege or reply the separate or distinct wrongful act of the other, done not to himself nor to his injury, and not necessarily connected with, or leading to, or causing or producing the wrongful act com-

¹ Welch v. Wesson, 6 Gray, 505; Gregg v. Wyman, 4 Cush. 122; Phalen v. Clark, 19 Conn. 421; Simpson v. Bloss, 7 Taunt. 246; Myers v. Meinrath, 101 Mass. 366; Connolly v. Boston, 117 Mass. 64; McGrath v. Merwin, 112 Mass. 467; Gulf, etc. Ry. Co. v. Johnson, 71 Tex. 619; Kitchen v. Greenabaum, 61 Mo. 110; The Arrogante Barcelones, 7 Wheat. 496; The Clarita and The Clara, 23 Wall. 1, Meguire v. Corwine, 101 U. S. 108; Oscanyan v. Winchester Arms Co., 103 id. 261.

² Welch v. Wesson, 6 Gray, 505.

³ Bosworth v. Swansey, 10 Met. 368; Jones v. Andover, 10 Allen, 18.

⁴ Sutton v. Wauwatosa, 29 Wis. 21; Louisville, etc. Ry. Co. v. Buck, 116 Ind. 566; Same v. Frawley, 110 id. 18; Knowlton v. Milwaukee C. Ry. Co., 59 Wis. 278; Gulf, etc. Ry. Co. v. Johnson, 71 Tex. 619; and numerous other cases referred to in the three first cited.

An action lies for injury done to property used for gaming purposes if it was not so used at the time it was damaged. Gulf, etc. Ry. Co. v. Johnson, 71 Tex. 619.

plained of; and secondly, that the fault, want of due care or negligence on the part of the plaintiff which will preclude a recovery for the injury complained of as contributing to it must be some act or conduct of the plaintiff having the relation to that injury of a cause to the effect produced by it."¹ Though an illegal contract will not be executed, yet when it has been executed by the parties themselves, and the illegal object has been accomplished, the money or thing which is the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin.²

§ 6. Contractual exemption from liability for damages. The benefit of the rules of law which provide compensation for injury may in many cases be waived or relinquished in whole or in part by contract. Thus persons engaged in public employments out of which spring duties and responsibilities to patrons may be relieved to some extent by contract of liabilities imposed by law, where such waivers or limitations are reasonable and not inconsistent with sound public policy. The responsibility of a common carrier as an insurer may be so limited by contract.³ It is settled, however, that a carrier cannot, by any agreement with shippers or patrons, relieve itself from responsibility for its own negligence, or that of its servants; and this because such release is unreasonable and contrary to public policy.⁴

At common law there was no right to recover damages for negligence which caused the death of a human being. That

¹ *Sutton v. Wauwatosa*, 29 Wis. 21, 26.

² *Planters' Bank v. Union Bank*, 16 Wall. 483; *McBlair v. Gibbes*, 17 How. 232; *Kiusman v. Parkhurst*, 18 How. 289; *Brooks v. Martin*, 2 Wall. 70.

³ See *Mechem's Hutchinson on Carriers*, ch. 7; note to *Cole v. Goodwin*, 32 Am. Dec. 495-506; vol. 3, ch. 11.

⁴ *Bank of Kentucky v. Adams Exp. Co.*, 98 U. S. 181; *Railway Co. v. Stevens*, 95 id. 655; *Chicago, etc. R. Co. v. Abels*, 60 Miss. 1017; *Wallingford v. Columbia & G. R. Co.*, 26 S.

C. 258; S. C., 30 Am. & Eng. R. Cas. 40; *Alabama, etc. R. Co. v. Little*, 71 Ala. 611; S. C., 12 Am. & Eng. R. Cas. 37; *American Exp. Co. v. Sands*, 55 Pa. St. 140; *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *Judson v. Western R. Corp.*, 6 Allen, 486; *Ball v. Wabash, etc. Ry. Co.*, 83 Mo. 574; *Christenson v. American Exp. Co.*, 15 Minn. 270.

The rule seems to be different in New York if the intention is clearly expressed. *Nelson v. Hudson R. R. Co.*, 48 N. Y. 498; *Nicholas v. New York C. etc. R. Co.*, 89 id. 370.

right, being given by statute, may thereby be abolished or limited. But after the right of unlimited recovery for personal injury or for death caused by negligence has been declared by the constitution, no statute which purports to fix limits to the amount recoverable can have effect.¹ It is an open question in nearly all the states whether a contract between persons who sustain the relation of master and servant to each other, by which the latter releases the former from the liability which the law imposes upon him as master, is valid. In Georgia a contract by which the servant assumes all risks connected with or incident to his employment, whether resulting from his own negligence or fault or that of any other person in the master's service, is valid if any criminal neglect is not waived.² A railroad company which is a party to such a contract does not enter into it as a common carrier; hence the principle which limits its power to restrict its liability in the latter capacity does not affect the agreement.³ It is strongly intimated in Arkansas that a stipulation which relieves the employer from liability for the negligence of co-servants (he having selected such as are competent in the first instance, and afterwards discharged those found careless, vicious or inefficient) might be sustained as reasonable, notwithstanding the abolishment of the common-law rule of non-liability for the acts and omissions of fellow-servants.⁴ This intimation was made with decisions before the court which hold otherwise. The cases which deny the validity of such contracts do so upon the ground that they are contrary to public policy.⁵ On this ground contracts which assume to relieve employers from liability for neglect to furnish suitable appliances are void.⁶ It is provided by the statute known as

¹ *Pennsylvania R. Co. v. Bowers*, 124 Pa. St. 183.

² *Western & A. R. Co. v. Bishop*, 50 Ga. 465; *Galloway v. Western & A. R. Co.*, 57 Ga. 513; *Cook v. Western & A. R. Co.*, 72 Ga. 48.

³ *Western & A. R. Co. v. Bishop*, *supra*; *Little Rock, etc. Ry. v. Eubanks*, 48 Ark. 460.

⁴ *Little Rock, etc. Ry. v. Eubanks*, 48 Ark. 460.

⁵ *Railway Co. v. Spangler*, 44 Ohio St. 471; *Kansas P. Ry. v. Peavey*, 29 Kan. 169; S. C., 84 Kan. 472.

⁶ *Little Rock, etc. Ry. v. Eubanks*, 48 Ark. 460; *Roesner v. Hermann*, 10 Biss. 486; 8 Fed. Rep. 782.

A contract to which an employee is not a party cannot affect his right to recover against his employer. *Omniger v. New York C. R. Co.*, 6 Thomp. & Cook, 498; *Kenney v. Same*, 54

the English employers' liability act, 1880, that where personal injury is caused to a workman in specified cases he may, or in case death is caused by the injury his representatives shall, have the same right of compensation and remedies against the employer as if the workman had not been in the employer's service. This has been held to affect the contract so far only as to negative the implication of an agreement on the workman's part to assume the risks of the employment. It does not render invalid his express contract to relieve the employer from liability for injuries sustained in the employment; and a contract which expressly releases all right on behalf of the servant and his representatives to claim compensation is not void as against public policy because it affects only the interest of the employed.¹ This position, it seems to the writer, is well answered by Smith, J., who said: But surely the state has an interest in the lives and limbs of all its citizens. Laborers for hire constitute a numerous and meritorious class in every community. And it is for the welfare of society that their employers shall not be permitted, under the guise of enforcing contract rights, to abdicate their duties to them. The consequence would be that every railway company and every owner of a factory, mill or mine would make it a condition precedent to the employment of labor that the laborer should release all right of action for injuries sustained in the course of the service, whether by the employer's negligence or otherwise. The natural tendency of this would be to relax the employer's carefulness in those matters of which he has the ordering and control, such as the supplying of machinery and materials, and thus increase the 'perils of occupations which are hazardous even when well managed. And the final outcome would be to fill the country with disabled men and paupers, whose support would become a charge upon the counties or upon public charity.²

Hun, 143. The master's liability is not removed by a rule which is made part of the contract requiring that the servant shall be responsible for the condition of the appliances with which he works. *Ford v. Fitchburg R. Co.*, 110 Mass. 240, 261.

¹*Griffiths v. Earl of Dudley*, 9 Q. B. Div. 357. The substance of the opinion in this case is given in a note in 44 Am. Rep. 633.

²*Little Rock, etc. Ry. v. Eubanks*, 48 Ark. 460, 468.

§ 7. Nature of the right to damages; its survival. When a cause of action arises it has a legal value as a chose in [7] action; it is a species of property.¹ The right to damages vests when the act or neglect out of which it arises occurs. Even where there is no legal measure of damages, as in case of slander or assault, the injured party has an indeterminate right to compensation the instant he receives the injury. The verdict of the jury and the judgment of the court thereon do not give, they only define, the right.² Such right when vested is to the injured party of the nature of property, and is protected as property in tangible things is protected. It cannot be annulled³ or changed by legislation,⁴ nor extinguished except by satisfaction, release or the operation of statutes of limitation.⁵ Trover will lie for its conversion⁶ or the conversion of paper evidence of it;⁷ and other actions will lie for breaches of duty or contract, as well as for other wrongs relating to it.⁸ Except when the right of action and to damages is for a personal tort or breach of a marriage promise, it survives the death of the injured party and is assignable.⁹

¹ 2 Black. Com. 438.

² Id.

³ Cooley on Const. Lim. 449; Streun-
bel v. Milwaukee, etc. R. Co., 12 Wis.
467; Westervelt v. Gregg, 12 N. Y.
211; Dash v. Van Kleeck, 7 Johns.
477; Thornton v. Turner, 11 Minn.
336; Terrill v. Rankin, 2 Bush, 453;
Williar v. Baltimore, etc. Ass'n, 45
Md. 546; Griffin v. Wilcox, 21 Ind.
370.

⁴ Chicago, etc. R. Co. v. Pounds, 11
Lea, 127.

⁵ Bowman v. Teall, 28 Wend. 305;
Allaire v. Whitney, 1 Hill, 484; Whit-
ney v. Allaire, 1 N. Y. 305; Christian-
son v. Linford, 3 Robt. 215; Baylis v.
Usher, 4 Moore & P. 790; Bayliss v.
Fisher, 7 Bing. 158; Willoughby v.
Backhouse, 4 Dowl. & Ry. 539; S. C.,
2 B. & C. 821; Clarke v. Meigs, 10
Bosw. 837.

⁶ Ayres v. French, 41 Conn. 151;
Payne v. Elliot, 54 Cal. 841-2.

⁷ Fullam v. Cummings, 16 Vt. 697;

Archer v. Williams, 2 C. & K. 26;
Comparet v. Burr, 5 Blackf. 419;
Hudspeth v. Wilson, 2 Dev. 872;
Pierce v. Gilson, 9 Vt. 216; Moody v.
Keener, 7 Port. 218.

⁸ Terry v. Allis, 20 Wis. 82; Evans
v. Trenton, 24 N. J. L. 764; Allen v.
Suydam, 17 Wend. 868; Walker v.
Bank, 9 N. Y. 582; McNair v. Burns,
9 Watts, 180; Rhinelander v. Bar-
row, 17 Johns. 588; Rundle v. Moore,
3 Johns. Cas. 86.

⁹ Final v. Backus, 18 Mich. 218;
Sears v. Conover, 3 Keyes, 118; North
v. Turner, 9 S. & R. 244; Johnston
v. Bennett, 5 Abb. (N. S.) 331; Butler
v. New York E. R. Co., 22 Barb. 110;
Zabriskie v. Smith, 13 N. Y. 822;
Haight v. Hayt, 19 N. Y. 464; Richt-
meyer v. Remsen, 38 N. Y. 206; Pur-
ple v. Hudson R. R. Co., 4 Duer, 74;
Zogbaum v. Parker, 66 Barb. 341;
Waldron v. Willard, 17 N. Y. 466;
Grocers' Nat. Bank v. Clark, 48 Barb.
26; McKee v. Judd, 12 N. Y. 622;

[8] The general subject embraces the principles and illustrative examples by which all legal causes of action may be tested and their pecuniary value measured or adjudicated. By these courts determine, first, whether the party complaining has suffered a legal injury, and how the conclusion that he has shall be expressed in damages; and secondly, they direct and limit the inquiries for the ascertainment of the amount which shall be recovered by way of recompense.

§ 8. **Injuries to unborn child.**— In 1884 the question was raised in Massachusetts whether a child prematurely born, and surviving only a few minutes, in consequence of an injury to its mother, was a “person” within the meaning of a statute giving an action for the loss of life against the town whose defective highway caused it. The court, after reviewing by Holmes, J., the argument in favor of the administrator of the child, which was based on Lord Coke’s statement to the effect that if a woman is quick with child, and takes a potion, or if a man beats her and the child is born alive and dies of the potion or battery, this is murder;¹ and said that “no case, so far as we know, has ever decided that, if the infant survived, it could maintain an action for injuries received by it while in its mother’s womb. Yet that is the test of the principle relied on by the plaintiff, who can hardly avoid contending that a pretty large field of litigation has been left un-

McDougall v. Walling, 48 Barb. 364; 1 Black. Com. 129, 130; 4 id. 198; Fried v. New York C. R. Co., 25 Beale v. Beale, 1 P. Wms. 244, 246; How. Pr. 285; Rice v. Stone, 1 Allen, Burdet v. Hopegood, id. 486; Rex v. 566; Munsell v. Lewis, 4 Hill, 635; Senior, 1 Moody C. C. 346. Robinson v. Weeks, 6 How. Pr. 161; The court did not consider how far the statement in the text would Jordan v. Gillen, 44 N. H. 424; be followed by it, if the question Grant v. Ludlow’s Adm’r, 8 Ohio St. 1; were to be considered as one at Taylor v. Galland, 8 G. Greene, 17; common law, but observed that it Foy v. Troy, etc. R. Co., 24 Barb. 382; was opposed to the case in 3 Ass. pl. Smith v. New York, etc. R. Co., 28 2; S. C., Y. B. 1 Ed. III. 23, pl. 18; Barb. 605; Blakeney v. Blakeney, 6 which seems not to have been Port. 109; Nettles v. Barnett, 8 Port. doubted by Fitzherbert or Brooke, 181; Hoyt v. Thompson, 5 N. Y. 347; and which was afterwards cited as Nash v. Hamilton, 3 Abb. 35; Brig law by Lord Hale. Fitz. Abr., “En- Sarah Ann, 2 Sumn. 211; Meech v. ditement,” pl. 4; “Corone,” pl. 146; Stoner, 19 N. Y. 26; Linton v. Hur- Bro. Abr., “Corone,” pl. 146; 1 Hale ley, 104 Mass. 853. See Barnard v. P. C. 433. See note 1, p. 16. Harrington, 3 Mass. 228.

¹ 3 Inst. 50; 1 Hawk. P. C., c. 31, § 16;

explored until the present moment." If the difficulties stated by the court could be got over, "and if we should assume, irrespective of precedent, that a man might owe a civil duty and incur a conditional prospective liability in tort to one not yet in being, and if we should assume also that causing an infant to be born prematurely stands on the same footing as wounding or poisoning, we should then be confronted with the question raised by the defendant, whether an infant dying before it was able to live separate from its mother could be said to be a person recognized by the law as capable of having a *locus standi* in court, or of being represented there by an administrator.¹ And this question would not be disposed of by citing those cases where equity has recognized the infant provisionally while still alive *en ventre*.² And perhaps not by showing that such an infant was within the protection of the criminal law. . . . Taking all the foregoing considerations into account, and further, that, as the unborn child was a part of the mother at the time of the injury, and damage to it which was not too remote to be recovered for at all was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff's intestate within its meaning."³ In 1891 the court of queen's bench in Ireland ruled that an infant who was deformed from its birth by reason of an accident which happened to its mother while it was *en ventre sa mere* could not maintain an action for the permanent injuries thereby inflicted. The mother was injured while a passenger on a railroad train. The chief justice said that the statement of claim did not allege that the mother made any contract in reference to the child—the contract was with the mother in respect of herself alone. It did not allege that any consideration was received by the company in respect of the child. It did not allege that the company, through its servants or otherwise, knew anything about the

¹ *Marsellis v. Thalhimer*, 2 Paige, 35; *Harper v. Archer*, 4 Sm. & M. 99. be afterwards born alive." See note 1, p. 16.

In the first case it was held that "an unborn child, after conception, is to be considered *in esse* for the purpose of enabling it to take an estate or for any other purpose which is for the benefit of the child, if it should

² *Lutterel's Case*, stated in *Hale v. Hale*, Prec. Ch. 50; *Wallis v. Hodson*, 2 Atk. 114, 117. See *Musgrave v. Parry*, 2 Vern. 710.

³ *Dietrich v. Northampton*, 188 Mass. 14.

child or the condition of the mother. "It is quite plain, for aught that appears in this statement of claim, that however the child in the womb may be regarded, whether as part of the mother or having a distinct personality — whether an entity or a nonentity,—it was, so far as any actual relation the company had with it, a nonentity; and therefore, in my opinion, the existence of the duty, for the breach of which the defendants would be liable as carriers of passengers, cannot be inferred. To infer the existence of such a duty from the mere possibility that the mother was with child when she was received as a passenger by the defendants would be to act without the sanction of any judicial decision, or, in my opinion, of any legal principle."¹ The same judge was anx-

¹ Walker v. Great Northern Ry. Co., 28 L. R. Ir. 69.

The arguments for the respective parties are thus summarized by the chief justice (O'Brien): Counsel for the company principally rely upon an undoubted proposition of criminal law, that under no circumstances is it held at the present day to be murder to destroy a child whilst in the womb. In Russell on Crimes, 645, it is stated on the authority of Lord Hale "that an infant in its mother's womb, not being *in rerum natura*, is not considered as a person who can be killed within the description of murder, and that therefore, if a woman being quick or great with child take any potion, or cause an abortion, or if another give her any such potion, or cause an abortion, or if a person strike her whereby the child within is killed, it is not murder or manslaughter." And they also rely upon what seems clearly established in the case of descent at common law, that a child *en ventre sa mere* is considered not in existence; and, referring to Richards v. Richards, Johns. 754, they show "that the qualified heir was entitled to the rents and profits until the post-

humous heir was born." Plaintiffs replied that the last point was an exception to the general rule which arose from the rigor of the common law with regard to real estates requiring a tenant to the *præcipe*, as pointed out in Thellusson v. Woodford, 4 Ves. 835. Mr. Justice Buller in that case observed in replying to the contention that a child *en ventre sa mere* was a nonentity: "Let us see what this nonentity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be even executor. He may take under the statute of distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction, and he may have a guardian. Some other cases put this beyond all doubt. In Wallis v. Hodson, 2 Atk. 117, Lord Hardwicke says: 'The principal reason I go upon in the question is that the plaintiff was *en ventre sa mere* at the time of her brother's death, and consequently a person *in rerum natura*, so that, by the rules of the common and civil law, she was to all intents and purposes a child as much as if born in the

ious to have it understood that he did not go so far as to hold that if a person knowing that a woman is *enciente* wilfully inflicts injuries on her with a view to injuring the child, which is born a cripple or becomes so subsequently as a result of the injuries, an action will not lie at the suit of such child. The other judges concurred in separate opinions which are very interesting and instructive.¹ It is worthy of note in this connection that it has been held in England² that a child *en ventre sa mere* is a child within the meaning of Lord Campbell's act, so as to be capable, after its birth, of maintaining an action in respect of the pecuniary loss sustained by the death of its father owing to the wrongful act of others done while it was in the womb.

father's life-time.' In the same case Lord Hardwicke takes notice that the civil law confines these rules to cases where it is for the benefit of the child to be considered as born; but notwithstanding, he states the rule to be that such child is to be considered living to all intents and purposes." Mr. Justice Buller stated in *Thellusson v. Woodford*, *supra*, that the words " 'that whenever such consideration would be for his benefit, a child *en ventre sa mere* shall be considered actually born' were used by me because I found them in the book whence the passage was taken. Why should not children *en ventre sa mere* be considered generally as in existence? They are entitled to all the privileges of other persons." In *Rex v. Senior*, 1 Moody C. C. 346, all the judges except two sitting, it was unanimously decided that a doctor who, through culpable ignorance and want of skill, inflicted a wound on a child in the act of being born, and before it was born, and of which it died afterwards, was properly convicted of manslaughter.

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¹ The editor of the Central Law Journal (vol. 32, p. 197), in commenting on the Irish case, says: Upon principle we cannot see why a suit of the character indicated cannot be maintained. An unborn child is now recognized in many decisions as being absolutely born and *in esse* from the time of its conception. In that view the child was as much a passenger as an infant in arms for whom no extra charge is made, and to whom the company certainly owes a duty; and the fact that the company, through its servants, did not know of the child, should not relieve the former from the results of its negligence. If so, it would be an easy matter for railroads to escape liability for injuries to infants in all cases by failing to notice them, and in the case of children *en ventre sa mere*, it would be a necessary and frequent subject of inquiry how far the blindness of the carrier's servants is excusable.

² *The George and Richard*, L. R. 3 Ad. & Eccl. 466.

CHAPTER II.

NOMINAL DAMAGES.

- § 9. Nature and purpose of nominal damages.
- 10. Illustrations of the right to nominal damages.
- 11. The right a substantial one; new trials.

[9] § 9. Nature and purpose of nominal damages. For every actionable injury there is an absolute right to damages; the law recognizes such an injury whenever a legal right is violated. Rights are legal when recognized and protected by law. Every invasion of such a right threatens the right itself, and to some extent impairs the possessor's enjoyment of it. The logical sequence of finding an invasion is the legal sequence,—a legal injury; this entitles the injured party to compensation. In abstract principle the law is that the person whose rights have been invaded is entitled to compensation proportioned in amount to the injury. The extent of the actual injury, however, is seldom matter of law; and when it is not, merely showing the wrong or breach of contract which constitutes the injury, will only authorize the court to judicially declare that the party injured is entitled to *some* damages. If there is no inquiry as to actual damages, or none appear on inquiry, the legal implication of damage remains. This requires some practical expression as the compensation for a technical injury; therefore, nominal damages are given, as six cents, a penny, or a farthing; a sum of money that can be spoken of, but has no existence in point of quantity. Verdicts and judgments for damages generally specify a small sum which may be paid.¹ When actual damages are assessed

¹ *Beaumont v. Greathead*, 2 C. B. 499; *Ashby v. White*, 2 Ld. Raym. 938; *Parker v. Griswold*, 17 Conn. 803; *Ripka v. Sergeant*, 7 W. & S. 9; *McConnel v. Kibbe*, 38 Ill. 175; *Pleasants v. North Beach, etc. R. Co.*, 34 Cal. 586; *Tootle v. Clifton*, 22 Ohio St. 247; *Pastorius v. Fisher*, 1 Rawle, 27; *Hobson v. Todd*, 4 T. R. 71; *Clifton v. Hooper*, 6 Q. B. 468; *Foster v. Elliott*, 38 Iowa, 216; *Leeds v. Metropolitan Gas L. Co.*, 90 N. Y. 26; *Anders v. Ellis*, 87 N. C. 207; *Hill v. Forkner*, 76 Ind. 115. If there is no substantial right involved a judgment awarding \$1 as damages will not be reversed because some smaller sum would have been sufficient. *Hill v. Forkner*, 76 Ind. 115. *Contra*, *White v. Woodruff*, 25 Neb. 797, 806.

those which are nominal are included and are not separately added. Where a plaintiff sued in an inferior court for a debt of 50 $\frac{1}{2}$., which was the extent of its jurisdiction, and neither recovered nor sought to recover damages except for the purpose of obtaining costs, it was held that nominal damages for this purpose did not place the debt beyond the jurisdiction.¹ Where judgment by default was taken on a bond in the penalty of \$250, conditioned to pay \$150, it was held that nominal damages could not be added to the penalty for detention of the debt to affect costs.²

The damages which the law thus infers from the infraction of a legal right are absolute; they cannot be controverted; they are the necessary consequent. The act complained of may produce no actual injury; it may be in fact beneficial, by adding to the value of property or by averting a loss which would otherwise have happened; yet it will be equally true, in law and in fact, that it was in itself injurious if violative of a legal right. The implied injury is from that circumstance; the fact that beyond violating a right it was not detrimental, or was even advantageous, is immaterial to the legal quality of the act itself.³

§ 10. Illustrations of the right to nominal damages. A message containing a direction to purchase a specified quantity of wheat, deliverable at a stated time in the future,

¹ *Joule v. Taylor*, 7 Exch. 58.

² *People v. Hallett*, 4 Cow. 67.

³ *Murphy v. Fond du Lac*, 23 Wis. 365; *Jewett v. Whitney*, 43 Me. 242; *Cook v. Hull*, 8 Pick. 269; *Bolivar Manuf. Co. v. Neponset Manuf. Co.*, 16 Pick. 246; *Stowell v. Lincoln*, 11 Gray, 434; *Hathorne v. Stinson*, 12 Me. 183; *Pollard v. Porter*, 3 Gray, 312; *Pond v. Merrifield*, 12 Cush. 181; *Newcomb v. Wallace*, 112 Mass. 25; *Chamberlain v. Parker*, 45 N. Y. 569; *Marzetti v. Williams*, 1 B. & Ad. 415; *Kimel v. Kimel*, 4 Jones' L. 121; *Warre v. Calvert*, 7 Ad. & El. 143; *Embrey v. Owen*, 6 Exch. 353; *Northam v. Hurley*, 1 El. & Bl. 665; *Medway Nav. Co. v. Romney*, 9 C. B. (N. S.) 575; *McLeod v. Boulton*, 8 Up.

Can. Q. B. 84; *Smith v. Whiting*, 100 Mass. 122; *McConnell v. Kibbe*, 33 Ill. 175; *Burnap v. Wight*, 14 Ill. 301; *Barker v. Green*, 2 Bing. 317; *Graver v. Sholl*, 42 Pa. St. 58; *Delaware & H. C. Co. v. Torrey*, 33 Pa. St. 143; *Kirkham v. Sharp*, 1 Whart. 333; *Chapman v. Thames M. Co.*, 13 Conn. 269; *Tyler v. Wilkinson*, 4 Mason, 397; *Bealey v. Shaw*, 6 East, 208; *Fray v. Voules*, 1 El. & El. 839; *Blodgett v. Stone*, 60 N. H. 167; *Fulkerson v. Eads*, 19 Mo. App. 623; *Adams v. Robinson*, 65 Ala. 586; *Drum v. Harrison*, 33 Ala. 384; *Barlow v. Lowder*, 35 Ark. 492; *Empire Co. v. Bonanza Co.*, 67 Cal. 406; *Hancock v. Hubbell*, 71 Cal. 537; *Green v. Weaver*, 63 Ga. 302; *Kenny v. Collier*, 79 Ga. 743;

was furnished a telegraph company for transmission. The message, by negligence of the company's servants, was not delivered. The market price of wheat advanced for two days, then fluctuated, and was less on the day specified in the message than on the day when it should have been delivered; so that there was not only no damage, but the sender was saved from the loss which he would have suffered if his message had been delivered and acted upon. But there was a neglect of duty, an infraction of the sender's right to have care and diligence used in the transmission and delivery of his message; for that he was entitled to nominal damages.¹ The plaintiff and defendants were riparian proprietors on a water-course, and had mills thereon; various other mills belonging to third persons were located on the same stream. In case, the plaintiff complained that the defendants heated the water of the stream by operating steam boilers in their mills, increasing the evaporation five per cent., which was to that extent an abstraction of the water; also that they fouled the water by discharging into it soap suds, etc. But the pollution did no actual damage to the plaintiff, because the water was already so polluted by similar acts of other mill owners and dyers above the defendants' mill that the latter's acts made no appreciable difference; that is, the pollution by the defendants did not make the stream less applicable to practical purposes than it was before. It was held, however, that the plaintiff received damage in point of law from such pollution. It was an injury to a right; but that the loss of five per cent. would not give a cause of action if such diminution arose from a reasonable use of the stream.² Where a part owner was expelled from a mill property, and while wrongfully kept out of possession, the mill, which was old, was replaced by a new one of greater value, so that when he regained possession the property was much more valuable, and he was a gainer after deducting all intermediate lost profits, he was entitled to nominal damages.³

Brant v. Gallup, 111 Ill. 487; Mize v. Glenn, 38 Mo. App. 98; Jones v. Han-novan, 55 Mo. 462.

¹ Hibbard v. Western U. Tel. Co., 83 Wis. 558.

² Wood v. Waud, 8 Exch. 748; U'-bricht v. Eufaula Water Co., 86 Ala. 587.

³ Jewett v. Whitney, 43 Me. 242.

The principle that for the violation of every legal right nominal damages at least will be allowed applies to all actions, whether for tort or breach of contract, and whether the right is personal or relates to property. The offer of violence to a person is an assault, and the least unjustifiable touching of him a battery. Where a debtor was arrested on a *ca. sa.*, and judgment, after an insolvent discharge, which gave him immunity from arrest, it was held that the party at whose [12] instance the writ was issued, as well as the attorney who issued it, were liable for false imprisonment whether they were previously notified of the discharge or not. Want of notice might reduce the damages to a nominal sum, but could not be allowed to absolutely excuse a trespass.¹ The death of a child was caused by the neglect or unskilfulness of defendant's clerk in substituting morphine for quinine. As the child could have brought an action for the injury had he survived, it was held that a liability under a statute of New York existed in favor of the administrator; and because the statute expressly gave a right of action, at least nominal damages were recoverable.² In actions for libel and slander, wherever there has been publication of matter in itself libelous or actionable *per se*, the law infers some damage.³ Every unauthorized entry upon land of another or intermeddling with his goods is an actionable trespass, whether there be actual injury or not; whether the owner suffer much or little he is entitled to a verdict for some damages.⁴ In an action for fishing in the plaintiff's several fishery, he was held entitled to nominal damages though the defendant took no fish and the declaration did not allege that he caught any.⁵ One's right of property is infringed by any unlawful flowage of his land.⁶ A riparian owner has a right to the natural flow of

¹ *Deyo v. Van Valkenburgh*, 5 Hill, 242. See *Flint v. Clark*, 18 Conn. 361.

² *Quin v. Moore*, 15 N. Y. 432; *McIntyre v. New York C. R. Co.*, 43 Barb. 532; *Ihl v. Forty-second Street, etc. R. Co.*, 47 N. Y. 317.

³ *Ashby v. White*, 1 Salk. 19; S. C., 2 Ld. Raym. 955; *Flint v. Clark*, 18 Conn. 361; *Kelly v. Sherlock*, L. R. 1 Q. B. 686.

⁴ *Dixon v. Clow*, 24 Wend. 188; *McAneany v. Jewett*, 10 Allen, 151; *Carter v. Wallace*, 2 Tex. 206; *Plummer v. Harbut*, 5 Iowa, 308; *Coe v. Peacock*, 14 Ohio St. 187; *Pierce v. Hosmer*, 66 Barb. 345; *White v. Griffin*, 4 Jones' L. 139.

⁵ *Patrick v. Greenway*, 1 Saund. 346b, note.

⁶ *Amoskeag M. Co. v. Goodale*, 46

water not increased or diminished in quantity, and unpolluted in quality, and for any infraction of this right at least nominal [13] damages may be recovered.¹ A fraud by which one is drawn into a contract is an injury actionable *per se*.² Actual damage is not necessary to an action. A violation of a right with the possibility of damage is sufficient ground.³

§ 11. **The right a substantial one; new trials.** The failure to perform a duty or contract is a legal wrong independently of actual damage to the party for whose benefit the performance of such duty or contract is due.⁴ The omission to

N. H. 53; McCoy v. Danley, 20 Pa. St. 89; Tootle v. Clifton, 22 Ohio St. 247; Kemmerrer v. Edelman, 23 Pa. St. 143; Warren v. Deslippe, 33 Up. Can. Q. B. 59; Plumleigh v. Dawson, 6 Ill. 544; Pastorius v. Fisher, 1 Rawle, 27; Whipple v. Cumberland M. Co., 2 Story, 661; Jones v. Hanovon, 55 Mo. 462; Doud v. Guthrie, 13 Ill. App. 658; Mellor v. Pilgrim, 7 Ill. App. 806; Mize v. Glenn, 38 Mo. App. 98.

¹ New York Rubber Co. v. Rothery, 132 N. Y. 293; Newhall v. Gilson, 8 Cush. 595; Tillotson v. Smith, 32 N. H. 90; Wadsworth v. Tillotson, 15 Conn. 366; Clinton v. Myers, 46 N. Y. 511; Holsman v. Boiling Spring B. Co., 14 N. J. Eq. 335; Embrey v. Owen, 6 Exch. 353; Northam v. Hurley, 1 El. & Bl. 665; Stockport Water Works Co. v. Potter, 7 H. & N. 160; Tyler v. Wilkinson, 4 Mason, 397; Wood v. Waud, 3 Exch. 748; Tuthill v. Scott, 43 Vt. 525; Munroe v. Stickney, 48 Me. 462; Mitchell v. Barry, 26 Up. Can. Q. B. 416; Blanchard v. Baker, 8 Me. 253; Stein v. Burden, 24 Ala. 180.

² Allaire v. Whitney, 1 Hill, 484; Ledbetter v. Morris, 3 Jones' L. 543; Pontifex v. Bignold, 3 Scott N. R. 890.

³ Id.; National Exchange Bank v. Sibley, 71 Ga. 726, 734; Ross v. Thompson, 78 Ind. 90; Hooten v.

Barnard, 137 Mass. 36; Blodgett v. Stone, 60 N. H. 167.

Mr. Justice Story observed in Webb v. Portland Manuf. Co., 3 Sumner, 189, that actual perceptible damage is not indispensable as the foundation of an action. The law tolerates no further inquiry than whether there has been the violation of a right. If so, the party is entitled to maintain his action in vindication of his right. In Whittemore v. Cutter, 1 Gall. 429, 438, he said that, where the law gives an action for a particular act, the doing of that act imports of itself a damage. See Enos v. Cole, 53 Wis. 235.

⁴ Spafford v. Goodell, 3 McLean, 97; Runlett v. Bell, 5 N. H. 433; Hagan v. Riley, 13 Gray, 515; Pond v. Merrifield, 12 Cush. 181; Bagby v. Harris, 9 Ala. 173; Clinton v. Mercer, 3 Murph. 119; Conger v. Weaver, 20 N. Y. 140; Mecklem v. Blake, 22 Wis. 495; Freese v. Crary, 29 Ind. 525; Worth v. Edmonds, 52 Barb. 40; French v. Bent, 43 N. H. 448; Johnson v. Stear, 15 C. B. (N. S.) 330; Steer v. Crowley, 14 C. B. (N. S.) 337; Brown v. Emerson, 18 Mo. 103; Laflin v. Willard, 16 Pick. 64; Goodnow v. Willard, 5 Met. 517; Browner v. Davis, 15 Cal. 9; Conroy v. Flint, 5 Cal. 327; Seat v. Moreland, 7 Humph. 575; Bond v. Hilton, 2 Jones' L. 149; Craig v. Chambers, 17 Ohio St. 254;

show actual damages and the inference therefrom that none have been sustained do not necessarily render the case trivial. The law has regard for the substantial rights of parties though it may overlook trivial things.¹ When such a right is violated the maxim *de minimis non curat lex* has no application. The court will add nominal damages to the finding of a jury when necessary to such rights, as to carry costs.² So where [14-16] judgment should have been given for plaintiff for nominal damages, but was rendered for defendant, it will be reversed if such damages will entitle the plaintiff to costs;³ otherwise a judgment which is erroneous only because it fails to award plaintiff nominal damages will not be reversed,⁴ nor will a new trial be granted.⁵ But if the object of the action is to determine some question of permanent right, and through error the plaintiff is deprived of the judgment he is entitled to, the fact that he can recover only nominal damages will not be reason for denying a new trial.⁶ If the right to such damages is established the court cannot ignore it and give the defendant judgment although the jury erroneously find substantial

Dow v. Humbert, 91 U.S. 294; Smith v. Whiting, 100 Mass. 122; Blot v. Boiceau, 8 N. Y. 78; Hickey v. Baird, 9 Mich. 82; McCarty v. Beach, 10 Cal. 461; Lawrence v. Rice, 12 Met. 535; Devendorf v. Wert, 42 Barb. 227; Newcomb v. Wallace, 112 Mass. 25; Chamberlain v. Parker, 45 N. Y. 569; Wilcox v. Executor of Plummer, 4 Pet. 172; Clark v. Smith, 9 Conn. 379; Barker v. Green, 2 Bing. 317; Pollard v. Porter, 8 Gray, 312; Marzetti v. Williams, 1 B. & Ad. 415; Jordan v. Gallup, 16 Conn. 536; Cooper v. Wolf, 15 Ohio St. 528; Mickles v. Hart, 1 Denio, 548; Carl v. Granger Coal Co., 69 Iowa, 519; Rosser v. Timberlake, 78 Ala. 162.

¹Smith v. Gugerty, 4 Barb. 614; Hathorne v. Stinson, 12 Me. 188; Stowell v. Lincoln, 11 Gray, 484; Kimel v. Kimel, 4 Jones' L. 121; Elliottville, etc. Plank R. Co. v. Buffalo, etc. R. Co., 20 Barb. 644.

²Von Schoening v. Buchanan, 14 Abb. 185.

³Potter v. Mellen, 36 Minn. 122; Enos v. Cole, 53 Wis. 235; Sayles v. Bemis, 57 Wis. 315; Eaton v. Lyman, 30 Wis. 41.

⁴Hickey v. Baird, 9 Mich. 82; Robertson v. Gentry, 2 Bibb, 542; Watson v. Van Meter, 43 Iowa, 76; Wire v. Foster, 62 Iowa, 114; Ely v. Parsons, 55 Conn. 83, 101; Platter v. Seymour, 86 Ind. 323; Rhine v. Morris, 96 Ind. 81; Norman v. Winch, 65 Iowa, 263; Harris v. Kerr, 87 Minn. 537; Hibbard v. Western U. Tel. Co., 33 Wis. 558; Benson v. Waukesha, 74 Wis. 31; Beatty v. Oille, 12 Can. Sup. Ct. 706; Mears v. Cornwall, 73 Mich. 78; Haven v. Manuf. Co., 40 id. 286.

⁵Ibid.; Brantingham v. Fay, 1 Johns. Cas. 256; Jennings v. Loring, 5 Ind. 250; Watson v. Hamilton, 6 Rich. 75.

⁶Merrill v. Dibble, 12 Ill. App. 85; Ely v. Parsons, 55 Conn. 83, 101.

damages in plaintiff's favor.¹ A cause of action may be so intrinsically trivial and vexatious that it would be almost a pardonable departure from the technical rule to apply the maxim *de minimis non curat lex* and direct a verdict for the defendant. It was so ruled in a Vermont case. The defendant as an officer had attached certain hay, straw, etc., and used a pitchfork belonging to the debtor in removing the same; he did no injury to the fork, and after its use returned it where he found it. The court held there was no liability.² It is to be observed that though there was a technical wrong, by an unauthorized intermeddling with another's property, there was no assertion of an adverse right and no actual injury. The action was not necessary for the vindication of a right nor to redress a wrong deserving compensation. It was, however, a case in which, upon strict principles, nominal damages should have been given; for they are always due for the positive and wrongful invasion of another's property.³ Technical rules and rules as to the forms of proceedings must be observed without regard to the consequences which may follow in particular cases; otherwise the stability of judicial decisions and the certainty of the law cannot be preserved.⁴

¹ *Carl v. Granger Coal Co.*, 69 Iowa, 519.

² *Paul v. Slason*, 22 Vt. 231.

³ *Seneca Road Co. v. Auburn, etc. R. Co.*, 5 Hill, 175.

⁴ *Clark v. Swift*, 3 Met. 390, 395.

In *Fullam v. Stearns*, 30 Vt. 443, it was said that whenever the maxim *de minimis non curat lex* is applied to take away a right of recovery, it has reference to the injury and not to the resulting damage. The opinion of Bennett, J., in that case states the result of several cases on this proposition. See *Ashby v. White*, 2

Ld. Raym. 938; *Kidder v. Barker*, 18 Vt. 454; *Clifton v. Hooper*, 6 Q. B. 468; *Barker v. Green*, 2 Bing. 317; *Williams v. Mostyn*, 4 M. & W. 145; *Cady v. Huntington*, 1 N. H. 138; *Young v. Spencer*, 10 B. & C. 145; *Embrey v. Owen*, 6 Exch. 353, 372; *Williams v. Esling*, 4 Pa. St. 486; *Glanvill v. Stacey*, 6 B. & C. 543; *Seneca Road Co. v. Auburn, etc. R. Co.*, 5 Hill, 175; *Bustamente v. Stewart*, 55 Cal. 115. A violation of right with a possibility of damage forms the ground of an action. *Allaire v. Whitney*, 1 Hill, 484.

CHAPTER III.

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SECTION 1.

COMPENSATORY DAMAGES.

§ 12. Award of compensation the object of the law. Actions at law are usually brought to recover compensa- [17] tion for the wrong complained of. The law which is denominated the law of damages is principally that which defines, measures and awards compensation. Such damages as are not compensatory are either nominal or exceptional. Compensation is the redress which the law affords to all persons whose rights have been invaded; in the nature of things they must accept that by way of reparation. Therefore the principles which underlie this right so necessary and so frequently invoked, and the rules which govern its enforcement, are of the greatest importance. The law defines very precisely all personal and property rights so that every person may enjoy his own with confidence and repose. If they are infringed the extent of the encroachment is readily seen when the facts appear. The law defines the scope of responsibility with as much precision as the nature of the subject will permit, and lays down a universal measure of recompense for civil injury which the sufferer is entitled to recover, and the person who is liable is bound to pay, when the injury has been done without a motive for which the law subjects him to punishment. The universal and cardinal principle is that the person injured shall receive a compensation commensurate with his loss or injury and no more; and it is a right of the person who is bound to pay this compensation not to be compelled to pay more, except costs.¹ It is not within legislative power to deprive an

¹ *Rockwood v. Allen*, 7 Mass. 254; *waukee, etc. R. Co. v. Arms*, 91 U. S. 489; *Dexter v. Spear*, 4 Mason, 115; *Baker v. Drake*, 53 N. Y. 216; *Walker v. Smith*, 1 Wash. C. C. 152; *United States v. Smith*, 94 U. S. 214; *Ferrer v. Beale*, 1 Ld. Raym. 692; *Robinson v. Harman*, 1 Exch. 850; *Allison v. Chandler*, 11 Mich. 542; *Peltz v. Eichele*, 62 Mo. 171; *Noble Northrup v. McGill*, 27 Mich. 234; *v. Ames Manuf. Co.*, 112 Mass. 492; *Bussy v. Donaldson*, 4 Dall. 206; *Buckley v. Buckley*, 12 Nev. 428; *Griffin v. Colver*, 16 N. Y. 494; *Mil-Suydam v. Jenkins*, 8 Sandf. 614;

individual who has been injured in his person or estate of redress either in whole or in part. "Nothing less than the full amount of pecuniary damage which a man suffers from an injury to him in his lands, goods or person fills the measure secured to him in the declaration of rights."¹ The principle of just compensation is paramount. By it all rules on the subject of compensatory damages are tested and corrected. They are but aids and means to carry it out; and when in any instance such rules do not contribute to this end, but operate to give less or more than just compensation for actual injury, they are either abandoned as inapplicable or turned aside by an exception. There are, however, upon certain subjects some arbitrary rules, or those which have been adopted from considerations of policy, ostensibly on the basis of compensation, which really fall short of that object in a conservative deference to possible consequences to the party who must respond to the demand. With these necessary or expedient exceptions, the person who has broken his contract or caused injury by any tortious act is liable to the other party to the contract or to the sufferer from such act for such damages as will place the person so injured in as good condition as though the contract had been performed or the tort had not been committed. It is not meant by this that the party liable must answer for all consequences which may indirectly and remotely ensue. The latter are, beyond a certain point, incapable of being traced; they combine with results of other causes, and any attempt to follow and apportion them would be abortive, and any conclusion of liability based upon such consequences would rest on conjecture and lead to great injustice. If men were held to such a far-reaching responsibility they would be timid or reckless; if it were legally recognized it would be fatal to all activity and enterprise.

§ 13. Limitation of liability to natural and proximate consequences. As before remarked, the law defines the scope of responsibility for consequences; beyond that they are supposed to cease or the injured party is presumed to counteract

Parker v. Simonds, 8 Met. 205; Jacobson v. Poindexter, 42 Ark. 97; Sumpter, 53 Wis. 652.

Goodbar v. Lindsley, 51 Ark. 380; Thirteenth & F. St. P. Ry. v. Boudrou, 92 Pa. St. 475, 482.

them by preventive measures. The legal scope is a reasonable one; in general it extends as far as the moral judgment and practical sense of mankind recognize responsibility in the domain of morals, and in those affairs of life which are not referred to the courts for regulation or adjustment. The law defines it generally by the principle which limits the recovery of damages to those which *naturally* and *proximately* result from the act complained of; or, in other words, to those consequences of which the act complained of is the natural and proximate cause. This limitation is expressed in such general terms that the distinction between those damages which are compensable and those which, because being too remote, are not, is not always very clear. On similar facts different courts have come to diverse conclusions, though equally acknowledging the principle. It is made more specific, however, by rules of an elementary character formulated under it, and by judicial expositions and illustrations which impart to this legal generality a more precise and determinate import than is suggested by its words; and it is only by resort to them that the principle of this limitation can be definitely understood, explained or elucidated. Damages which are recoverable may, therefore, be conveniently divided primarily for this purpose into two classes: first, direct; second, consequential.

SECTION 2.

DIRECT DAMAGES.

§ 14. What these include. These include damages for all such injurious consequences as proceed immediately from the cause which is the basis of the action; not merely the consequences which invariably or necessarily result and are always provable under the general allegation of damages in the declaration, but also other direct effects which have in the particular instance naturally ensued, and must be alleged specially to be recovered for. The liability of the defendant for these, if responsible for the cause, is clear. All such damages, whether for tort or breach of contract, are recoverable without regard to his intention or motive, or any previous actual contemplation of them. A defendant is conclusively presumed to have contemplated the damages which result directly

and necessarily or naturally from his breach of contract,¹ as will be more particularly illustrated in another place; and [20] in cases of tort his responsibility to this extent is absolute.² An illustration of this rule is found in a case in Virginia where an administrator sold a chattel which intestate had in his possession when he died, but which in truth belonged to another, and applied the proceeds to the payment of the debts of the intestate, in due course of administration, without notice of the right or claim of the owner; he was held personally liable to such owner for the value of the property.³ A factor bought goods for his principal residing at W., and by mistake sent them to a third person at S., who received them in good faith and paid the freight; he was held liable for the goods to the owner, but was allowed a deduction for the freight paid.⁴

SECTION 3.

CONSEQUENTIAL DAMAGES FOR TORTS.

§ 15. Awarded for probable consequences of tort. Consequential damages are those which the cause in question naturally but indirectly produced. An example: defendant was liable for killing a mare; plaintiff suffered injury in the loss of that animal to the extent of her value, but circumstances gave her an additional value to him; she had an unweaned colt, and was suckling the colt of another mare which had died. The direct consequence of the killing of the mare was her loss — the necessity of employing other means to raise the colts was consequential.⁵ The consequential damages which may be recovered are governed by one consideration when they are claimed for a tort, and by another when

¹ Hadley v. Baxendale, 9 Exch. 841; 414; Lane v. Atlantic Works, 111 Burrell v. New York, etc. Co., 14 Mass. 136. See chs. 21, 22, 36, vol. 3; Mich. 84; Brown v. Foster, 51 Pa. St. 165; Collard v. Southeastern Ry. Co., 7 H. & N. 79; Williams v. Vanderbilt, 28 N. Y. 217; Smith v. St. Paul, etc. Ry. Co., 30 Minn. 169.

² Newsum v. Newsum, 1 Leigh, 86.

³ Whitney v. Beckford, 105 Mass. 267; Eten v. Luyster, 60 N. Y. 252; Keenan v. Cavanagh, 44 Vt. 268;

⁴ Little v. Boston, etc. R. Co., 66 Me. 239; Bowas v. Pioneer Tow Line, 2 Sawyer, 21.

⁵ Teagarden v. Hetfield, 11 Ind. 522.

they are sued for as the result of a breach of contract. The latter will be the subject of the next section.

§ 16. Rule of consequential damages for torts. In [21] an action for a tort, if no improper motive is attributed to the defendant, the injured party is entitled to recover such damages as will compensate him for the injury received so far as it might reasonably have been expected to follow from the circumstances; such as according to common experience and the usual course of events might have been reasonably anticipated. The damages are not limited or affected, so far as they are compensatory, by what was in fact in contemplation by the party in fault. He who is responsible for a negligent act must answer "for all the injurious results which flow therefrom, by ordinary natural sequence, without the interposition of any other negligent act or overpowering force. Whether the injurious consequences may have been 'reasonably expected' to have followed from the commission of the act is not at all determinative of the liability of the person who committed the act to respond to the person suffering therefrom. Such reasonable expectation bears more clearly upon the intent with which the act was committed than upon the liability of the doer for the injurious consequences. If he might reasonably have expected that the injurious consequences which did flow from the act would flow from its commission, the *prima facie* legal presumption would be that he intended the consequences, and the action should be trespass rather than case. It is the unexpected rather than the expected that happens in the great majority of the cases of negligence."¹ Mr. Wharton says that a man may be negligent in a particular matter "a thousand times without mischief; yet, though the chance of mischief is only one to a thousand, we would continue to hold that the mischief, when it occurs, is imputable to the negligence. Hence it has been properly held that it is no defense that a particular injurious consequence is 'improbable,' and 'not to be reasonably expected,' if it really appear that it naturally followed from the negligence under examination."² Continuing, the same au-

¹ *Stevens v. Dudley*, 56 Vt. 158, 166. *White v. Ballou*, 8 Allen, 408; *Luce*

² *Wharton on Neg.*, § 77, referring to *Higgins v. Dewey*, 107 Mass. 494; *Lewis v. Smith*, 107 Mass. 334, and *v. Dorchester Ins. Co.*, 105 Mass. 297;

thor says: "Nor, when we scrutinize the cases in which the test of 'reasonable expectation' is applied, do we find that the 'expectation' spoken of is anything more than an expectation that some such disaster as that under investigation will occur on the long run from a series of such negligences as those with which the defendant is charged."¹ This doctrine is fully approved by the supreme court of Vermont,² and is logically sustained by other recent adjudications in this country, some of which are cited in the preceding note; others will be referred to in the pages devoted to this branch of the law of damages. The correct doctrine, as we conceive, is that if the act or neglect complained of was wrongful, and the injury sustained resulted in the natural order of cause and effect, the person complaining thereof is entitled to recover. There need not be in the mind of the individual whose act or omission has wrought the injury the least contemplation of the probable consequences of his conduct; he is responsible therefor because the result proximately follows his wrongful act or non-action. All persons are imperatively required to foresee what will be the natural consequences of their acts and omissions according to the usual course of nature and the general experience. The lawfulness of their acts and the degree of care required of them depend upon this foresight.³ An apt illustration of this principle is afforded by the rule of law which compels a person who is insane to make recompense for his torts. This is rested, it is true, on grounds of public policy;⁴ and the liability of all persons may be rested

several English cases. See, also, *Stevens v. Dudley*, 56 Vt. 158; *Brown v. Chicago, etc. Ry. Co.*, 54 Wis. 342; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346; *Winkler v. St. Louis, etc. Ry. Co.*, 21 Mo. App. 99; *Evans v. Saine*, 11 id. 463; *Baltimore City P. Ry. v. Kemp*, 61 Md. 74; *Hoadley v. Northern Transp. Co.*, 115 Mass. 304; *Ehrgott v. Mayor*, 96 N. Y. 264, 281; *Milwaukee, etc. R. Co. v. Kellogg*, 94 U. S. 469.

¹ § 78.

² *Stevens v. Dudley*, 56 Vt. 158.

³ A person who places a man whom

he has made helplessly drunk in charge of a horse is presumed to know that injury may result, because horses require management by persons who are possessed of mental and physical capacities. *Dunlap v. Wagner*, 85 Ind. 529; *Mead v. Stratton*, 87 N. Y. 493; *Bertholf v. O'Reilly*, 8 Hun, 16; S. C., 74 N. Y. 509; *Aldrich v. Sager*, 9 Hun, 537; *Mulcahey v. Givens*, 115 Ind. 286; *Brink v. Kansas City, etc. Ry. Co.*, 17 Mo. App. 177, 199.

⁴ *McIntyre v. Sholty*, 121 Ill. 660; *Krom v. Schoonmaker*, 3 Barb. 647; *Behrens v. McKenzie*, 28 Iowa, 833.

there as well as on the principles of natural justice. The injury, however, must proceed from and be caused by the wrongful act of the defendant; but the causation is not to be tested metaphysically or by any occult principles of science, but rather as persons of ordinary intelligence apprehend cause and effect. The law is practical, and courts do not indulge refinements and subtleties as to causation if they tend to defeat the claims of natural justice. They rather adopt the practical rule that the efficient and predominating cause in producing a given effect or result, though subordinate and dependent causes may have operated, must be looked to in determining the rights and liabilities of the parties.¹ Hence if the defendant's negligence greatly multiplied the chances of accident, and was of a character naturally leading to its occurrence, the possibility that it might have happened without such negligence is not sufficient to break the chain of cause and effect.² An act of negligence will be regarded as the cause of an injury which results unless the consequences were so unnatural and unusual that they could not have been foreseen and prevented by the highest practicable care.³

§ 17. **Illustrations of the doctrine of the preceding section.** It is a misfeasance to go through a militia drill in the public squares and business resorts of towns or villages; the officer under whose command it is done is responsible for consequential damages; if a team hitched to a wagon and standing in the usual place for business takes fright at the exercises, the discharge of small arms, and the "pomp and circumstance" of mimic war, and runs away, and one of the horses is thereby killed, the officer is responsible for its value.⁴ This case is a fair exemplification of the rule under consideration. Drilling the militia was lawful, but doing it in an improper manner or in an unsuitable place was a legal wrong to any person who in consequence thereof received injury. In ordering it to take place in a public square, the officer may not have considered the effect of frightening horses, but such an

¹ *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117, 186.

² *Reynolds v. Texas & P. Ry. Co.*, 37 La. Ann. 694.

³ *Louisville, etc. Ry. Co. v. Lucas*, 119 Ind. 583.

⁴ *Childress v. Yourie*, Meigs (Tenn.), 561; *Forney v. Geldmacher*, 75 Mo. 118.

effect was natural; horses have to be trained to witness such a spectacle without being frightened; they were to be expected where the drill was appointed to take place, and if one or a team, with or without a driver or attendant, got frightened, it would naturally run away, and in running away the usual collisions and casualties might occur. The officer who gave the command was bound to consider all these probabilities. Giving the command which no subordinate could decline to obey made the drill at the place appointed the act of the officer, whether he was present or not; the frightening of the horses which ensued was probable from their known characteristics, and from their being where [22] horses were likely to be; their breaking loose and running off in a state of fright, with or without a driver, made the usual collisions and casualties a natural sequence. Here were a series of acts so concatenated that the final damage from killing a horse was a result which the officer was bound to consider as likely to ensue; all the effects of the drill were an entirety, and therefore proceeded naturally and proximately from his act.

In a Massachusetts case this subject was well illustrated and explained. The facts are thus stated in the opinion: By careless driving the defendant's sled was caused to strike against the sleigh of one Baker with such violence as to break it in pieces, throwing Baker out, frightening his horse, and causing the animal to escape from the control of his driver, and to run violently along Fremont street, round a corner near by into Eliot street, where he ran over the plaintiff and his sleigh, breaking that in pieces and dashing him on the ground. "Upon this statement," says Foster, J., delivering the opinion, "indisputably the defendant would be liable for the injuries received by Baker and his horse and sleigh. Why is he not also responsible for the mischief done by Baker's horse in its flight? If he had struck that animal with his whip, and so made it run away, would he not be liable for an injury like the present? By the fault and direct agency of his servant the defendant started the horse in uncontrollable flight through the streets. As a natural consequence it was obviously probable that the animal might run over and injure persons traveling in the vicinity. Every one can plainly see that the acci-

dent to the plaintiff was one very likely to ensue from the careless act. We are not, therefore, dealing with remote or unexpected consequences, not easily foreseen, nor ordinarily unlikely to occur; and the plaintiff's case falls clearly within the rule already stated as to the liability of one guilty of negligence for the consequential damages resulting therefrom.

. . . Here the defendant is alleged to have been guilty of culpable negligence. And his liability depends, not upon any contract or statute obligation, but upon the duty of due care which every man owes to the community, expressed by the maxim *sic utere tuo ut alienum non lædas*. Where a right [23] or duty is created wholly by contract it can only be enforced between the contracting parties. But where the defendant has violated a law it seems just and reasonable that he should be held liable to every person injured, whose injury is the natural and probable consequence of the misconduct. In our opinion this is the well established and ancient doctrine of the common law; and such a liability extends to consequential injuries by whomsoever sustained, so long as they are of a character likely to follow and which might reasonably have been anticipated as the natural and probable result under ordinary circumstances of the wrongful act. The damage is not too remote if, according to the usual experience of mankind, the result was to be expected. This is not an impracticable or unlimited sphere of accountability extending indefinitely to all possible contingent consequences. An action can be maintained only where there is shown to be, first, a misfeasance or negligence in some particular as to which there was a duty towards the party injured or the community generally; and secondly, where it is apparent that the harm to the person or property of another which has actually ensued was reasonably likely to ensue from the act or omission complained of.

. . . It is clear from numerous authorities that the mere circumstance that there have intervened between the wrongful cause and the injurious consequence acts produced by the volition of animals or of human beings does not necessarily make the result so remote that no action can be maintained. The test is to be found, not in the number of intervening events or agents, but in their character and in the natural and probable connection between the wrong done and the

injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence as a result which might reasonably have been foreseen as probable the legal liability continues. There can be no doubt that the negligent management of horses in the public street of a city is so far a culpable act that any party injured thereby is entitled to redress. Whoever drives a horse in a thoroughfare owes the duty of due care to the community or to all persons whom [24] his negligence may expose to injury. Nor is it open to question that the master in such a case is responsible for the misconduct of his servant.”¹

§ 18. Further illustrations. Where a teamster's wagon while being loaded at a depot was injured by a train of cars, it was held he was entitled to recover for damage done thereto, for the loss of the trip in which he was engaged and for the loss of the use of the wagon until it could be repaired.² A similar measure is applied in cases of collision of boats: a reasonable sum for the damage the injured boat has received; the expense of raising it, if sunk, and of repairing it, and compensation for the loss of the use during the time it is being refitted, with interest on such items.³ In an action of trespass by forcibly invading a plantation, carrying off some slaves and frightening others away, it was held proper for the plaintiff to give in evidence the consequential damages which resulted to his wood and crops — to the former for want of the assistance of the slaves to preserve it from a subsequent flood, and to the latter to protect them against animals.⁴ The wrong included leaving a plantation with growing crops and other property exposed to injury from any cause which might arise;

¹ McDonald v. Snelling, 14 Allen, 292; Weick v. Lander, 75 Ill. 93; Clark v. Chambers, 3 Q. B. Div. 327; S. C., 7 Cent. L. J. 11. In the last case defendant was held liable for an injury caused by a dangerous thing put by him in a carriage way, although it was afterwards removed to a footpath by a third person, and was there when plaintiff was injured.

² Shelbyville, etc. R. Co. v. Lewark, 4 Ind. 471.

³ Mailler v. Express Prop. Line, 61 N. Y. 312; Brown v. Beatty, 35 Up. Can. Q. B. 328; Steamboat Co. v. Whilldin, 4 Harr. (Del.) 228; New Haven, etc. Co. v. Vanderbilt, 16 Conn. 420; Williamson v. Barrett, 13 How. (U. S.) 101.

⁴ McAfee v. Crofford, 13 How. (U. S.) 447; Hobbs v. Davis, 30 Ga. 423; Johnson v. Courts, 3 Har. & McHen. 510.

there being no force of laborers to meet any exigency, the wrong-doer was bound to take notice at his peril of any exposure to injury thus created by flood, marauding cattle or otherwise; whether an action would lie against the owner of trespassing cattle or not for the damage done by them was held immaterial. The owner of sheep which had a contagious disease suffered them to trespass on another's land and to mingle with his sheep, to which the disease was communicated, causing the death of many of the latter. He was held liable for the breach of the close, also for the loss of the sheep that so died.¹ A railroad company's servant left bars down between the plaintiff's field and the railroad track; horses escaped through the opening to the railroad and were killed by the engine; the company was held liable.² Plaintiff's horses escaped into the defendant's close by reason of the latter not keeping his fence in repair, and were there killed by the falling of a hay stack; he was held responsible.³ The lessee of a wharf was guilty of negligence in not keeping it in repair; he suffered the railing to become dilapidated, and in consequence a horse backed into the river with a wagon, and both were lost. This loss was held to be the natural and proximate effect of the negligence.⁴ A gas company, having contracted to supply plaintiff with a service pipe from its main to the meter on his premises, laid a defective pipe from which the gas escaped. A workman, in the employ of a gas-fitter engaged by plaintiff to lay pipes leading from the meter over his premises, negligently took a lighted candle for the purpose of finding out whence the gas escaped. An explosion took place damaging plaintiff's premises; he brought an action against the gas company and it was held that the damages were not too remote.⁵ A railroad company by wrongfully excavating in a public street destroyed the lateral support of the soil to the foundation of a house, and thereby plaintiff's

¹ *Barnum v. Vandusen*, 16 Conn. 402; *Lee v. Riley*, 18 C. B. (N. S.) 200; *Fultz v. Wycoff*, 25 Ind. 821. 722.

² *White v. McNett*, 83 N. Y. 871; *Henly v. Neal*, 2 Humph. 551.

⁴ *Radway v. Briggs*, 87 N. Y. 256; S. C., 35 How. Pr. 422.

³ *Powell v. Salisbury*, 2 Y. & J. 391; *Gilbertson v. Richardson*, 5 C. B. 502; *Lawrence v. Jenkins*, L. R. 8 Q. B. 274; *Couch v. Steel*, 3 El. & B.

⁵ *Burrows v. March Gas Co.*, 89 L. J. (Exch.) 83; L. R. 5 Exch. 67; *Lannen v. Albany Gas L. Co.*, 44 N. Y. 459; *Louisville Gas Co. v. Gutenkuntz*, 82 Ky. 432.

adjoining house, depending on the other for support, was injured; it was held that the company was liable for the injury.¹ It is now apparently settled that a person who negligently sets a fire is not only liable for the first building consumed, but for all subsequently destroyed by the same continuous conflagration, without regard to the distance the fire runs or the time it is in progress.²

[26] § 19. **Further illustrations.** The owner of a horse and cart who leaves them unattended in a public street is liable for any damage to children resorting there and meddling with either.³ The owner of a loaded gun, who puts it into the hands of a child, by whose indiscretion it is discharged, is liable for the damage occasioned thereby.⁴ It is negligence for a dealer to sell, contrary to law, dangerous explosives to children. When this is done with knowledge that the purchasers are not familiar with their use the vendor is held to know that the probable consequences will be injury to them or to their associates; and he is liable to the party injured although the injuries were the result of the natural conduct of a child who did not purchase the article which produced them.⁵ But the mere fact that the law forbids the sale of fire-arms to a minor does not make the vendor liable for the consequences unless he knew that the purchaser was ignorant of their character, inexperienced in the use of them, or that there was something in

¹ *Baltimore, etc. R. Co. v. Reaney*, 42 Md. 118.

² *Atkinson v. Goodrich T. Co.*, 60 Wis. 141; *O'Neill v. New York, etc. Ry. Co.*, 115 N. Y. 579; *Adams v. Young*, 44 Ohio St. 80; *Small v. C., R. I. & P. R. Co.*, 55 Iowa, 582; *Kellogg v. Chicago, etc. R. Co.*, 26 Wis. 223; *Hart v. Western R. Co.*, 13 Met. 99; *Milwaukee, etc. R. Co. v. Kellogg*, 94 U. S. 469; *Perley v. Eastern R. Co.*, 98 Mass. 414; *Higgins v. Dewey*, 107 Mass. 494; *Webb v. Rome, etc. R. Co.*, 49 N. Y. 420; *Pennsylvania R. Co. v. Hope*, 80 Pa. St. 373; *St. Joseph, etc. R. Co. v. Chase*, 11 Kan. 47; *Atchison, etc. R. Co. v. Stanford*, 12 Kan. 854; *Atchison, etc. R. Co. v. Bales*, 16 Kan. 252. But see *Ryan v. New York*

C. R. Co., 35 N. Y. 210, as limited and explained in *Lowery v. Manhattan Ry. Co.*, 99 id. 158, and *O'Neill v. New York, etc. Ry. Co.*, *supra*; *Pennsylvania R. Co. v. Kerr*, 62 Pa. St. 853, adhered to in *Hoag v. Lake Shore, etc. R. Co.*, 85 id. 298.

The rule of the *Ryan* case and the *Pennsylvania* cases is that the person who has negligently allowed a fire to be started is not responsible if it spreads over an unusual distance in consequence of an uncommonly high wind.

³ *Lynch v. Nurdin*, 1 Q. B. 29; *Ilidge v. Goodwin*, 5 C. & P. 190.

⁴ *Dixon v. Bell*, 5 M. & S. 198.

⁵ *Binford v. Johnston*, 82 Ind. 426.

his character or disposition which rendered it unsafe for him to have them.¹ Leaving an iron truck with a hot iron casting upon it in a street where children are accustomed to go and in a condition to do injury by slight interference is negligence, which will be regarded as the proximate cause of any injury to a child which may result therefrom.² The defendant's servant left a truck standing near a sidewalk in a public street, with the shafts shored up by a plank in the usual way. Another truckman temporarily left his loaded truck directly opposite on the other side of the same street; after which a third person tried to drive his truck between those two. In attempting to do so with due care he hit the defendant's truck in such a manner as to whirl its shafts round on the sidewalk so that they struck plaintiff, who was walking by, and broke her leg. For this injury she was allowed to maintain her action, the only fault imputable to defendant being the careless position in which the truck was left by his servant on the street. This was treated as the sole cause of plaintiff's injury; and was deemed sufficiently proximate to render defendant responsible.³ The defendant was liable for the act of his servant, for he was engaged in his master's work; it was negligence to leave the truck in the street when not in use; it was considered that the driver of the truck, who was the immediate agent of the force which injured plaintiff, had a right to attempt to pass between the two trucks, if he conducted himself with due care, and exercised a sound discretion in determining whether the attempt could be made with safety to persons lawfully using the street. And as the jury found that in the exercise of such care, prudence and discretion he made the attempt which resulted in the injury sustained by plaintiff, defendant was liable inasmuch as his truck was unlawfully in the street, and that should be regarded as the natural and proximate cause of the injury. The decision imports that a danger not apparent enough to deter the driver from attempting to pass the truck of the defendant could legally be apparent enough to render the injury proximate to the illegal use of the street by leaving the truck there. A man who negli-

¹ Poland v. Earhart, 70 Iowa, 285. ² Lane v. Atlantic Works, 107 Mass.
See Harris v. Cameron, 81 Wis. 239. 104; Osake v. Larkin, 40 Kan. 206.

³ Powell v. Deveney, 3 Cush. 300.

gently sets and keeps a fire on his own land is liable for any injury done by its direct communication to his neighbor's land, whether through the air or along the ground, and whether or not he might reasonably have anticipated the particular manner and direction in which it was communicated.¹ The defendants moored their boats in the channel and entrance to the locks at a dam upon a river so that the boats of others were stopped outside and exposed to the current, then rapidly rising, until by its force such boats were carried over the dam and lost without any fault of the owners. It was held that defendants negligently or wantonly caused this injury and were liable for it.² The plaintiff's boat had anchored at a wharf when the water was low. The river rose afterwards, covering certain piles of pig iron negligently left by the defendant on the wharf about a foot above low-water mark. To avoid these piles the boat was compelled to back out into the stream, where she was struck by some floating body, stove and sunk. The defendant was held liable for the loss of the boat.³ The defendant broke and entered plaintiff's close adjacent to a river and carried away gravel from a bank, near to a dam across the river, in consequence of which a flood in the river three weeks afterwards, swept away a portion of the close and a cider mill. It was held that the whole damage might [28] be recovered.⁴ A harbor company which had been in the habit of keeping a light on the end of one of its piers to enable vessels to safely enter the harbor at night discontinued the light without public notice. A vessel was afterwards lost in attempting to enter in the absence of the light. It was held that the harbor company for such act and neglect was liable for the value of the vessel lost and also for certain moneys expended in good faith, with a reasonable expectation of success, in attempting to raise her.⁵ One who maliciously causes the arrest of an engineer while he is engaged in running a train is liable to his employer for the damage resulting from the delay.⁶ It cannot be affirmed that it is not the natural and reasonable consequence of the sale of liquors to an intox-

¹ Higgins v. Dewey, 107 Mass. 494.

² Scott v. Hunter, 46 Pa. St. 192.

³ Pittsburgh v. Grier, 22 Pa. St. 54.

⁴ Dickinson v. Boyle, 17 Pick. 78.

⁵ Sweeney v. Port Burwell Harbor Co., 17 Up. Can. C. P. 574.

⁶ St. Johnsbury, etc. R. Co. v. Hunt, 55 Vt. 570.

icated person between whose home and the place where the sale is made there are railroad tracks that such person should in a dark night meet with injury or death from a train of cars.¹ If weeds or brush are allowed to grow upon the right of way of a railroad company to such a height as to obstruct the view of a highway crossing and animals are injured by a train the company will be liable;² and so if cattle concealed in such weeds or brush cause the wrecking of a train and the injury of a person thereon.³ If the unlawful speed of a train upon station grounds stampedes animals at large there and they run upon the track, either by breaking down fences or otherwise, and are killed by the negligent running of the train, such speed is the direct cause of the killing.⁴ It is not the natural consequence of the intoxication of a man to whom liquors are sold in violation of law that his wife while following him in the street for the purpose of ascertaining where he procures liquor shall fall and injure herself, and the seller is not liable for such injury.⁵ The neglect to fence a railroad and track is not the proximate cause of an injury to an animal sustained by putting its foot into a small hole while running along the track. Such an occurrence is so unusual as not to be expected by a reasonable man.⁶ There is no connection between the failure of a railroad company to provide separate accommodations for white and colored passengers, where that is required, and an assault made upon one of the latter, by a fellow passenger, without the knowledge or consent of the company's servants, after the removal of the passenger assaulted from the ladies' car to a smoking car;⁷ nor between the act of a mortgagee who takes possession of property under his mortgage before default and injury to crops because a mule needed to work them was taken;⁸ nor between threats made to arrest a debtor and a miscarriage by his wife, no physical violence being used;⁹ nor between a like result and the false imprison-

¹ *Schroder v. Crawford*, 94 Ill. 357.

⁶ *Nelson v. Chicago, etc. Ry. Co.*, 30

² *Indianapolis, etc. R. Co. v. Smith*, Minn. 74.

78 Ill. 112.

⁷ *Royston v. Illinois C. R. Co.*, 67

³ *Eames v. T. & N. O. Ry. Co.*, 63 Miss. 376.

Texas, 660.

⁸ *Jackson v. Hall*, 84 N. C. 489.

⁴ *Story v. Chicago, etc. Ry. Co.*, 79 Iowa, 402.

⁹ *Wulstein v. Mohlman*, 57 N. Y. Super. Ct. 50.

⁵ *Johnson v. Drummond*, 16 Ill. App. 641.

ment of a husband;¹ nor as a result of the wrongful finding of an indictment against him.² One who invites a person to drink liquor with him is not responsible for an assault made by the person who accepts such invitation upon a third individual, although the liquor so drank made him intoxicated.³

§ 20. **Consequential damages under fence statutes.** When a new right is conferred upon one person by a statute and a corresponding duty is thereby enjoined upon another, the liability of the defaulting party to the other party is confined to the limits prescribed by the statute. Hence, when a statute concerning division fences provides that the party who shall neglect to maintain such fences shall be liable to the party injured by his default for "such damages as shall accrue to his lands, crops, fruit-trees, shrubbery and fixtures," there is no liability for injuries which may be sustained by animals while trespassing on the lands of the party who has failed to maintain his fence.⁴ It has been attempted, in order to restrict the liability of railroad companies for neglect to fence their tracks, to apply this principle. The duty is for the protection of the public as well as for the benefit of persons who stand in other relations to the party upon whom it is enjoined, and the neglect of the duty entitles the party who is thereby injured to all the relief due him in either or both relations.⁵ But this view is not accepted in some jurisdictions, or at least the strict construction given such statutes is not in harmony with it, though the question in the aspect stated is not considered. Under a statute requiring railroad companies to fence and declaring them liable for all damages resulting from their neglect to do so which may be done by their "agents, engines or cars," liability does not extend to consequential injuries to an animal which gets upon the track by reason of the failure to fence, as where it is injured, after being frightened by an approaching train, either by jumping a cattle-guard or by coming in contact with a wire fence, or both, no wilful misconduct being charged against the train-men.⁶ The

¹ *Ellis v. Cleveland*, 55 Vt. 858; *Huxley v. Berg*, 1 Starkie, 98.

² *Hampton v. Jones*, 58 Iowa, 817.

³ *Swinfin v. Lowry*, 87 Minn. 845.

⁴ *Crandall v. Eldridge*, 46 Hun, 411.

⁵ *Graham v. President, etc.*, 46 Hun, 386; *Crandall v. Eldridge*, id. 411.

⁶ *Schertz v. Indianapolis, etc. Ry. Co.*, 107 Ill. 577; *Knight v. New York, etc. R. Co.*, 99 N. Y. 25, revers-

injuries contemplated by such language are only those which result from a direct or actual collision of the engines or cars with the animal injured.¹ The same conclusion has been reached from language which imposed liability if animals "shall be killed or injured by the cars, or locomotive, or other carriages."² Where it is provided that railroad companies shall be liable for animals killed or injured by their negligence, and that a "failure to build and maintain fences shall be deemed an act of negligence," such a construction as was given in the above cases is unwarranted.³ Under a statute which provides that on neglect to fence the road the company shall be liable for all damages sustained to any person in consequence, damages may be recovered for injury done to a farm by rendering it less fit for pasturage in consequence of such neglect.⁴ The same liability has been declared to exist under the New York statute which employs the words "shall be liable for all damages which shall be done by their agents or engines to cattle, horses or other animals."⁵ And under the same statute a railroad company has been held liable where a horse fell into a cut made by the company along a pasture, which cut was not fenced.⁶

§ 21. Consequential mental suffering and its effects. In 1888 the question whether damages for a nervous shock or mental injury caused by the defendant's negligence in permitting the plaintiff to cross its track when it was dangerous to do so, and its servant had knowledge of the danger, came before the English privy council on appeal from the supreme court of Victoria. The latter court was of the opinion that

ing 80 Hun, 415, distinguished in *Leggett v. Rome, etc. R. Co.*, 41 Hun, 80.

¹ *Ibid.*; *Lafferty v. Hannibal, etc. R. Co.*, 44 Mo. 291; *Foster v. St. Louis, etc. Ry. Co.*, 90 Mo. 116, and other Missouri cases cited therein.

² *Peru & L. R. Co. v. Hasket*, 10 Ind. 409; *Jeffersonville, etc. R. Co. v. Downey*, 61 Ind. 287.

In the last case one of two animals, which were tied together, was struck by the train; both were killed. A recovery was allowed for but one.

³ *Nelson v. Chicago, etc. Ry. Co.*, 30 Minn. 74.

The construction given the Missouri statute is forcibly criticised in 25 Am. L. Rev. 114, 264.

⁴ *Emmons v. Minneapolis, etc. Ry. Co.*, 35 Minn. 508; *Nelson v. Same*, 41 id. 181.

⁵ *Leggett v. Rome, etc. R. Co.*, 41 Hun, 80. It is doubtful whether this case is in harmony with *Knight v. New York, etc. R. Co.*, 99 N. Y. 25.

⁶ *Graham v. President, etc.*, 46 Hun, 386.

the damages were not too remote. Its judgment was reversed, and the rule declared to be that damages arising from mere sudden terror, unaccompanied by actual physical injury, cannot be considered a consequence which, in the ordinary course of things, would flow from such negligence.¹ The court observed that it was remarkable that no precedent was cited of a similar action having been maintained or even instituted. It has since come to the knowledge of the legal world that such an action had been maintained before that time. In 1890 substantially the same question came, for the second time, before the courts of Ireland, and they reached a conclusion squarely opposite to that arrived at by the privy council, and one which is supported by better reasoning and is more in harmony with justice. The action was brought by a husband and his wife, and arose out of the following facts: The female plaintiff was a passenger in an excursion train on defendant's railway. The train was too heavy to be drawn up an incline, and was divided, the car in which plaintiff was remaining attached to the engine. The rear part of the train descended the incline with great velocity; the engine was thereafter reversed and with the car plaintiff occupied followed at a high rate of speed, until stopped with a violent jerk. The proof showed that A. was put in great fright by the occurrence, and suffered from nervous shock in consequence; that she was incapacitated from performing her ordinary avocations; medical witnesses expressed the opinion that paralysis might result. The jury were charged that if great fright was, in their opinion, a reasonable and natural consequence of the circumstances in which the defendant had placed the plaintiff, and she was actually put in great fright by the circumstances, and if injury to her health was, in their opinion, a reasonable and natural consequence of such fright, and was actually occasioned thereby, damages for such injury would not be too remote. The material facts were found in plaintiff's favor. In considering the objections to the refusal of the court to charge, as requested by the defendant, that if damages or injury were the result of, or arose from, mere fright,

¹ *Victorian Ry. Com'rs v. Coultas*, *Purcell v. St. Paul City Ry. Co.*, 50 N. 13 App. Cas. 222. The facts are fully *W. Rep.* 1034, — *Minn.* —, stated in the next section. *Contra*,

not accompanied by actual physical injury, even though there might be a nervous or mental shock occasioned by the fright, such damages would be too remote, Palles, C. B., said: "This objection presupposes that the plaintiff sustained, by reason of the defendant's negligence, 'injury' of the class left to the consideration of the jury by the summing-up, i. e., injury to health, which is bodily or physical injury; and the proposition presented is that damages for such injury are not recoverable if two circumstances occur: (1) if the only connection between the negligence and this bodily injury is that the former caused fright, which caused nervous or mental shock, which shock caused the bodily injury complained of; and (2) that this so-called bodily injury did not accompany the fright, which I suppose means that the injury, although in part occasioned by the fright, assumed the character of bodily injury subsequently to, and not at, the time of the negligence or fright. To sustain this contention, it must be true whether the shock which it assumed to have been caused was either mental or nervous; and as the introduction of the word 'mental' may cause obscurity, by involving matter of a wholly different nature, unnecessary to be taken into consideration here, I eliminate it from the question. If there be a distinction between mental shock and nervous shock, then the objection cannot be sustained. It is then to be observed: (1) that the negligence is a cause of the injury, at least in the sense of a *causa sine qua non*; (2) that no intervening independent cause of the injury is suggested; (3) that jurors, having regard to their experience of life, may hold fright to be a natural and reasonable consequence of such negligence as occurred in the present case. If, then, such bodily injury as we have here may be a natural consequence of fright, the chain of reasoning is complete. But the medical evidence here is such that the jury might from it reasonably arrive at the conclusion that the injury, similar to that which actually resulted to the plaintiff from the fright, might reasonably have resulted to any person who had been placed in a similar position. It has not been suggested that there was anything special in the nervous organization of the plaintiff which might render the effect of the negligence or fright upon her different in character from that which it would have produced in any other individual. I do

not myself think that proof that the plaintiff was of an unusually nervous disposition would have been material to the question; for persons, whether nervous or strong-minded, are entitled to be carried by railway companies without unreasonable risk of danger; and my only reason for referring to the circumstance is to show that, in this particular case, the jury might have arrived at the conclusion that the injury which did in fact ensue was a natural and reasonable consequence of the negligence which actually caused it.

“Again, it is admitted that, as the negligence caused fright, if the fright contemporaneously caused physical injury, the damage would not be too remote. The distinction insisted upon is one of time only. The proposition is that, although, if an act of negligence produces such an effect upon particular structures of the body as at the moment to afford palpable evidence of physical injury, the relation of proximate cause and effect exists between such negligence and the injury, yet such relation *cannot* in law exist in the case of a similar act producing upon the same structures an effect which, at a subsequent time — say a week, a fortnight, or a month — must result, without any intervening cause, in the same physical injury. As well might it be said that a death caused by poison is not to be attributed to the person who administered it because the mortal effect is not produced contemporaneously with its administration. This train of reasoning might be pursued much farther; but in consequence of the decision to which I shall hereafter refer, I deem it unnecessary to do so.”

§ 22. **Same subject; criticism of the English case.** The chief baron then proceeded to review the English case cited in the opening paragraph of the previous section: “In support of their contention the defendants relied upon the *Victorian Railway Commissioners v. Coultas*. That was a remarkable case. The statement of claim alleged that through the negligence of the servants of the defendants, in charge of a railway gate at a level crossing, the plaintiffs, while driving over it, were placed in imminent peril of being killed by a train, and by reason thereof the plaintiff, Mary, received a shock and suffered personal injuries. It appeared that the female plaintiff, whilst returning with her husband and brother in the evening, from Melbourne to Hawthorn, in a buggy,

had to cross the defendant's line of railway at a level crossing. When they came to it the gates were closed; the gatekeeper opened the gates nearest to the plaintiffs, and then went across the line to those on the opposite side. The plaintiffs followed him, and were partly onto the up-line (the further one), when the train was seen approaching on it. The gatekeeper directed them to go back, but James Coultas, who was driving, shouted to him to open the opposite gate, and went on. He succeeded in getting the buggy across the line, so that the train, which was going at a rapid speed, did not touch it, although it passed close at the back of it. As the train approached the plaintiff, Mary, fainted. The medical evidence showed that she received a severe *nervous* shock from the fright, and that the illness from which she afterwards suffered (and which is stated in Mr Beven's book on Negligence to have included a miscarriage) was the consequence of the fright. One of the plaintiffs' witnesses said she was suffering from profound impression on the nervous system — *nervous shock*; and that the shock from which she suffered would be a natural consequence of the fright. Another said he was unable to detect any physical damage; he put down her symptoms to *nervous* shock. It is to be observed that from this evidence the jury might have inferred that physical injury was sustained by the female plaintiff at the time of the occurrence in question. Although one witness spoke of nervous shock as contradistinguished from physical damage, the question would still have been open for the jury whether the nervous shock was not — as in the generality of, if not indeed in all, cases it necessarily must be — physical injury. The jury found for the plaintiffs. Upon an appeal the privy council, without deciding that impact was necessary to sustain the action, not only set aside the verdict, but entered judgment for the defendants. In delivering judgment Sir R. Couch says: 'Her fright was caused by seeing the train approaching, and thinking that they were going to be killed. Damages arising from mere sudden terror, unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot, *under such circumstances* (their lordships think), be considered *a consequence* which, in the ordinary course of things, would flow from the negligence of the gate-keeper.'

“ Amongst the reasons stated in the judgment in support of this conclusion are: 1, that a contrary doctrine would involve damages on account of *mental* injury being given in every case where the accident caused by the negligence had given the person a severe nervous shock; 2, that no decision of an English court had been produced in which, upon such facts, damages were recovered; 3, that a decision of the supreme court of New York (*Vandenberg v. Truax*)¹ which was relied upon, was distinguishable as being a case of *palpable* injury. Of these reasons, the first seems to involve that injuries other than mental cannot result from nervous shock; and the third implies that injuries resulting from such a shock cannot be ‘palpable.’ I am unable (I say it with deference) to follow this reasoning; and further, it seems to me that even were the proposition of law upon which the judgment is based sustainable, the privy council were not warranted in assuming as a fact, against the verdict of the jury, and without any special finding in regard to it, that the fright was, in *that* particular case, unaccompanied by any actual physical injury. Further, the judgment assumes, as a matter of law, that nervous shock is something which affects merely the mental functions, and is not in itself a peculiar physical state of the body. This error pervades the entire judgment. Mr. Beven states in his recent work on Negligence,² and I entirely concur with him, that ‘the starting point of the reasoning there is that nervous shock and mental shock are identical; and that they are opposed to actual physical injury.’

§ 23. **Same subject; an earlier ruling.** “Possibly, were there no decision the other way, I should from courtesy defer my opinion to that of the privy council, and leave it to the plaintiff to test our decision upon appeal. The very point, however, had been, four years before the decision of the privy council in the *Victorian Railway Commissioners v. Coultas*, decided in this country, first in the common pleas division, then presided over by the present Lord Morris, and afterwards in the court of appeal, in the judgment delivered by the late Sir Edward Sullivan; and it is a sad commentary

¹ 4 Denio, 464.

² Page 67.

upon our present system of reporting that a decision so important and so novel has never found its way into our law reports. The case I refer to is *Byrne v. Great Southern and Western Railway Company*. It was tried before me on the 5th and 6th of December, 1882; and a motion to enter a verdict for the defendants was heard in 1883 by the common pleas division; and by the court of appeal in February, 1884. It was an action by the superintendent of the telegraph office at the Limerick Junction station of the defendant's railway. His office consisted of a small building at the end of one of the defendant's sidings, between which and the office there was a permanent buffer strongly fixed. On the 7th December, 1881, through some railway points having been negligently left open, a train entered this siding, broke down the permanent buffer and the wall of the telegraph office. The plaintiff's case was that by hearing the noise, and seeing the wall falling, he sustained a nervous shock which resulted in certain injuries to his health. . . . A verdict having been found for the plaintiff with £325 damages, a motion to set it aside, and enter a verdict for the defendant, on the ground that there was no evidence of injury sufficient to sustain the action, was refused by the common pleas division; and this refusal was affirmed by the court of appeal. That case goes much further than is necessary to sustain the direction here, as in it there was nothing in the nature of impact. As between it, by which we are bound, and the decision of the privy council, by which we are not, I must prefer the former. I desire, however, to add that I entirely concur in the decision in *Byrne v. Great Southern and Western Railway*, and that I should have been prepared to have arrived at the same conclusion, even without its high authority. . . . In conclusion, then, I am of opinion that, as the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any court to lay down, as a matter of law, that if negligence cause fright, and such fright, in its turn, so affects such structures as to cause injury to health, such injury cannot be a consequence which, in the ordinary course of things, would flow from the negligence,

unless such injury 'accompany such negligence in point of time.'"¹

§ 24. **Same subject.** A miscarriage resulting from threats to arrest a debtor husband,² by the unlawful imprisonment of a husband,³ or by wrongfully procuring him to be indicted, is not the reasonable or natural result of such acts.⁴ One who engages in a quarrel with the husband of a woman who is *enciente*, the quarrel being carried on in her hearing without knowledge of her presence or condition, is not liable for a miscarriage.⁵ It has recently been ruled in Pennsylvania that a complaint which alleges that in a collision on the defendant's railroad the cars were thrown off the track and fell on plaintiff's premises and against her dwelling, whereby plaintiff was subjected to great fright, nervous excitement and distress, and her life endangered, does not state a cause of action.⁶

§ 25. **Anticipation of injury as to persons; illustrations.** It has already been stated that though consequential damages to be recovered must be the natural and probable effect of the act complained of, yet it is not requisite that the wrongdoer should be able to anticipate who the sufferer will be. If his act has a tendency to injure some person of the general public, or many persons, and finally does in the manner which was beforehand probable cause such injury, it is proximate. This is cogently illustrated by the case of a spring gun set so as to be unwittingly discharged by the first comer.⁷ A dealer in drugs, for negligently bottling a poisonous drug and putting it in market labeled as a harmless medicine, is liable to all persons who, without fault on their part, are injured by using it though it may have been the subject of many intermediate sales.⁸ So a person who, knowing another to be a retailer of illu-

¹ Bell v. Great Northern Ry. Co., 26 L. R. Ire. 428 (1890). The opinion of the chief baron was concurred in by Andrews and Murphy, JJ. Purcell v. St. Paul City Ry. Co., 50 N. W. Rep. 1034, — Minn. —, is in accord with this case.

² Wulstein v. Mohlman, 57 N. Y. Super. Ct. 50.

³ Ellis v. Cleveland, 55 Vt. 358. See Huxley v. Berg, 1 Starkie, 98.

⁴ Hampton v. Jones, 58 Iowa, 317.

⁵ Phillips v. Dickerson, 85 Ill. 11. See Chicago & N. Ry. Co. v. Hunerberg, 16 Ill. App. 387.

⁶ Ewing v. Pittsburgh, etc. Ry. Co., 23 Atl. Rep. 340.

⁷ Jay v. Whitfield, 4 Bing. 644; Bird v. Holbrook, 4 Bing. 628; Forney v. Geldmacher, 75 Mo. 118.

⁸ Thomas v. Winchester, 6 N. Y. 397; Langridge v. Levy, 2 M. & W.

minating fluids, and that naphtha is explosive and dangerous to life for such use, sells that article to him to be retailed to his customers, he being ignorant of its dangerous properties, is liable to any person buying it of such retailer and being injured by its explosion or ignition.¹ One who knowingly [29] delivers an apparently harmless package containing a dangerous and explosive substance to a common carrier for transportation without giving him notice of its contents is liable for damages caused by its explosion while the carrier is transporting it without knowledge thereof, with such care as is adapted to its apparent nature.² The act of keeping a large quantity of gunpowder in a wooden building insufficiently secured, and situate near other buildings, thereby endangering the lives of persons in the vicinity, will subject the person so doing to damages for injury suffered by any person from its explosion though the fire which causes the explosion is [30] accidental or results from the negligence of a third person.³ So a person who by public false representations causes another reasonably to act upon them as true in a matter of business is liable to make good any loss the latter may sustain from their falsity.⁴ The servants of a railroad company ran its cars, after due warning, over a hose being used to convey water to a burning building, thereby severing it and preventing the extinguishment of the fire. It was held that the company was liable though the hose did not belong to plaintiffs, and the men in charge of it were not their servants — that the sever-

519; *Levy v. Langridge*, 4 id. 337; *Norton v. Sewall*, 106 Mass. 143; *George v. Skivington*, L. R. 5 Exch. 1.

¹ *Wellington v. Downer K. O. Co.* 104 Mass. 64. See *Carter v. Towne*, 93 Mass. 567; S. C., 103 id. 507.

The sale of an article in itself harmless, and which becomes dangerous only by being used in combination with some other substance, without any knowledge by the vendor that it is to be used in such combination, does not render him liable to an action by one who purchases the article from the original vendee, and who is injured while using it in a

dangerous combination with another article, although by mistake the article actually sold is different from that which is intended to be sold. *Davidson v. Nichols*, 11 Allen, 514. See *Loop v. Litchfield*, 42 N. Y. 351; *Longmeid v. Holliday*, 6 Exch. 761; *Langridge v. Levy*, 2 M. & W. 519; *Levy v. Langridge*, 4 id. 337.

² *Boston, etc. R. Co. v. Shanly*, 107 Mass. 568; *Farrant v. Barnes*, 11 C. B. (N. S.) 553.

³ *Myers v. Malcolm*, 6 Hill, 292.

⁴ *Morse v. Swits*, 19 How. Pr. 275; *Gerhard v. Bates*, 2 E. & B. 476; *Polhill v. Walter*, 3 B. & Ad. 114.

ing of the hose was the proximate cause of the loss.¹ The plaintiff engaged with defendant to serve on board the latter's vessel as a common seaman on a specified voyage; breach, that defendant neglected to supply and keep on board a proper supply of medicines as required by a statute, whereby plaintiff's health suffered; held a good cause of action.² The sale of a saltpetre cave was rescinded on the ground of the vendor's fraud; the vendee claimed compensation for erections on the premises, for their improvement and use made prior to the discovery of the fraud. The court held that these expenditures were not a loss naturally and proximately resulting from the fraud; that they were not part of the contract, but were made by complainant of his own choice in consequence of the bargain; that damages could not be given upon the first consequence, and then upon successive subsequent consequences.³ But it is obvious that the expenditures [31] were a proper item of damages for the fraud, if, as a fact, they were expenditures likely to be made by a purchaser; for then they were a loss which was the natural and proximate consequence of the wrong done.⁴ In a late case in Illinois,

See *Chester v. Dickerson*, 52 Barb. 349.

¹ *Metallic, etc. Co. v. Fitchburg R. Co.*, 109 Mass. 277; *Atkinson v. Newcastle, etc. Co.*, L. R. 6 Exch. 404. But see *Mott v. Hudson R. R. Co.*, 1 Robert. 593.

There is no connection between the wrongful occupation of the bank of a river and a fire, although such occupation may render it impossible for the fire department to obtain water with which to subdue the fire. *Bosch v. Burlington, etc. R. Co.*, 44 Iowa, 402. See *Brown v. Wabash, etc. Ry. Co.*, 20 Mo. App. 222; *Jackson v. Nashville, etc. Ry. Co.*, 13 Lea, 491; *Railway Co. v. Staley*, 41 Ohio St. 118.

² *Couch v. Steel*, 3 El. & B. 402. In this case it was contended that as the act of parliament imposing the duty to keep a proper supply of medicine provided a penalty for neglect

of that duty, and that it might be sued for and collected by a common informer, no action at common law would lie for damages resulting from the breach of the statutory duty, but the court sustained the action. *Rowning v. Goodchild*, 3 W. Bl. 906.

³ *Peyton v. Butler*, 3 Haywood, 141.

⁴ In *Peyton v. Butler*, *supra*, the court say: "The failure of a postmaster to deliver a letter giving liberty by a certain day to pay for a lottery ticket, price one dollar, would make him liable for \$20,000 should the ticket afterward turn out to be a prize of \$20,000. In short, the absurdity of such damages is well elucidated by the story of the crockery-ware peddler who intended by the sale and profits to become a merchant and then a nobleman of the first order, and afterwards to marry the princess." See *Bishop v. Williamson*, 11 Me. 495, where it was held

defendant contracted without authority as agent, to sell land belonging to the plaintiff, and the latter had been put to the expense of defending an unsuccessful suit on that contract for specific performance. It was held that he was entitled to recover as damages for his trouble and the expense in making such defense.¹

§ 26. **Consequential damages in highway cases.** The general rule is that municipal corporations are bound to keep their streets in a reasonably safe condition for travel. But *quasi*-municipal corporations, such as counties, townships and New England towns, are not under such obligation unless it is imposed by statute,² and clearly expressed therein.³ Such statutes are strictly construed in some states and the right of recovery is denied, especially in Maine and Massachusetts, under circumstances which do not prevent a recovery in other jurisdictions. This, it is probable, has been the result of the language employed in the statutes of those states, which are construed to relieve from liability if the accident was not directly and solely the effect of the insufficiency of the highway.⁴ It is said in a recent case⁵ that "some portion of the harness or carriage may be defective and unsafe, and the accident may be the combined result of the defect in the harness or carriage and the defect in the way; in such case there is an efficient co-operating cause, in connection with the defect in the way, that produces the injury, and the town is not liable. The same principle applies where a horse, becoming frightened at an object for which the town is not responsible, breaks away from his driver and escapes from all control, while traveling on the way, and afterwards, while thus free

that a postmaster was liable to an action for refusing to deliver a letter according to its address, but delivering it to another, it containing a list of lottery prizes or statement of the drawing; and it appearing that the person receiving the letter, availing himself of the information contained therein, purchased of the plaintiff, who was vendor of lottery tickets, a ticket that had drawn a prize; the injury was held to be the immediate consequence of the un-

lawful withholding of the letter, and the proper measure of damages the net amount of the prize.

¹ Philpot v. Taylor, 75 Ill. 309.

² 2 Dillon, Mun. Corp., § 996.

³ Barnett v. Contra Costa Co., 67 Cal. 77.

⁴ Marble v. Worcester, 4 Gray, 395; Aldrich v. Gorham, 77 Me. 287; Moulton v. Sanford, 51 Me. 127; Davis v. Dudley, 4 Allen, 557.

⁵ Aldrich v. Gorham, 77 Me. (1885), 287.

from the management and control of the driver, meets with an injury through a defect in the way.¹ . . . But whether the fright or misconduct of the horse is such as to be regarded as the true and proximate cause of the injury, in any given case, is to be governed by the extent of such misconduct. It may in some remote degree even bear upon or influence, though not in any legal sense be said to cause it. 'Everything which induces or influences an accident does not necessarily and legally cause it.'² And not only is it the doctrine of the court in our own state, but also in Massachusetts, that if a horse, well broken and adapted to the road, while being properly driven, suddenly swerves or shies from the direct course, he is not in any just sense to be considered as escaping from the control of the driver or becoming unmanageable, if he is in fact only momentarily not controlled; and that if while thus momentarily swerving or shying he is brought in contact with a defect in the road and an injury is thereby sustained, such conduct of the horse will not be considered as the proximate cause of the accident, though it may be one of the agencies or mediums through which it was produced, and a recovery may be had for such injury."³ This is also the rule in Wisconsin⁴ and in Illinois.⁵ The Wisconsin case first cited appears to go beyond the cases in Maine and Massachusetts. The fright of the horses was caused by something not in the highway and for which the city authorities were not at all responsible. Nevertheless the absence of a railing to a bridge was held the proximate cause of the accident. The distinction made in Maine and Massachusetts as to the duration of the loss of control of a horse by its driver does not appear to be taken in many states,⁶ nor in Ontario.⁷ The rule in these ju-

¹ Davis v. Dudley, 4 Allen, 557; Moulton v. Sanford, 51 Me. 127; Marble v. Worcester, 4 Gray, 895.

⁴ Olson v. Chippewa Falls, 71 Wis. 558; Houfe v. Fulton, 29 Wis. 296.

² Spaulding v. Winslow, 74 Me. 534.

⁵ Rockford v. Russell, 9 Ill. Ap. 229; Joliet v. Verley, 85 Ill. 58.

³ Spaulding v. Winslow, 74 Me. 534; Titus v. Northbridge, 97 Mass. 258; Stone v. Hubbardston, 100 Mass. 55; Bemis v. Arlington, 114 Mass. 508; Wright v. Templeton, 132 Mass. 50.

⁶ Baltimore & H. T. Co. v. Bateman, 68 Md. 389; Ring v. Cohoes, 77 N. Y. 83; Putman v. New York, etc. R. Co., 47 Hun, 439, 442; Baldwin v. Greenwoods T. Co., 40 Conn. 238;

⁷ Sherwood v. Hamilton, 37 Up. Can. Q. B. 410.

risdictions is that when an accident happens from a defect existing in a highway as the result of negligence, the fact that the horse was at the time uncontrollable or running away is not a defense to an action to recover for the injury. The Connecticut court say: "The failure of a traveler to be continually present with his team up to the time and place of injury, when that failure proceeds from some cause entirely beyond his control and not from any negligence on his part, ought not to impose upon him the loss from such injury, particularly when the direct cause of the same is the negligence of some other party; the loss should be charged upon the party guilty of the first and only negligence. If the plaintiff is in the exercise of ordinary care and prudence and the injury is attributable to the negligence of the defendants, combined with some accidental cause to which the plaintiff has not negligently contributed, the defendants are liable." Nor will the fact that the horse of the plaintiff was uncontrollable for some distance before the injury change or in any way affect the liability of the defendant.¹ But this principle is not to be extended to a case in which the horse is left tied to a post and breaks away therefrom and goes over an unguarded bank, where he would not have been driven by a prudent driver.² It may, however, apply where the first cause leading to the injury happened outside of the defendants' road, as where the horse became uncontrollable through fright upon a road for which defendants were not responsible and ran from there upon private property, thence to the original road, and finally and without a driver upon defendants' turnpike.³ In a Wisconsin case⁴ the injured horse took fright and escaped from his driver while in a field and ran from thence to the highway, which was out of repair. The court very properly held that towns are not bound to provide roads for runaway horses. But if the highway is so defective as to cause a team

Hull v. Kansas, 54 Mo. 598; Hunt v. Pownal, 9 Vt. 411; Winship v. Enfield, 42 N. H. 197; Hey v. Philadelphia, 81 Pa. St. 44; Byerly v. Anamosa, 79 Iowa, 204; Manderschied v. Dubuque, 25 Iowa, 108; Ward v. North Haven, 43 Conn. 148; Campbell v. Stillwater, 32 Minn. 308.

¹ Baldwin v. Greenwoods T. Co., 40 Conn. 238; approved in Ring v. Cohoes, 77 N. Y. 83, 88.

² Moss v. Burlington, 60 Iowa, 438.

³ Baldwin v. Greenwoods T. Co., 40 Conn. 238.

⁴ Jackson v. Bellevieu, 30 Wis. 250.

to become frightened the town is liable.¹ If a traveler, while using due care, is exposed to imminent danger by a defect in the highway, and to avoid the probable consequences of coming in contact with the defect and as a reasonable precaution turns his horse, whereby his vehicle is brought into collision with another vehicle, which would not have happened if the horse had not been turned, the defect may be regarded as the sole cause of the injury.²

¹ *Kelley v. Fond du Lac*, 31 Wis. 179; *Hodge v. Bennington*, 43 Vt. 451.

² *Flagg v. Hudson*, 142 Mass. 280. It is difficult to harmonize the Massachusetts cases on the question of consequential damages for injuries on highways. It was ruled in *Palmer v. Andover*, 2 Cush. 600, that a town was liable where the primary cause of the injury was a pure accident: a nut getting loose and dropping from a bolt, the horses were detached from a carriage while descending a hill, at the foot of which the road abruptly turned to the right on the bank of a mill pond, into which, by going straight on, the carriage plunged, on account of the absence of any railing. The court say: "The . . . question . . . whether, in case of an injury received while traveling upon a public way, shown to be defective, but where the accident or injury is attributable in part to a defect in the carriage or harness, but occurring under such circumstances as show that the plaintiff was chargeable with no fault or negligence in the matter, the town is liable for the damage, is one not free from difficulty. Against maintaining such action, it is strongly urged that the injury is not fairly imputable to the defect in the highway; and inasmuch as it resulted, at least in part, from causes for which the town was not responsible, and over which it had no control, the town should not be chargeable with damages therefor.

If the objection was that the injury was caused by the combined effect of an obstruction or want of repair in the road, and the want of ordinary care, diligence or skill on the part of the plaintiff in reference to his harness, his horses or his carriage, or the use of the road, it would be very clear that the plaintiff could not recover. He must be without fault in this respect; and if not so, although the highway be out of repair, the town is not liable. But is the like effect to follow when there is a defect in the road, but the accident or injury is attributable in part to a defect in the carriage or harness, which defect was unknown to the plaintiff, and which was of such a character that it might have existed, and yet no fault or negligence be chargeable by reason thereof to the plaintiff? We should be slow to adopt or sanction any principles in reference to this class of actions that would in so many cases render the statute nugatory. If the circumstance that some accident or casualty occurred, as the primary cause, and which by reason of a defect in the road, and through their combined operation, caused the damage to the plaintiff, would deprive the party of recovering damages, the protection to the traveler would be very much restricted. It is the ordinary course of events, and consistent with a reasonable degree of prudence on the part of the traveler, that accidents will occur; horses

§ 27. **Negligence of third person.** It was formerly the law in England that the negligence of the driver of a public conveyance was imputable to a passenger therein, although the latter exercised no control over the former.¹ This doctrine was not authoritatively disapproved of, although it was much commented on and shaken, until 1888, when it came before the house of lords in *Mills v. Armstrong*,² with the result that the whole foundation on which it rested was removed. The theory has but little support in the American cases: except

may be frightened, the harness may break, a bolt or screw may be dropped. To guard against damage by such accidents the law requires suitable railings and barriers, a proper width of the road, and whatever may be reasonably required for the safety of the traveler. It seems to us that when the loss is the combined result of an accident and of a defect in the road, and the damage would not have been sustained but for the defect, although the primary cause be a pure accident, yet, if there be no fault or negligence on the part of the plaintiff, if the accident be one which common prudence and sagacity could not have foreseen and provided against, the town is liable." In *Davis v. Dudley*, 4 Allen, 557 (decided seven years after *Palmer v. Andover*, *supra*), a town was held not to be responsible in damages if a horse on becoming accidentally frightened breaks away from his driver, and afterwards, while running at large, meets with an injury through a defect in the highway. It is declared that this case does not conflict with the other, *Merrick, J.*, saying: "The facts in the present case are widely different, and afford no occasion for the application of the doctrine by which, in the decision of that case, the court were influenced and controlled. Here the accident and in-

jury were not coincident, but were separate and produced by separate causes. The effect of the accident as procuring cause was complete when the horse, frightened by the falling of the cross-bar and thills upon his heels, became detached from the sleigh and had escaped from the control of the driver. The blind violence of the animal, acting without guidance or direction, became, in the course and order of incidents which ensued, the supervening and proximate cause of the injury inflicted by his running against a wood-pile, which constituted an unlawful obstruction and defect in the highway. In this succession of events, it happens that the accident placed the owner in a situation where it was out of his power to exercise due care over the horse while this new cause was in operation, and until it had contributed to produce the disaster by which his leg was broken." These cases and others in Massachusetts are criticised and contrasted in an interesting manner in *Toms v. Whitby*, 85 Up. Can. Q. B. 195, where a different rule prevailed. The substance of the opinion in the case referred to is given in the first edition of this work, vol. 1, pp. 88-47.

¹ *Thorogood v. Bryan*, 8 C. B. 115, decided in 1849.

² 13 App. Cas. 1.

in Wisconsin¹ all the recent adjudications are hostile to it.² The principle deducible from these decisions, say the supreme court of Indiana, is that one who sustains an injury without any fault or negligence of his own, or of some one subject to his control or direction, or with whom he is so identified in a common enterprise as to become responsible for the consequences of his negligent conduct, may look to any other person for compensation whose neglect of duty occasioned the injury, even though the negligence of some third person with whom the injured person was not identified may have contributed thereto.³ But this is not the rule if the person who is riding with another knows of and acquiesces in the driver's purpose to commit a wrong against a third party. In such a case, in the absence of exculpatory evidence, the passenger will be presumed to be co-operating with the driver.⁴

[47] § 28. **Particular injury need not be foreseen.** It will appear from a perusal of the cases in which consequential damages have been allowed and from the principle on which they are recovered, that at the time the wrongful act is done it need not be certain that such damages will ensue. It is only essential that the act have a tendency and be likely to cause such damages, not that they be certain to follow; in this respect they are generally contingent, and by possibility may not happen.⁵ If one remove or destroy a fence inclosing a field, or open a gap in it, there is a possibility that animals confined there may not escape so as to encounter danger outside⁶ or subject the owner to expense in recovering them;⁷

¹ *Prideaux v. Mineral Point*, 43 Wis. 518; *Otis v. Janesville*, 47 id. 422. 116 Ind. 121; *Sheffield v. Central U. T. Co.*, 36 Fed. Rep. 164.

² *Little v. Hackett*, 116 U. S. 366; *Wabash, etc. Ry. Co. v. Shacklet*, 105 Ill. 364; *Carlisle v. Brisbane*, 113 Pa. St. 544; *Railway Co. v. Eadie*, 43 Ohio St. 91; *Philadelphia, etc. R. Co. v. Hoylland*, 66 Md. 149; *Cuddy v. Horn*, 46 Mich. 596; *New York, etc. R. Co. v. Steinbrenner*, 47 N. J. L. 161; *Nesbit v. Garner*, 75 Iowa, 314; *Mason v. New York C. etc. R. Co.*, 84 N. Y. 247; *Knightstown v. Musgrove*, 116 Ind. 121.

³ *Knightstown v. Musgrove*, 116 Ind. 121. ⁴ *Brannen v. Kokomo, etc. Co.*, 115 Ind. 115.

⁵ *Louisville, etc. Ry. Co. v. Wood*, 113 Ind. 544, 565; *Wabash, etc. Ry. Co. v. Locke*, 112 Ind. 404; *Brown v. Chicago, etc. Ry. Co.*, 54 Wis. 342; *Hill v. Winsor*, 118 Mass. 251; *Barbee v. Reese*, 60 Miss. 906.

⁶ *Powell v. Salisbury*, 2 Y. & J. 391;

⁷ *Bennett v. Lockwood*, 20 Wend. 223.

and it is possible that other cattle will not trespass upon such field to destroy a crop there,¹ or to do injury to an animal there,² or to receive injury.³ But the wrong done in opening such inclosure is so likely to lead to these injurious results that they are proximate if they occur. Opening the fence does not cause an animal to pass through it; it offers the opportunity, exposes to injury property within or property outside of it, or both. It is in this manner that the primary and efficient cause generally produces consequential damages. The party injured in his person or property is by the wrongful act of another or his culpable negligence exposed or left in exposure from some cause imminent and fairly obvious in existing circumstances or otherwise, and through such exposure the injury ultimately and proximately reaches him. The [48] wrongful act is the cause of the injury in the natural and probable course of events by subjecting the party injured unlawfully to other and dependent causes from which the injury directly proceeds. In this way at least the relation of cause and effect must be established between the wrongful act and the injurious consequence.⁴ The owner of a vessel employed in building a sea wall was given by the owner of the wall the exclusive right to its use as a place of safety for his vessel. The master of another vessel without permission placed her behind the wall and refused to move her when requested, the former desiring to put his there as a place of safety against a storm. This vessel was sunk by the storm while thus excluded from that position. The sinking was held to be the proximate consequence of being denied the shelter of the wall.⁵ It is not required that the damages be foreseen, as con-

White v. McNett, 83 N. Y. 871;
Welch v. Piercy, 7 Ired. L. 865.

The act of opening a fence which incloses a pasture in which horses are kept is the proximate cause of injury to them, if they escape and come into contact with a barbed-wire fence, such material being largely used for fencing in the adjacent country. West v. Ward, 77 Iowa, 323.

¹ Scott v. Kenton, 81 Ill. 96.

It is held in California that injury done by trespassing animals owned

by a third person is not the direct result of the destruction of the fence which inclosed the crops damaged. Berry v. San Francisco, etc. R. Co., 50 Cal. 435; approved in Durgin v. Neal, 82 Cal. 595.

² Lee v. Riley, 18 C. B. (N. S.) 722.

³ Lawrence v. Jenkins, L. R. 8 Q. B. 274.

⁴ Olmsted v. Brown, 12 Barb. 657; Schumaker v. St. Paul & D. R. Co., 46 Minn. 89.

⁵ Derry v. Flitner, 118 Mass. 131;

sequential damages from a breach of contract must be contemplated by the parties when they enter into it.¹ Nor, on the other hand, will the wrong-doer be liable for every possible damage which may indirectly ensue from his misconduct.²

§ 29. **The act complained of must be the efficient cause.** The defendant's misconduct must be the efficient cause and the injury which follows must be such as ought to have been foreseen as a probable consequence in the light of surrounding circumstances. There is generally another and more immediate cause of the injury; the primary cause, to be deemed responsible and efficient for the purpose of recovering damages, must have directly set in motion an intervening and more immediate agency or be directly in fault for the exposure of the injured party to its injurious influence. The wrongful refusal of a corporation to register among its members one who has purchased shares of its stock on the ground that there was a debt due it from the original owner does not make it liable to such owner for a decline in their value occurring between the times when the transfer ought to have been registered, and when in fact it was registered, such decline damaging the transferee because of the terms of the contract between him and the transferee, of which the company had no notice. There is no connection between the market price of the shares and the act of the corporation.³ A bridge erected over a slough of the Mississippi river and a part of the highway from the business part of the city of Dubuque to a levee on said river became impassable for want of repairs, [49] by reason of which the owner of a lot of wood which had been collected at the levee for transportation over the bridge was unable to so transport it. While lying there under these circumstances it was washed away by a freshet. The damages were held too remote to be the consequence of the neglect to repair the bridge.⁴ The defendant's negligence did not consequentially cause the loss of the wood, if it could be moved to a place of safety in another direction; nor was the loss by

Tinsman v. Belvidere D. R. Co., 26 N. J. L. 148.

¹ Bowas v. Pioneer Tow Line, 2 Sawyer, 21.

² Beach v. Ranney, 2 Hill, 314.

³ Skinner v. London Marine Ins. Co., 14 Q. B. Div. 882.

⁴ Dubuque, etc. Ass'n v. Dubuque, 30 Iowa, 176.

freshet proximate unless according to the general experience it was a probable occurrence. The loss of an office as the result of an assault and battery has been held too remote, and too much the result of other and independent causes, to be taken into consideration.¹ So where the defendant libeled a concert singer who, in consequence, refused to sing at the plaintiff's oratorio for fear of being badly received, it was held that this damage to the plaintiff was not sufficiently connected with the act of the defendant. The refusal to sing might have proceeded from groundless apprehension or caprice, or some other cause altogether different than that alleged.²

¹ *Brown v. Cummings*, 7 Allen, 507; *Boyce v. Bayliffe*, 1 Camp. 58; *Hoey v. Felton*, 11 C. B. (N. S.) 142; *Burton v. Pinkerton*, L. R. 2 Exch. 840.

² *Ashley v. Harrison*, 1 Esp. 48. In *Taylor v. Neri*, id. 386, it appeared that the defendant beat an actor and thereby disabled and prevented him from performing his engagement with the plaintiff. It was held that the injury to the manager was too remote.

These two cases came under criticism in the subsequent case of *Lumley v. Gye*, 2 E. & B. 216, which was an action by the manager of a theatre against the manager of a rival theatre for procuring a singer to break her engagement. The circumstance that the plaintiff had an action against the singer herself upon her agreement was overruled, and the plaintiff recovered on the principle that the defendant incurred the same liability for interfering with such a servant as any other. Wightman, J., said: "In the present case there is the malicious procurement of Miss Wagner to break her contract, and the consequent loss to the plaintiff. Why, then, may not the plaintiff maintain an action on the case? Because, as it is said, the loss or damage is not the natural or legal consequence of the acts of the defendant. There is the *injuria* and the *damnum*;

but it is contended that the *damnum* is neither the natural nor legal consequence of the *injuria*, and that, consequently, the action is not maintainable, as the breaking of her contract was the spontaneous act of Miss Wagner herself, who was under no obligation to yield to the persuasion or procurement of the defendant. Another case of *Vicars v. Wilcocks*, 8 East, 1, which, though it has been brought into question, has never been directly overruled, was relied upon as an authority upon this point for the defendant. That case, however, is clearly distinguishable from the present upon the ground suggested by Lord Chief Justice Tindal in *Ward v. Weeks*, 7 Bing. 211, 215, that the damage in that case, as well as in *Vicars v. Wilcocks*, was not the necessary consequence of the original slander uttered by the defendants, but the result of spontaneous and unauthorized communications made by those to whom the words were uttered by the defendants. The distinction is taken in *Green v. Button*, 2 C., M. & R. 707, in which it was held that the action was maintainable against the defendant for maliciously and wrongfully causing certain persons to refuse to deliver goods to the plaintiff by asserting that he had a lien upon them and ordering these persons to

[50] § 30. **Same subject.** A lease of a canal was made by commissioners of navigation under a statute providing that if the lessee should permit the work to be out of repair the commissioners should give him notice to repair, and on his neglecting to make the repairs they might make them and pay the expenses out of the tolls. A lock forming part of the canal fell and detained a barge. In an action for that detention against the commissioners for neglecting to give notice to the lessee to repair, it was held that the action would not lie because the detention was not a damage naturally flowing from the alleged neglect, it not being shown that if such notice had been given the lessee would have repaired or that the commissioners would have done so. Pollock, C. B.: "To say that the damage could be the consequence of the wrongful act or omission is, in our judgment, to assert a false proposition of law. The surmise is,—if the notice had been given the repairs would have been done and the lock would not have fallen in, and so not giving notice caused the lock to fall in. As we have said, this is not proved; but it is not the proximate, necessary or natural result of not giving notice. The not giving notice is not sufficient to bring about the result; the giving of it would not be sufficient to hinder it."¹ Here the immediate cause of the detention was the obstruction and want of repair [51] of the canal; the alleged wrong of the defendant did not put the canal out of repair, and as the commissioners were not

retain the goods until further orders from him. It was urged for the defendant in that case that as the persons in whose custody the goods were, were under no legal obligation to obey the orders of the defendant, it was a mere spontaneous act of these persons which occasioned the damage to the plaintiff; but the court held the action maintainable though the defendant did make the claim as of right, he having done so maliciously, and without any reasonable cause, and the damage accruing thereby."

The doctrine of *Vicars v. Wilcocks* and cases of that class does not exclude responsibility when the dam-

age results to the party injured through the intervention of the legal and innocent acts of third parties, for in such instances damage is regarded as occasioned by the wrongful cause, and not by those which are not wrongful; as where one who desires to make the customer of another believe that the work done for him is badly done, and to accomplish that end loosens a shoe put on the customer's horse. In such case the person who defames the horseshoer is responsible to him for the loss of the patronage which may result from his act. *Hughes v. McDonough*, 48 N. J. L. 459.

¹ *Walker v. Goe*, 3 H. & N. 395.

absolutely required to do anything but give notice, as a step towards repair, it could not be assumed as matter of law that doing so would have caused the repair to be made. The relation of cause and effect between the wrongful act and the alleged injurious consequence was not established. It is indispensable that the plaintiff should show not only that he has sustained *damage*, and that the defendant has committed a *tort*, but that the damage is the clear and necessary consequence of the tort, and that it can be clearly defined and ascertained.¹

An action on the case was brought by a creditor against his debtor and another for confederating together to prevent the plaintiff from obtaining security for the payment of his debt; they were charged with having accomplished that wrong by removing the debtor's property from his possession to that of his confederate, who secured it or its proceeds, and thus prevented its attachment. The plaintiff had obtained judgment, and the debtor had relieved himself from the execution against his body by taking the poor-debtor's oath, and the debt remained wholly unpaid. The case was proved except the conspiracy. It was held that the action could not be maintained. Among other reasons for this conclusion was the uncertainty of the plaintiff's damage. Metcalf, J., said: "How could this plaintiff prove that he suffered any damage from the acts of the defendant which are averred in the declaration? How could he prove that he would have secured his debt by attaching the property of his debtor if the defendant had not inter-meddled with it? Other creditors might have attached it before him, or it might have been stolen or destroyed while in the debtor's possession. The fact that the plaintiff has suffered actual damage from the defendant's conduct is not capable of legal proof, because it is not within the compass of human knowledge, and therefore cannot be shown by human

¹ *Lamb v. Stone*, 11 Pick. 527; *Vernon v. Keys*, 12 East, 632; *Morgan v. Bliss*, 2 Mass. 111.

The causation between a fire negligently started and which is supposed to have been extinguished, but which starts up again, is not severed by the non-action of a third person

after the second fire starts. Although such failure to act is culpable it neither adds to the original force nor gives it new direction, and hence in tracing back the line of causation it will not be noticed as a potent agency. *Wiley v. West Jersey R. Co.*, 44 N. J. L. 247.

testimony. It depends on numberless unknown contingencies, and can be nothing more than a matter of conjecture.”¹

[52] § 31. Same subject. A demurrer was allowed to a declaration which stated that the defendant and a confederate

¹ Wellington v. Small, 3 Cush. 145.

In Randall v. Hazelton, 12 Allen, 412, a mortgagee voluntarily promised the mortgagor not to act under a power of sale contained in a mortgage without a notice to him; he was afterwards induced by the falsehood of the defendants to assign the mortgage to one M. for their benefit, and then caused such foreclosure to take place in a manner to avoid notice reaching the plaintiff, who was compelled to pay \$500 to get a deed of the property. The case was determined on demurrer against the plaintiff. The promise of the mortgagee was gratuitous, and therefore neither he nor an assignee would do any legal wrong by foreclosing according to the power in the mortgage. The damage was held to result from the foreclosure and not from the alleged wrong. “Damages,” say the court, “can never be recovered where they result from the lawful act of the defendant.” The benefit of that gratuitous promise was not a matter of legal right, and though it would have been kept but for the defendant’s fraudulent contract, and the plaintiff saved from the loss which resulted from the sale, yet that fraud was not actionable because it did not affect any legal right; it could not be said to be an invasion of such a right “to deprive the plaintiff even by falsehood of the benefit of this gratuitous undertaking.” The court say: “In the Tunbridge-Wells Dippers’ case, 2 Wils. 414, while the court remark that there was a real damage in depriving the plaintiff of some gratuity, they also say in the same sentence

that the injury was by disturbing the dippers in the exercise of their right or employment, which it seems by some statutes they were entitled to.” Hutchins v. Hutchins, 7 Hill, 104; Burton v. Henry, 90 Ala. 281.

In Bradley v. Fuller, 118 Mass. 239, the court stated the material allegations of the declaration, which was held, on demurrer, not to state a cause of action, to be that the defendant orally represented to the plaintiff that a corporation of which he was treasurer, and whose overdue note the plaintiff then held, owed no other debts, and had no attachments upon its property; that the representation was fraudulently and falsely made for the purpose of inducing the plaintiff not to commence suit upon his note until the corporate property could be placed beyond the reach of attachment by the plaintiff; that all the property of the company was afterwards attached and sold on execution upon another debt; and that the plaintiff, induced by the representations not to enforce his claim by suit, lost his debt against the company. In one count the plaintiff states that he “was induced to forbear securing payment of his note by an attachment of said property, as he might and would have done but for said false representation.” The court say: “Under the law as laid down by this court, the facts stated in these counts do not show a legal cause of action, or that the plaintiff has suffered any legal damage. There is no attachment or attempt to attach, on the part of the plaintiff, alleged; it does not appear that by reason of the alleged repre-

conspired to and did obtain possession of a portion of plaintiff's premises by falsely pretending that it was wanted for a lawful trade, and then set up an illicit still there; that by falsely pretending, and by divers false and fraudulent means and devices, they made it appear and be believed that it was the plaintiff who set up such still and was the proprietor [53] thereof; that thereby he was convicted of keeping illicit stills. It was held that the damage was not the natural and proximate consequence of the defendant's act.¹ Where a trespassing horse kicked a child, it was held that the injury was not the natural consequence of the trespass in the absence of evidence that the defendant knew that the horse was vicious. The court said to entitle the plaintiff to maintain an action it is necessary to show a breach of some legal duty due from the defendant to the plaintiff. And if there was negligence on the part of the owner of the horse in permitting him to be at large, it did not appear to be connected with the damage of which the plaintiff complains. "The owner of a horse must be taken to know that the animal will stray if not properly secured, and may find its way into his neighbor's corn or

sentations he lost anything which he ever had. Taking these counts in the most favorable sense for the plaintiff, they simply charge that the plaintiff, induced by the falsehood alleged, refrained from carrying into effect an intention to attach; and that another creditor did attach and apply the company's property to the payment of his debt. It must necessarily be uncertain whether the plaintiff would have attached the property and applied it to the payment of his debt if the alleged representation had not been made."

It seems to the writer that this case was erroneously decided. The law recognizes the value of the preference which one creditor by diligence may obtain by a first attachment of the property of an insolvent debtor. Its practical value was illustrated by that case. The debtor was liable to attachment, and had prop-

erty. The plaintiff alleged that he might and would have attached it but for the fraudulent representations. The court, on demurrer, held it "necessarily uncertain" that this purpose would be executed; and so much so, that the law will not accept the allegation as stating a provable fact, and it is therefore not admitted by a demurrer. It certainly cannot be maintained, as a matter of law, that no damages can be recovered on the basis of frustrating an intention, the carrying out of which, in the future, is lawful, and would secure an advantage or prevent a loss. That it may be proved that an intention will be carried out where the party has the ability, and his interest requires it to be executed, is legally assumed in a multitude of cases.

¹ Barber v. Lesiter, 7 C. B. (N. S.) 175.

pasture. For a trespass of that kind the owner is, of course, responsible. But if the horse does something which is quite [54] contrary to his ordinary nature, something which his owner has no reason to expect him to do, he has the same sort of protection that the owner of a dog has, and everybody knows that it is not at all the ordinary habit of a horse to kick a child on a highway. It was assumed that the injury to the plaintiff was caused by the horse having viciously kicked him, as a horse of ordinary temper would not have done; therefore the plaintiff was bound to show, and did not, that the defendant knew that the horse was subject to that infirmity of temper.”¹ In a subsequent case a mare strayed into the plaintiff’s pasture and there, from some unexplained cause, kicked the plaintiff’s horse and broke his leg, and he was necessarily killed. Erle, C. J.: “The contest at the trial seems to have been whether or not the mare was of a ferocious or vicious disposition, and whether the defendant knew it. But I think it was not necessary to go into that question, because the act, which upon the evidence must be presumed to have caused the injury, was not one which was characteristic of vice or ferocity in the mare in the ordinary sense. The animal had strayed from its own pasture, and it was impossible that her owner could know how she would act when coming suddenly in the night-time into a field among strange horses. That constitutes the difference between this case and those relied on by the defendant, and supports the summing up of the judge when he said it was not a question of vice or *scienter* in the ordinary sense.” The defendant was held responsible for the mare’s trespass, the damage not being remote.²

Upon the trial of an action for the enticement of servants from the employment of another, it was held erroneous to permit evidence of consequential damages to the effect that the servants plaintiff first employed had provisions and those he subsequently employed to take their places had not, by which he was compelled to furnish provisions, and, making a poor crop, such persons were unable to pay him for the pro-

¹ Cox v. Burbidge, 18 C. B. (N. S.) 430; Jackson v. Smithson, 15 M. & W. 563; Hudson v. Roberts, 6 Exch. 697. ² Lee v. Riley, 18 C. B. (N. S.) 722; Barnes v. Chapin, 4 Allen, 444; Dunckle v. Kocker, 11 Barb. 387; Lyons v. Merrick, 105 Mass. 71.

visions furnished out of their share of the crop, by which he was damaged.¹

§ 32. Breach of statutory duties. Whenever an ac- [55] tion is brought for breach of duty imposed by statute the party bringing it must show that he had an interest in the performance of the duty and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another and the advantage to be derived to the party complaining of its breach from its performance is merely incidental and no part of the design of the statute, no such right is created as forms the subject of an action. A private person might make a profit by the performance of the duty, but the breach of that duty, while it would naturally deprive him of that benefit, is not a wrong to him. The loss of such a benefit is not in a legal sense an injury. Though actual, it is not a legal consequence of the delinquency. Thus, a postmaster bound by an act of congress to advertise uncalled-for letters in a newspaper of a particular description commits no legal wrong to the proprietor of such a paper when he omits such publication or gives the business to a paper of a different description.² If the non-performance of a duty results in injury to a third person the delinquent party is responsible to him. Thus, where the owner of a water channel or cut, made pursuant to authority of the state and open for the use of all vessels whose owners comply with the prescribed conditions, refused to allow to a tug necessarily employed to tow a vessel through it access to the vessel, he is

¹ *Salter v. Howard*, 43 Ga. 601.

Under a statute which makes the person who contracts with, decoys or entices away any person in the employ of another who was entitled to the services of the person enticed liable for all such damages as the original employer may reasonably sustain by the loss of the labor of such employee, it is competent to consider the reasonable cost of procuring other labor, the damages resulting to crops from delay in planting, or, if planted, from failure to work them, and such kindred damages as plaintiff

could not have prevented by reasonable diligence and which are attributable to defendant's act. *McCutchin v. Taylor*, 11 Lea (Tenn.), 259.

In Georgia the damages which may be recovered for enticing away the servant of another include the profits of the servant's labor, and the loss sustained by the plaintiff's inability to improve his property in consequence. *Smith v. Goodman*, 75 Ga. 198.

² *Strong v. Campbell*, 11 Barb. 135.

responsible to her owner for damage resulting from the discharge of her cargo by lighters.¹

§ 33. **Injury through third person.** Where the plaintiff sustains injury from the defendant's conduct to a third person it is too remote, if the plaintiff sustains no other than a contract relation to such third person, or is under contract obligation on his account, and the injury consists only in impairing the ability or inclination of such third person to perform his part, or in increasing the plaintiff's expense or labor of fulfilling such contract, unless the wrongful act is wilful for that purpose.² A., who had agreed with a town to support for a specific time and for a fixed sum all the town paupers, in sickness and in health, was held to have no cause of action against S. for assaulting and beating one of the paupers, whereby A. was put to increased expense. The damage was held too remote and indirect.³ A stockholder in a bank cannot maintain an action against its directors for their negligence in so conducting its affairs that its whole capital stock is lost and the shares therein rendered worthless; nor for the malfeasance of the directors in delegating the whole control of the affairs of the bank to the president and cashier, who wasted and lost the whole capital.⁴ The direct injury is to [56] the corporation, and only remotely to the stockholders. The latter have a remedy, in theory, though often inadequate, in the power of the corporation in its corporate capacity to obtain redress for injuries done to the common property by the recovery of damages.⁵ A party who by contract was, he furnishing the raw material, to have all the articles to be manufactured by an incorporated company, was held not entitled to maintain an action against a wrong-doer who by trespass stopped the company's machinery so that it was prevented from furnishing, under that contract, manufactured goods to so great an extent as it otherwise would have done.⁶ A creditor can maintain no action against one who has forged a note by which the dividends from an estate were diminished.⁷ An insurance company cannot recover from a wrong-

¹ Buffalo B. Co. v. Milby, 68 Texas, 492.

² Lumley v. Gye, 2 El. & Bl. 216.

³ Anthony v. Slaid, 11 Met. 290.

⁴ Smith v. Hurd, 12 Met. 371.

⁵ Smith v. Hurd, 12 Met. 371.

⁶ Dale v. Grant, 34 N. J. L. 142.

⁷ Cunningham v. Brown, 18 Vt. 128.

doer who causes the loss insured against the money paid to satisfy such loss.¹ A man drafted into the military service deserted, and another who had been drawn as an alternate to serve in such a contingency, and was consequently obliged to and did serve, was held to have no legal claim against the deserter for the loss and injury of doing so.² But where a tradesman or mechanic is defamed in his business or avocation by a false and fraudulent device practiced upon one of his customers, the person who is guilty of such fraud is responsible for a loss of patronage flowing therefrom, although the customer was also wronged by the act.³

§ 34. **Liability as affected by extraordinary circumstances.** There must not only be a legal connection between the injury and the act complained of, but such nearness in the order of events and closeness in the relation of cause and effect that the influence of the injurious act may predominate over that of other causes, and concur to produce the consequence or be traced to those causes. To a sound judgment must be left each particular case. The connection is usually, but not always, enfeebled and the influence of the injurious act controlled, where the wrongful act of a third person intervenes, or where any new agent introduced by accident or design becomes more powerful in producing the consequence than the first injurious act. The requirement that the consequences to be answered for should be natural and proximate is not [57] that they should be such as upon a calculation of chances would be found likely to occur, nor such as extreme prudence would anticipate, but only that they should be such as have actually ensued one from another, without the occurrence of any such extraordinary conjuncture of circumstances, or the intervention of such an extraordinary result as that the usual course of nature should seem to have been departed from.⁴ The general rule is that a defendant is not answerable for anything beyond the natural, ordinary and reasonable consequences of his conduct.⁵ We are not to link together as

¹ Rockingham Ins. Co. v. Bosher, 30 Me. 253; Connecticut, etc. Ins. Co. v. New York, etc. R. Co., 25 Conn. 265.

² Jemmison v. Gray, 29 Iowa, 537.

³ Hughes v. McDonough, 48 N. J. L. 459.

⁴ Harrison v. Berkley, 1 Strobb. L. 525, 549.

⁵ Bennett v. Lockwood, 20 Wend.

cause and effect events having no probable connection in the mind, and which could not, by prudent circumspection and ordinary thoughtfulness, be foreseen as likely to happen in consequence of the act in which we are engaged. It may be true that the injury would not have occurred without the concurrence of our act with the event which immediately caused the injury, but we are not justly called to suffer for it unless the other event was the effect of our act or was within the probable range of ordinary circumspection. If one's fault happens to concur with something extraordinary and therefore not likely to be foreseen he will not be answerable for such unexpected result.¹

§ 35. **Illustrations of the doctrine of the preceding section.** An injury by negligence was done to wool by wetting it, rendering it necessary to take it out of the original packages in which it had been imported. A few weeks afterwards an act of congress was passed under which, if the wool had remained in the original packages, the plaintiff would have been entitled to a return of duties. It was held that the loss of the right to claim a return thereof was not recoverable as a proximate consequence of the negligence. It was remarked that if the market value of the wool in the original packages had been higher by reason of its being entitled to debenture under the laws existing at the time when the injury was done the plaintiff would have had a right to an increase of damages [58] in consequence of being obliged to break the packages; so if the market value had been enhanced at that time by reason of a general expectation that an act of congress would be passed allowing a return of duties.² In trespass for taking two horses, a wagon and double harness, the declaration stated as special damage occasioned thereby that when it occurred the plaintiff was moving with his family and household goods to another state, and was employing his horses, wagon and harness for that purpose; that he was thereby prevented from pursuing his journey, and put to great expense for the support of himself and family; that when the property was taken the roads were frozen and the traveling good; but while it was

223; *Crain v. Petrie*, 6 Hill, 523; *banks v. Kerr*, 70 Pa. St. 86; *People McGrew v. Stone*, 58 Pa. St. 436. *v. Mayor*, 5 Lans. 524.

¹ *McGrew v. Stone*, *supra*; *Fair-* ² *Stone v. Codman*, 15 Pick. 297.

detained the frost left the ground and the roads became so muddy that it was quite impossible for the plaintiff to prosecute his journey, by reason whereof he was detained with his family and prevented from putting in his crops in the state to which he was moving. It was held erroneous to admit evidence of these various circumstances. The court recognized the rule that to be recovered the damages must be the natural and proximate consequence of the act complained of; but it was said "no case can be found where a mere accident or event not resulting naturally from the act done by the defendant has been held sufficient to constitute a valid claim for damages."¹ The law is correctly stated, but in other cases there has been recovery for some of the damages here stated. In the plaintiff's predicament increased expenses and loss of time were necessary results of the taking of the property. In an English case² the plaintiff took passage to Australia in the defendant's vessel, but he was not allowed to sail on account of a mistaken belief that he had not paid his entire fare. The error was found out immediately and he was offered a passage in a ship which sailed in a week after the first. Instead of going by it, however, he remained in England to a later time to sue the defendant. It was held that the expense of his keep till trial could not be allowed as damages, since he might have gone earlier if he had wished. The suicide of one who was injured on a railway train eight months after the injuries were sustained, though they disordered his mind and body, is not a result which might naturally and reasonably be expected to follow. The court say: "The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering and eight months' disease and medical treatment to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that 'great first cause least understood' in which the train of all causation ends."³ The fact that a passenger train three-fourths of an hour behind its schedule time was blown over by a windstorm which struck a portion

¹ *Vedder v. Hildreth*, 2 Wis. 427.

³ *Scheffer v. Railroad Co.*, 105 U. S.

² *Ansett v. Marshall*, 22 L. J. (Q. B.) 249. See § 36.

of the track on which the train would not have been but for the delay does not make the company liable for an injury thereby sustained by a passenger.¹

§ 36. Liability of carriers for consequential damages; extraordinary circumstances. The recent leading American case on the liability of carriers of passengers for consequential damages was decided in Wisconsin in 1882.² Although the court was not united in the decision, it has had a marked influence in courts which have since been called upon to consider similar questions. The principal facts involved are not essentially different from those in an English case decided in 1875;³ but the rules of law applied are in strong contrast. This is in part accounted for by the fact that in the Wisconsin case the action was held to be in tort, while the English case was considered as one for breach of the contract. In the former the plaintiffs were husband and wife. They had been defendant's passengers, and were directed to leave its train at a point three miles from M., their destination, being told that that place was reached. When they disembarked it was dark; a freight train stood on a side-track; there were no lights visible, and no platform on which to alight. There was a station-house near, but it was hid from their view by the freight train. Plaintiffs did not know their location, but supposed that they were one mile nearer M. than they were; they started thither expecting to find a house in which they might remain, but did not find one until they were within one mile of M., when they concluded to go on rather than to seek shelter at the house, it being a considerable distance from the track. It was late at night when they reached M. and Mrs. B. was quite exhausted. She was pregnant at the time, and during that night suffered severe pains which continued for more than two months, when a miscarriage resulted and inflammation set in. The jury found that her sickness was caused by the walk, that plaintiffs were not negligent in taking that walk, but were compelled to take it as the result of defendant's wrongful act. The first question determined by the court was that the action was in tort

¹ McClary v. Sioux City & P. R. Co.,
8 Neb. 44.

³Hobbs v. London, etc. Ry. Co.,
L. R. 10 Q. B. 111.

²Brown v. Chicago, etc. Ry. Co., 54
Wis. 342.

for the negligence and not upon the contract to carry, although the complaint recited that the relation between the parties was a contract relation, and that defendant "wholly disregarded its duty in the premises, and its contract and obligations to and with the plaintiffs."¹ The court, Taylor, J., writing the opinion, say that the doctrine is clearly established that one who commits a trespass or other wrong is liable for all the damage which legitimately flows directly therefrom, whether such damages might have been foreseen by the wrongdoer or not. Had the defendant wrongfully placed the plaintiffs off the train in the open country, where there was no shelter, in a cold and stormy night, and on account of the state of health of the parties, in their attempts to find shelter, they had become exhausted and perished, it would seem quite clear that the defendant ought to be liable. Its wrongful act would be the natural and direct cause of their deaths, and it would be a lame excuse for the defendant that if the plaintiffs had been of more robust health they would not have perished or have suffered any material injury. It was no excuse that the female plaintiff's condition was not known to the railroad employees. By wrongfully placing the parties in the position in which they were defendant was also liable for the resulting injury, whether it was the immediate result of its act or of theirs in endeavoring to escape therefrom. The case was within the rule that where an efficient adequate cause is found it must be considered the true cause unless some other cause independent of it is shown to have intervened between it and the result.² In strong contrast with the case stated is

¹ This view of the nature of the action is different from that entertained by the English court in *Hobbs v. London, etc. Ry. Co.*, L. R. 10 Q. B. 111, where it was held that an action resting on facts which are quite like those in the principal case was upon contract, and that damages resulting from the walk taken by the plaintiff to reach his home and sickness consequent thereupon could not be recovered. The case referred to is disapproved in *Evans v. St. Louis, etc. Ry. Co.*, 11 Mo. App. 463, 472; *Cin-*

cinnati, etc. R. Co. v. Eaton, 94 Ind. 474. See *McMahon v. Field*, 7 Q. B. Div. 591.

² This case has been approved in *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346; *Cincinnati, etc. R. Co. v. Eaton*, 94 Ind. 474. To the same effect are *Winkler v. St. Louis, etc. Ry. Co.*, 21 Mo. App. 99; *Augusta & S. R. Co. v. Randall*, 79 Ga. 304; *Evans v. St. Louis, etc. Ry. Co.*, 11 Mo. App. 463; *Fitzpatrick v. Great Western Ry. Co.*, 12 Up. Can. Q. B. 645; *Baltimore City P. Ry. v. Kemp*, 61 Md. 74;

one decided in 1873,¹ in which it is held that a female passenger who suffers injuries through a carrier's negligence cannot recover for such as are the result of the physical condition which she is in, as where illness follows arrested menstruation, although the negligence produced that condition. It is well observed concerning this case that it is unsustained by authority and is supported by neither the principles of law nor humanity.² If a passenger wrongfully put off a train at a flag-station, when it is dark and a storm is raging, and at a great distance from his starting point and destination, is injured by falling through a cattle-guard while on his way to the nearest station, the jury may decide whether the result is attributable to such wrong.³

If the negligence of a carrier results in an injury to a passenger by which his system is rendered susceptible to disease and less able to resist it when he is attacked by it, and death results, the injury is the proximate cause thereof, although the disease is to be regarded as an intervening agency, and the malady which attacked him was prevalent in the community. The court observe that if it "were to undertake to declare any other rule we should be involved in inextricable confusion, for it is clear that the passenger who suffers injuries of a serious character is entitled to some damages, and it is impossible for any one to pronounce, as matter of law, at what point the injury flowing from the wrong terminated. The only possible practicable rule is that the wrongdoer whose act is the mediate cause of the injury shall be held liable for all the resulting damages, and that the question of whether his wrong was the mediate cause is one for the jury."⁴

Ehrgott v. Mayor, 96 N. Y. 264. See *Mo. App.* 463; *Winkler v. Same*, 21 *Smith v. British, etc. Co.*, 86 N. Y. id. 99. See *Patten v. Chicago & N. Ry. Co.*, 32 *Wis.* 524; and compare *Co.* 47 *Hun*, 489. *Lewis v. Flint, etc. Ry. Co.*, 54 *Mich.*

¹ *Pullman P. Car Co. v. Barker*, 4 *Mo. App.* 463; *Winkler v. Same*, 21 *Smith v. British, etc. Co.*, 86 N. Y. id. 99. See *Patten v. Chicago & N. Ry. Co.*, 32 *Wis.* 524; and compare *Co.* 47 *Hun*, 489. *Lewis v. Flint, etc. Ry. Co.*, 54 *Mich.*

² *Brown v. Chicago, etc. Ry. Co.*, 54 *Wis.* 342; *Terre Haute & I. R. Co. v. Buck*, 96 *Ind.* 346, 355; *Ehrgott v. Mayor*, 96 N. Y. 264.

³ *Evans v. St. Louis, etc. Ry. Co.*, 11

⁴ *Terre Haute & I. R. Co. v. Buck*, 96 *Ind.* 346. The opinion in this case, by Elliott, J., reviews a large number of cases, including *Ginna v. Second Avenue R. Co.*, 8 *Hun*, 494, affirmed 67 N. Y. 596; *Brown v.*

§ 37. **Intervening cause.** Goods carried in a canal [59] boat were injured by the wrecking of the boat, caused by an extraordinary flood, which would not have been encountered but for a retarded passage in consequence of the carrier employing a lame horse. This fact was so unlikely to conduce to such an event that it was held the defendant was not liable for the loss.¹ A carrier was guilty of a negligent delay of six days in transporting wool from Suspension Bridge to Albany, and while in his depot at the latter place a few days after it was submerged by a sudden and violent flood in the Hudson river. The flood was held to be the proximate cause of the injury and the delay in the transportation the remote cause.² The same rule has been applied where there was negligent delay in dispatching goods by a carrier, and they were lost while in his hands by flood or sudden storm or other immediate cause; the damage occurring without his fault, he was not responsible.³ In similar cases in New York a different conclusion has been reached. In one it was held that when a carrier is intrusted with goods for transportation, and they are injured or lost in transit, the law holds him responsible. He is only exempted by showing that the injury was caused by an act of God or the public enemy. And to avail himself of such exemption he must show that he was himself free from fault at the time. His act or neglect must not concur and contribute to the injury. If he departs from the line of his duty and violates his contract, and while thus in fault, and in consequence of that fault, the goods are injured by the act of God, which would not otherwise have caused the injury, he is not protected.⁴ There was unreasonable delay on the part of the carrier in forwarding goods, and while they were in a railroad depot at an intermediate point they were injured by an extraordinary flood; the carrier was held lia-

Chicago etc. Ry. Co., 54 Wis. 842;
Sauter v. New York, etc. R. Co., 66
N. Y. 50. Compare Scheffer v. Rail-
road Co., 105 U. S. 249.

¹ Morrison v. Davis, 20 Pa. St. 171;
McClary v. Sioux City & P. R. Co., 8
Neb. 44.

² Denny v. New York C. R. Co., 18
Gray, 481.

³ Railroad Co. v. Reeves, 10 Wall.
166; Daniels v. Ballentine, 23 Ohio
St. 532; Hoadley v. Northern T. Co.,
115 Mass. 304.

⁴ See McAlister v. Chicago, etc. R.
Co., 74 Mo. 351; S. C., 4 Am. & Eng.
R. Cas. 210.

ble because the goods were exposed to the flood by his fault.¹ These cases relating to carriers or others held to an absolute responsibility except as relieved by showing that the injury [60] was caused by the act of God, are not wholly controlled by the consideration of the nearness of the injury to the fault. Davies, J., said: "It is to be observed that the foundation of this exemption is that the party claiming the benefit and application of it must be without fault on his part." He refers to several cases.² "These cases," he continues, "clearly establish the rule that the carrier cannot avail himself of the exception to his liability which the law has created, unless he has been free from negligence or fault himself. The policy of the law is to hold him to a strict liability; and this policy, for wise and just purposes, ought not to be departed from. But when the injury occurs from a cause which the carrier could not guard against nor protect himself from, from such an event the law excuses him, but it only does it when he himself [61] is not in fault and is free from all negligence."³ It

¹ Read v. Spaulding, 30 N. Y. 630.

² Davis v. Garrett, 6 Bing. 716. In this case the plaintiff put on board the defendant's barge lime to be conveyed from Medway to London. The master of the barge deviated unnecessarily from the usual course, and during the deviation a tempest wetted the lime, and the barge thereby taking fire the whole was lost, and he was held liable. Tindal, C. J., observed that no wrong-doer can be allowed to apportion or qualify his own wrong, and that as a loss had actually happened whilst his wrongful act was in operation and force, and which was attributable to such act, he could not set up as an answer to the action the bare possibility of a loss if the act had never been done. It might admit of a different construction if he could show not only that the same loss *might* have happened, but that it *must* have happened, if the act complained of had not been done. Charleston Steamboat

Co. v. Bason, 1 Harp. 262; Campbell v. Morse, id. 468; Bell v. Reed, 4 Bin. 127; Hart v. Allen, 2 Watts, 114; Hand v. Baynes, 4 Whart. 204; Williams v. Grant, 1 Conn. 487; Crosby v. Fitch, 12 id. 410.

³ See last section. In *Parmalee v. Wilks*, 22 Barb. 589, the plaintiff being the owner of a raft of saw logs lying at Port Maitland, Canada, made a contract with the defendants, the owners of a steamboat, by which it was agreed that they would come to Port Maitland on the next Tuesday morning with the steamboat, and proceed up the river about five miles to D., and there land her passengers, and immediately return to Port Maitland and take the plaintiff's raft in tow and tow it to Black Rock, a distance of about forty miles, which the steamboat could traverse in about fourteen hours with the raft in tow. The usual time for the arrival of the steamboat at Port Maitland, upon her trip up, was 8 o'clock in the morn-

has been held in Nevada that if an administrator deposits money of an estate in a bank and allows it to remain after the time when it should, by punctual performance of his duty, have been distributed and in the hands of those entitled to it, and the bank fails and the money is lost, he and his sureties are liable therefor, and the sum so lost is the measure of damages.¹

It is immaterial what is the intermediate cause between the act complained of and the injurious consequence, if such act is the efficient and proximate cause, and the consequence was the probable result. There may be intervening operations of nature, acts produced by the volition of animals or of human beings, innocent acts of the injured party or of third persons, and even tortious acts of the latter, and the chain of cause and effect not be necessarily broken, or the result rendered remote. The test is not to be found in any arbitrary number of intervening events or agents, but in their character, and in the nat-

ing. and it generally took about two hours to proceed to D., land her passengers and return to Port Maitland. On Tuesday morning the weather was fair, and the lake and river were calm, and so continued through the day. But the boat failed to call for the raft according to the agreement. In the evening, about sunset, she returned, and took the raft in tow for Black Rock. During the night a storm arose, and the raft went to pieces and was scattered along the shore. Held, that had the defendants entered upon the performance of the contract at the time specified, and used proper diligence in attempting to perform it, the plaintiff would have taken all the risk of storms or other casualties. But as they delayed for some fourteen hours to enter upon its performance, and as such delay resulted in the raft being overtaken by the storm, they were responsible for the consequences; that when they took the raft in tow in the evening instead of the morning, as

agreed, they took the risk of any storm that should arise after a sufficient time had elapsed for towing the raft to Black Rock, if they had commenced the towing in the morning. The plaintiff had a right to fix the time in the contract, and to make it an essential part of it, considering the dangers of navigation upon the lake, and the peculiar nature and condition of his property; he might determine when the voyage should commence, and make a special agreement to that effect. And upon the non-performance of the agreement, at the time specified, the party in default was liable for the damages resulting from causes which would not have arisen had the agreement been performed. *Michae's v. New York C. R. Co.*, 80 N. Y. 564; *Maghee v. Camden & A. R. Co.*, 45 N. Y. 514; *Condict v. Grand Trunk Ry. Co.*, 54 N. Y. 500; *Rawson v. Holland*, 59 N. Y. 611.

¹ *McNabb v. Wixom*, 7 Nev. 168.

ural and probable connection between the wrong done and the injury.¹

[62] § 38. **Same subject.** The primary cause may be the proximate cause of a disaster though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied at the other end, that force being the proximate cause of the movement. The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole; or was there some new and independent cause disconnected from the primary fault, and self-operating, which produced the injury? The inquiry must be answered in accordance with common understanding.² Any wrongful act which exposes one to injury from rain, heat, frost, fire, water, disease, the instinctive or known vicious disposition or habits of animals, or any other natural cause, under circumstances which render it probable that such an injury will occur, is a primary, efficient and proximate cause if harm ensues. Many such cases have been referred to in the preceding pages. Persons who dam water-courses are presumed to have knowledge of the fact that natural causes operate to fill up their beds and cause water to overflow adjacent lands; they cannot avoid liability for the resultant consequences because of such fact.³ If a positive tort is committed by unnecessarily leaving an obstruction in the bed of a natural water-course the parties who commit the wrong must take notice of the violence of rainfalls in that locality.⁴

¹ McDonald v. Snelling, 14 Allen, 296; Vandenburgh v. Truax, 4 Denio, 464; Kellogg v. Chicago, etc. R. Co., 26 Wis. 223.

² Milwaukee, etc. R. Co. v. Kellogg, 94 U. S. 469.

In Lowery v. Manhattan Ry. Co., 99 N. Y. 158; S. C., 12 Daly, 431, fire fell from a locomotive on an elevated road upon a horse and his driver. The horse ran, and, resisting an attempt to get him against a curbstone, ran over it and injured plaintiff, who

was on the sidewalk. The driver's effort to stop the horse by turning him from the course he was taking was, whether prudent or not, a continuation of the result of defendant's negligence, and its natural and probable consequence, as was the injury inflicted upon plaintiff.

³ Mississippi & T. R. Co. v. Archibald, 67 Miss. 38.

⁴ Brink v. Kansas City, etc. Ry. Co., 17 Mo. App. 177, 202.

§ 39. **Acts of injured party.** The act of the injured party may be the more immediate cause of his injury; yet, if that be an act which was as to him reasonably induced by the prior misconduct of the defendant, and without any concurring fault of the sufferer, that misconduct will be treated as the responsible and efficient cause of the damage. Cases of fraud are apt illustrations, where, by some artifice or false representation, the plaintiff has been induced to incur obligations, part with his property, or place himself in any predicament by which he suffers loss. The act by which he binds himself, pays money or alters his situation is his own act, but superinduced by the superior vicious will of the defrauding party; and the latter is legally responsible for all the loss which ensues. A single instance will suffice. W. obtained goods from the plaintiff on credit, upon the representation of R. that W. was responsible and worthy of credit and owed very little if anything. At the time of the sale and delivery of the goods W. was insolvent and R. knew it. R. himself had a judgment against W. for a considerable amount docketed only a month previous to the sale. On this judgment R. caused an [63] execution to be issued and levied upon the goods so obtained from the plaintiff before they reached W. It was held that for these representations R. was liable to the plaintiff for the value of the goods sold to W.¹

If the plaintiff is placed in a situation of danger to person or property by the defendant's misconduct, and is injured in a reasonable endeavor to extricate himself, such misconduct is the proximate cause of the injury, though it proceed more immediately, and it may be exclusively, from the plaintiff's own act. Thus, if through the default of a coach proprietor in neglecting to provide proper means of conveyance a passenger be placed in so perilous a situation as to render it prudent for him to leap from the coach, whereby his leg is broken, the proprietor will be responsible in damages, although the coach was not actually overturned.² Nor is a person

¹ *Bean v. Wells*, 28 Barb. 466.

² *Jones v. Boyce*, 1 Stark. 493; *Ingalls v. Bills*, 9 Met. 1; *McKinney v. Neil*, 1 McLean, 540; *Frink v. Potter*, 17 Ill. 406; *Buel v. New York, etc. R.*

Co., 31 N. Y. 814; *Eldridge v. Long Island R. Co.*, 1 Sandf. 87; *Southwestern R. Co. v. Paulk*, 24 Ga. 856; *Wilson v. Northern P. R. Co.*, 26 Minn. 278; *Oliver v. La Valle*, 86

chargeable with contributory negligence — that is, with making his own act in part the efficient cause — for acting erroneously in a position of sudden danger in which he is placed by the negligence or fault of another. If, therefore, a stage-coach is upset by the negligence of the driver, and a passenger therein, under the impulse of fear, acts in a manner which results in an injury to himself, where, had he remained calm and kept his place, he would have escaped harm, he will not thereby be precluded from recovering damages of the carrier.¹

A case arose in Massachusetts in which the immediate cause of the injury was the act of the plaintiff, and yet a defect in a highway was held to be the proximate and efficient cause thereof, though other circumstances contributed. The alleged defect was a culvert extending across the highway and a hole at one end of the culvert. As the plaintiffs (husband and wife) were driving together in their wagon along the traveled part of the highway between the hours of eight [64] and nine in the evening, a band of musicians a little way in advance commenced to play, by which the horse was alarmed; this happened near the alleged defect in the highway. In the course of the incident the wife was taken up from the ground at or near the culvert, seriously injured; but the precise manner in which she came to the ground, whether by being forcibly thrown from the wagon or by leaping from it or by the two actions concurring; and whether the wagon did or did not come into contact with the hole, were questions of fact. There was a variance between the proof and the declaration for which the judgment was reversed, but this instruction was approved: "When a party is traveling on a highway and there is a defect in it, and the party, under apprehensions of an imminent peril, by the near approach of his carriage to the defect in the highway, but without or previous to actual contact with the defect, leaps from his carriage and is injured thereby, then the rule of law is this: it is an element

Wis. 592; Twomley v. Central, etc. R. Co., 69 N. Y. 158; Filer v. New York C. R. Co., 49 N. Y. 47; Smith v. St. Paul, etc. Ry. Co., 30 Minn. 169; Dimmitt v. Hannibal, etc. Ry. Co., 40 Mo. App. 654; Knowlton v. Milwaukee City Ry. Co., 59 Wis. 278; Knapp v. Sioux City & P. Ry. Co., 65 Iowa, 91; S. C., 71 id. 41; Schumaker v. St. Paul & D. R. Co., 46 Minn. 39.
¹ Stokes v. Saltonstall, 18 Pet. 181.

of reasonable care on the part of the plaintiff. If the plaintiff be placed, by reason of the defect in the highway and his approach thereto, in such a situation as obliges him to adopt the alternative of a dangerous leap, or to remain at a certain peril, and he leaps and is injured, then, all the conditions of liability being fulfilled, he may recover damages of the party responsible for the repair of the highway.”¹ A lad aged ten years was forcibly put on a freight train and carried five miles. After being released he ran most of the distance to his home, was afterward taken sick and became permanently crippled. The jury found that this was the result of the trespass; a majority of the court refused to interfere with the verdict.² It is a rule of general application that the concurrence of an infant plaintiff’s natural indiscretion with the defendant’s negligence will not relieve the latter from responsibility for an act which results in injury to the former.³

§ 40. Act of third person. The innocent or culpable act of a third person may be the immediate cause of the injury, and still an earlier wrongful act may have contributed so effectually to it as to be regarded as the efficient or at least concurrent and responsible cause.⁴ The noted squib case [65]

¹ *Land v. Tyngsboro*, 11 Bush, 563; *Flagg v. Hudson*, 142 Mass. 280.

² *Drake v. Kiely*, 93 Pa. St. 492.

³ *Pittsburg, etc. R. Co. v. Caldwell*, 74 Pa. St. 421; *East Saginaw C. Ry. Co. v. Bohn*, 27 Mich. 503; *Holly v. Boston Gas Co.*, 8 Gray, 123; *Stillson v. Hannibal, etc. R. Co.*, 67 Mo. 671; *Lane v. Atlantic Works*, 111 Mass. 136; *Sheridan v. Brooklyn & N. R. Co.*, 36 N. Y. 39. See *Singleton v. Eastern C. Ry. Co.*, 7 C. B. (N. S.) 287; *Hughes v. Macfie*, 2 H. & C. 744; *Nangan v. Atterton*, L. R. 1 Exch. 239; *Lynch v. Nurdin*, 1 Q. B. 29.

⁴ *Burrows v. March, etc. Gas Co.*, L. R. 5 Exch. 67; *Lannen v. Albany Gas Co.*, 44 N. Y. 459; *Guille v. Swan*, 19 Johns. 381; *Scholes v. North L. Ry. Co.*, 21 L. T. (N. S.) 835; *Pastene v. Adams*, 49 Cal. 87; *Vandenburgh*

v. Truax, 4 Denio, 464; *Lowery v. Manhattan Ry. Co.*, 99 N. Y. 158; *S. C.*, 12 Daly, 481.

In *Sheridan v. Brooklyn & N. R. Co.*, 36 N. Y. 39, a child was on the platform of a car by direction of the conductor. By the rushing of another passenger for the purpose of getting off the car the child was pushed therefrom. Such conduct was not a justification to the defendant for its negligence in placing the child on the platform.

In *Macer v. Third Avenue R. Co.*, 47 N. Y. Super. Ct. 461, plaintiff’s injuries were increased by an effort made by the defendant’s servant to prevent them. The original negligence was held to be the proximate cause.

A workman who is injured by a defective instrument used by a fel-

is an example.¹ The defendant threw a squib into a market-house where it first fell; a person, to save himself, threw it off, and where it then fell it was again thrown for like reason, and struck and injured the plaintiff. It was held that the defendant's act so directly caused the injury that trespass would lie. A defendant stopped his team, and negligently left it in a business street without being hitched or otherwise secured. It started and ran violently along the street and collided with another team, which, though properly hitched at the side of the street, was frightened, broke from its fastenings and ran across the street against a horse and sleigh belonging to the plaintiff, injuring the former. It appeared that while the defendant's horses were running and before they had collided with the other horses a crowd of persons came into the street, hallooed, and raised their hats for the purpose of stopping the horses, which caused them to swerve from the course they were taking, and in this manner they came in contact with the second team. The court held the rule of law to be well settled that when the plaintiff has been injured in his person or property by the wrongful act or omission of the defendant or through his culpable negligence, the fact that a third party by his wrong or negligence contributed to the injury does not relieve the defendant from liability. Referring to the facts the court say: "The running away, from the starting of the defendant's team till the collision, was a single transaction; and whatever influence the interposition of the crowd had in occasioning the collision it was not the sole cause; the running away which occurred through the defendant's negligence was, in part at least, the occasion of it; both causes, therefore, in the most favorable view for the defendant, must have contributed to it; and as the defendant is responsible through his negligence for one of the agencies through which the collision occurred, under the rule we have stated, he is liable." Again: "All the consequences which actually resulted in this case from the running away of defendant's team might, we think, reasonably have been expected to occur from the running away of any team under similar

low workman has a cause of action
against the master. *Ryan v. Miller*,
12 Daly (N. Y.), 177.

¹ *Scott v. Shepherd*, 2 W. Bl. 892.

circumstances in the principal business street of a town; and the running away of the defendant's team was the efficient cause of the injury to the plaintiff's horse because it put in operation the force which was the immediate and direct cause of the injury."¹

An assessor of a town altered an assessment after it had been perfected and lodged with another officer, and after his power over it had ceased; he altered it in such a manner that the property of the plaintiff was rated at a higher sum. The selectmen made out a rate-bill by which the plaintiff was charged with an increased amount and procured a tax warrant which they placed in the hands of the collector. The plaintiff refusing to pay the illegal portion of the tax, the selectmen, with a full knowledge of all the facts, directed the collector to levy and collect it. The levy was made, the plaintiff then paid the tax and afterwards brought an action on the case against the assessor for the injury. The jury were instructed, and the instruction sustained, that the action of the selectmen in directing the levy, although it might make them liable, would not affect the right of the plaintiffs to recover against the defendant for the wrongful alteration; and the plaintiff was entitled to recover for the injury resulting from the levy.² An officer who makes a false return of *non est* to a summons is not relieved from liability for the consequences because an order for service by publication intervened between his act and a judgment by default. Such order is the natural result of such return, and the further action of the court was the legitimate consequence of it.³ It is negligence to leave a railroad turn-table in such condition that it may be revolved by children;⁴ and the negligence continues so as to render the owner liable for an injury caused to a child by the revolving of the table by other children.⁵

¹Griggs v. Fleckenstein, 14 Minn. 81; Billman v. Indianapolis, etc. R. Co., 76 Ind. 166; McDonald v. Snelling, 14 Allen, 292; 2 Greenl., Ev. §§ 256, 286, 286a; 3 Para. Cont. 179, 180.

²Bristol M. Co. v. Gridley, 28 Conn. 201; S. C., 27 id. 221.

³State v. Finn, 87 Mo. 810, reversing S. C., 11 Mo. App. 400.

⁴Koons v. St. Louis, etc. R. Co., 65 Mo. 592.

⁵Nagel v. Missouri P. Ry. Co., 75 Mo. 653; Boggs v. Same, 18 Mo. App. 274; Morrison v. Kansas City, etc. R. Co., 27 id. 418; Gulf, etc. Ry. Co. v. McWhirter, 77 Texas, 856.

§ 41. **Same subject.** The point under consideration is well illustrated by those cases in which a party has suffered a special injury at the hands of third persons in consequence of the speaking of slanderous words. Where the injurious act of the third person is shown with the requisite certainty to have been the consequence of the defendant's speaking the slanderous words the action has been sustained.¹ In case, for slanderous words by reason of which the plaintiff was turned out of her lodgings and employment, it appeared that the defendant complained to E., the mistress of the house, and his tenant, that her lodgers, of whom the plaintiff was one, behaved improperly at the windows; and he added that no moral person would like to have such people in his house. E. stated in her evidence that she dismissed the plaintiff in consequence [67] of the words, not because she believed them, but because she was afraid it would offend her landlord if the plaintiff remained. The action was held maintainable, the special damages, which were its gist, being the consequence of the slanderous words used. The witness' statement that she did not dismiss the plaintiff because she believed the words spoken was not allowed to defeat the action. Lord Denman, C. J., said: "It would be speculating too finely on motives; and such a disposition in the court would too often put it in the power of the unwilling witness to determine a cause against the plaintiff. The proper question is whether the injury was sustained in consequence of the slanderous words having been used by the defendant."² But the injury must be the natural and proximate consequence. Damage caused by the repetition of the words by a third person who heard them uttered by the defendant is too remote,³ unless the latter authorized or suggested their repetition, or there was some duty on the hearer to repeat them.⁴ Such a spontaneous and unauthorized communication, it is said, cannot be considered as

¹ Fuller v. Fenner, 16 Barb. 333; Hallock v. Miller, 2 Barb. 630; Moody v. Baker, 5 Cow. 351; Ward v. Weeks, 7 Bing. 211; Bateman v. Lyall, 7 C. B. (N. S.) 638; Williams v. Hill, 19 Wend. 305.

² Knight v. Gibbs, 1 Ad. & E. 43.

³ Ward v. Weeks, 7 Bing. 211.

⁴ Adams v. Kelly, Ry. & Moo. 157; Parkes v. Prescott, L. R. 4 Exch. 169; Kendillon v. Maltby, Car. & M. 402; Derry v. Handley, 16 L. T. (N. S.) 263.

the necessary consequence of the original uttering of the words.¹

If the injury inflicted is not the reasonable and natural result of a wrongful act of the defendant, but was caused by such act of a third person, though it was remotely induced by defendant's conduct, he is not liable.² Thus, in an action by one engaged in the business of butchering for selling diseased sheep as sound and healthy, it appeared that the plaintiff had engaged one G. to take some of the mutton which might be on hand and sell it; but in consequence of a report that the plaintiff had purchased the defendant's diseased sheep, G. refused to perform his contract. It was held that the defendant was not liable for G.'s refusal, nor for damages suffered by the plaintiff in consequence of his customers refusing to deal with him by reason of that report.³ In an action against several persons some of whom had sold plaintiff's husband liquors on the day of his death and others of whom had done so previously, and were charged with having caused him to become an habitual drunkard, death was held to be the result of the sales last made; and the fact that the liquor last obtained was drunk because he was an habitual drunkard did not make those who had antecedently sold him liquor jointly liable with the other defendants, because the latter's intervening acts were independent and the proximate cause of the wrong.⁴ This principle does not apply where the intervening act of a third person is not direct, wilful or criminal, as where a person who is intoxicated is run over by a train while lying on a track situated between his home and the place where he procured the liquor which produced that condition.⁵ If there

¹ Id. See *Riding v. Smith*, 1 Exch. Div. 91; *Kelly v. Partington*, 5 B. & Ad. 645; *Morris v. Langdale*, 2 B. & P. 284; *Ashley v. Harrison*, 1 Esp. 48; *Pilmore v. Hood*, 5 Bing. N. C. 97; *Allsop v. Allsop*, 5 H. & N. 584; *Bentley v. Reynolds*, 1 McMull. 16; *Underhill v. Welton*, 32 Vt. 40; vol. 8, ch. 24.

² *Ward v. Weeks*, 7 Bing. 211.

³ *Crain v. Petrie*, 6 Hill, 522; *Butler v. Kent*, 19 Johns. 228.

⁴ *Tetzner v. Naughton*, 12 Ill. App. 148. See *Shugart v. Egan*, 88 Ill. 56.

⁵ *Schroder v. Crawford*, 94 Ill. 357; *Emory v. Addis*, 71 Ill. 273. The Indiana court announced a rule contrary to that stated in the text in *Krach v. Heilman*, 53 Ind. 517; *Collier v. Early*, 54 Ind. 559. But these cases are much restricted by *Dunlap v. Wagner*, 85 Ind. 529, and are in effect overruled by *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 355.

intervenes between defendant's act or omission a wilful, malicious and criminal act committed by a third person, which act defendant had no reason to apprehend, the connection between the original wrong and the result is broken.¹

§ 42. **Same subject.** Where the immediate cause of the injury is the wrongful act of a third person, the injured party has of course an action against him; and this, in some early cases, was thought to bar an action against any antecedent actor more remotely responsible; but it now seems to be settled that the liability of a more immediate party does not relieve any other party whose act can properly be treated as the efficient and proximate or concurrent cause. A vendor of property, who had been paid for it, was induced by the defendant's false and malicious representation that he had a lien on it and was entitled to control its custody to refuse to deliver it, whereby the purchaser suffered injury; he was held entitled to his action although he had a remedy on his contract against the vendors. Knowingly making a false claim of lien was the *gravamen* of the action; and it was held that the special damage alleged, namely, the non-delivery of the property, was sufficiently connected with the wrongful act to support the action.² In one case it appeared that the defendant, being about to sell a public house, falsely represented to B., who had agreed to purchase it, that the receipts were £180 a month; B. having, to the knowledge of the defendant, communicated this representation to plaintiff, who became the purchaser instead of B., it was held that an action would lie for the circuitous deceit practiced.³

¹ Shugart v. Egan, 83 Ill. 56; Mars v. Delaware & H. C. Co., 54 Hun, 625; White v. Conly, 14 Lea (Tenn.), 51. In the last case W. and C. quarreled and fought; during the fight W.'s son stabbed C. and caused his death. This was done without the knowledge of W.

² Green v. Button, 2 C., M. & R. 707.

³ Pilmore v. Hood, 5 Bing. N. C. 97. Bosanquet, J., thus stated the facts and the grounds of the defendant's liability: "It appears that the de-

fendant entered into a contract of sale of a public house with a person of the name of Bowmer; that when the agreement was entered into he represented to Bowmer that the public house was of a certain value in respect of its trade, and that representation he knew to be false at the time he made it. After this agreement had been entered into with Bowmer, Bowmer, finding himself unable to complete the contract, entered into a negotiation with the plaintiff, Pilmore, and informed him

A stage-coach by the negligence of the driver was pre- [69] cipitated into a dry canal; the lock-keeper thereafter negligently opened the gates of the canal and drowned a passenger. Under Lord Campbell's act,⁴ the Irish court of queen's bench held that the death of the passenger, in the language of that act, was "caused" by the negligence of the driver. O'Brien, J., said: "The precipitation of the omnibus into the lock was certainly one cause of her death, inasmuch as she would not have drowned but for such precipitation. It is true that the subsequent letting of the water into the lock was the other and more proximate cause of her death, and that she would not have lost her life but for such subsequent act, which was not the necessary consequence of the previous precipitation by the negligence of the defendant's servant. But in my opinion the defendant is not relieved from [70] liability for his primary neglect by showing that but for such subsequent act the death would not have ensued."²

what representation he had received of the value of this public house from the defendant; and taking it according to the plea, that Bowmer had not any particular authority from the defendant to make such communication to Pilmore, the defendant had notice that the information had been given to Pilmore, and it is averred that both at the time of the original agreement with Bowmer as also at the time of the agreement which subsequently took place with Pilmore, the defendant knew that the information was false. Then having notice that that communication had been made, and knowing at the time that it was false, he enters into a new agreement with Pilmore and Bowmer, that Pilmore shall stand in the place of Bowmer in the purchase of this public house. The record further states that Pilmore, confiding in that representation, paid money to the defendant. I think it is impossible, on the statement of these facts, not to

see that the defendant when he entered into that contract with Bowmer, having thus himself made the fraudulent representation, and knowing it to have been communicated to the person with whom he was about to contract a second time, then withholding an explanation or denial of his authority for communication, and suffering the plaintiff, on the faith of the communication to enter into a contract, was as much guilty of a deceit on the plaintiff as if he had in terms repeated the statement himself. On these grounds, without entering further into the case, I think this action may be maintained." See *Langridge v. Levy*, 2 M. & W. 519; *Levy v. Langridge*, 4 id. 337; *Richardson v. Dunn*, 8 C. B. (N. S.) 655.

¹ 9 and 10 Vict., c. 93.

² *Byrne v. Wilson*, 15 Irish C. L. (N. S.) 332-342; *Thompson's Car. Pass.* 290; *Eaton v. Boston, etc. R. Co.*, 11 Allen, 500; *Spooner v. Brooklyn C. R. Co.*, 54 N. Y. 230.

Cases may be stated where the wrongful conduct of one person affords the opportunity or occasion for the illegal acts of another or for an injury from other causes; as where a street-car driver permits boys to ride on the platform without paying fare, and on their being ordered to get off one of them pushes another, who is injured. In such cases the injury is too remote,¹ unless it was such as would probably result; and the same rule applies where inaction offers an opportunity for injury. The neglect of duty by bailees and agents renders them liable for losses resulting, in co-operation with such neglect, by the torts of third persons.² The cases collected in the note following will give the reader an insight into various branches of the subject of consequential damages.³

¹ *Lott v. New Orleans, etc. R. Co.*, 37 La. Ann. 337; *Cuff v. Newark, etc. R. Co.*, 35 N. J. L. 30; *Scholes v. North L. Ry. Co.*, 21 L. T. (N. S.) 835.

² *Norcross v. Norcross*, 53 Me. 163; *Mason v. Thompson*, 9 Pick. 280; *Shaw v. Berry*, 31 Me. 478; *Sibley v. Aldrich*, 33 N. H. 558; *Sasseen v. Clark*, 37 Ga. 242; *Clute v. Wiggins*, 14 Johns. 175; *McDaniels v. Robinson*, 26 Vt. 316.

³ *Adams v. Lancashire, etc. Ry. Co.*, L. R. 4 C. P. 739; *Smith v. Dobson*, 3 M. & Gr. 59; *Rigby v. Hewitt*, 5 Exch. 240; *Greenland v. Chaplin*, id. 243; *Barnes v. Ward*, 9 C. B. 392; *Collins v. Middle L. Com'rs*, L. R. 4 C. P. 279; *Harrison v. Great Northern Ry. Co.*, 3 H. & C. 231; *Butterfield v. Forrester*, 11 East, 60; *Martin v. Great Northern Ry. Co.*, 16 C. B. 179; *General Steam Nav. Co. v. Mann*, 14 C. B. 127; *Holden v. Liverpool Gas Co.*, 3 C. B. 1; *Cotton v. Wood*, 3 C. B. (N. S.) 568; *Flower v. Adam*, 2 Taunt. 314; *Ellis v. London, etc. Ry. Co.*, 2 H. & N. 424; *Singleton v. Williamson*, 7 H. & N. 410; *Skelton v. London, etc. Ry. Co.*, L. R. 2 C. P. 631; *Thompson v. Northeastern Ry. Co.*, 2 B. & S. 106; *Bridge v. Grand J. Ry. Co.*, 3 M. & W. 244; *Glover v.*

London, etc. Ry. Co., 3 Q. B. 25; *The Flying Fish*, 34 L. J. (Adm.) 113; *Everard v. Hopkins*, 1 Bulst. 332; *Hughes v. Quentin*, 3 C. & P. 703; *Peacock v. Young*, 21 L. T. (N. S.) 527; *Priestley v. Maclean*, 2 F. & F. 288; *Sneesby v. Lancashire Ry. Co.*, L. R. 9 Q. B. 263; *Smith v. Condry*, 1 How. (U. S.) 35; *Loker v. Damon*, 17 Pick. 284; *State v. Thomas*, 19 Mo. 613; *Oil Creek, etc. R. Co. v. Keighron*, 74 Pa. St. 316; *Tarleton v. McGawley*, Peake, 270; *Carrington v. Taylor*, 11 East, 571; *Keeble v. Hickingill*, id. 574; *Herring v. Skaggs*, 62 Ala. 180; *Hanover R. Co. v. Coyle*, 55 Pa. St. 396; *Baldwin v. United States Tel. Co.*, 45 N. Y. 744; *Bartlett v. Hooksett*, 43 N. H. 18; *Ayer v. Norwich*, 39 Conn. 376; *Dimock v. Suffield*, 30 id. 129; *Foshay v. Glen Haven*, 25 Wis. 288; *Morse v. Richmond*, 41 Vt. 435; *Howard v. North Bridgewater*, 16 Pick. 189; *Kingsbury v. Dedham*, 13 Allen, 186; *Tisdale v. Norton*, 8 Met. 388; *Page v. Bucksport*, 64 Me. 51; *Bigelow v. Reed*, 51 Me. 325; *Lake v. Milliken*, 62 Me. 240; *Cobb v. Standish*, 14 Me. 198; *Merrill v. Hampden*, 26 Me. 234; *Lawrence v. Mt. Vernon*, 35 Me. 100; *Davis v. Bangor*, 42 Me. 522; *Jewett*

§ 43. Wilful or malicious injuries. It was said in the [71] first edition of this work that in cases of wilful or malicious injuries and injuries from reckless or illegal acts, or from positive fraud, the damages are not so strictly confined to proximate consequences as when these elements do not exist. This was probably an inaccurate statement, growing out of the well-established rule that in such cases the damages are not limited to those which are compensatory.¹ Those elements are aggravations which juries are apt to regard in determining their verdicts, and which courts consider in passing on them.² It was said by Baldwin, J.:³ "When a trespass is committed in a wanton, rude and aggravated manner, indicating malice or a desire to injure, the jury ought to be liberal in compensating the party injured in all he has lost in property, in expenses for the assertion of his rights, in feeling or reputation," and to superadd to such compensation a sum for punishment. In a case of wilful negligence in England, the trial court instructed the jury that they might take into consideration all the circumstances, and see whether there was anything to satisfy them that the defendant had behaved in an improper and unjustifiable manner; and if so, they need not give damages strictly, but might give them with a liberal hand. This instruction was held correct. Pollock, C. B., in giving judgment, said: "It is universally felt by all persons who have had occasion to consider the question of compensation, that there is a difference between an injury which is the mere result of

v. Gage, 55 Me. 538; Cook v. Charlestown, 98 Mass. 80; Card v. Ellsworth, 65 Me. 547; Chicago v. Hoy, 75 Ill. 530.

¹ "There is, in truth, no case that has been recognized as sound, that holds that the rule as to the responsibility of the wrong-doer is different in cases of actionable negligence from that which prevails in cases of wilful or malicious torts. There is a difference as to the measure of damages, for where the tort is malicious exemplary damages may be recovered, but such damages cannot be recovered in cases of negligence. This con-

sideration has, however, no influence upon the question of a negligent wrong-doer's responsibility for the consequences resulting from his act." Indianapolis, etc. Ry. Co. v. Pitzer, 109 Ind. 179, 189.

² Merest v. Harvey, 5 Taunt. 442; Wright v. Gray, 2 Bay, 464; McDaniel v. Emanuel, 2 Rich. 455; Detroit Daily Post v. McArthur, 16 Mich. 447; West v. Forrest, 22 Mo. 344; Huckle v. Money, 2 Wils. 205; McAfee v. Crofford, 18 How. (U. S.) 447.

³ Pacific Ins. Co. v. Conard, Baldwin (U. S.), 142.

such negligence as amounts to little more than an accident, and an injury, wilful or negligent, which is accompanied with expressions of insolence. I do not say that in actions of negligence there should be vindictive damages, such as are some- [72] times given in actions of trespass; but the measure of damage should be different according to the nature of the injury and the circumstances with which it is accompanied. . . . The courts have always recognized the distinction between damages given with a liberal and a sparing hand.”¹ For this reason all the circumstances of the injurious act are provable and to be considered by the jury.² The Massachusetts court says that in an action of tort for a wilful injury to the person the manner and manifest motive of the wrongful act may be given in evidence as affecting the question of damages; for when the mere physical injury is the same it may be more aggravated in its effects upon the mind if it is done in the wanton disregard of the rights and feelings of the plaintiff than if it is the result of mere carelessness.³ The same view is expressed, and more comprehensively, by Campbell, J., speaking for the supreme court of Michigan: “The common sense of mankind has never failed to see that the damage done by a wilful wrong to person or reputation and, in some cases, to property is not measured by the consequent loss of money. A person assaulted may not be disabled or even disturbed in his business, and may not be put to any outlay in repairs or medical services. He may not be made poorer in money directly or consequentially. He may incur no pecuniary damage whatever. . . . When the law gives an action for a wilful wrong it does it on the ground that the injured person ought to receive pecuniary amends from the wrong-doer. It assumes that every such wrong brings damage upon the sufferer, and that the principal damage is mental and not physical. And it assumes further, that this is actual and not metaphysical damage, and deserves compensation. When this is once recognized it is just as clear that the wilfulness and

¹ *Emblen v. Myers*, 6 H. & N. 54; *wards v. Beach*, 8 Day, 447; *Churchill v. Watson*, 5 Day, 140; *Post v. Munn*, Bixby v. Dunlap, 56 N. H. 462.

² *Bracegirdle v. Orford*, 2 M. & S. 4 N. J. L. 61.

79; *Snively v. Fahnestock*, 18 Md. 391; ³ *Hawes v. Knowles*, 114 Mass. 518. *Treat v. Barber*, 7 Conn. 279; *Ed-*

wickedness of the act must constitute an important element in the computation, for the plain reason that we all feel our indignation excited in direct proportion with the malice of the offender, and that the wrong is aggravated by it.”¹

§ 44. Same subject. The effect of fraud in causing a [73] loss on the amount recoverable beyond the measure of damages in analogous cases of breach of contract and tort is manifest in many particulars. A difference is made on this ground when there is a breach of the contract to sell and convey lands, and where there is a confusion of goods. Where one sells a chattel and delivers possession, so that he is taken to have warranted the title, his vendee cannot recover damages until he is dispossessed by the true owner; but if he sells property with a false and fraudulent representation of ownership, his vendee may recover damages for the deceit before he is disturbed in his possession and according to the measure of damages applicable to a breach of warranty.² It was held by Lord Kenyon that an action lay for firing on negroes on the coast of Africa, and thereby deterring them from trading with the plaintiff, and that damages might be recovered for loss of their trade.³ Where a dealer in drugs and medicines carelessly labels a deadly poison and sends it so labeled into market, he will be held liable to all persons who, without fault, are injured by using it as such medicine as it purports to be.⁴ So, a party who fraudulently sold a gun falsely representing it to have been made by a particular maker and to be well made was held liable to the purchaser whose son was injured by its explosion.⁵ In several states the expenses of the suit, above taxable costs, to obtain redress for such wrongs, are allowed to be considered by the jury.⁶ But in some states it is otherwise.⁷

¹ Welch v. Ware, 82 Mich. 77.

² Case v. Hall, 24 Wend. 102.

³ Tarleton v. McGawley, Peake, 205.

⁴ Thomas v. Winchester, 6 N. Y. 397.

⁵ Langridge v. Levy, 2 M. & W. 519; Levy v. Langridge, 4 id. 337.

See Rose v. Beattie, 2 N. & McC. 538; Fultz v. Wycoff, 25 Ind. 321.

⁶ Dibble v. Morris, 26 Conn. 416;

Roberts v. Mason, 10 Ohio St. 278;

Seeman v. Feeney, 19 Minn. 79; Titus

v. Corkins, 21 Kan. 722; Marshall v.

Betner, 17 Ala. 832; Thompson v.

Powning, 15 Nev. 210; New Orleans,

etc. R. Co. v. Allbritton, 38 Miss. 243.

⁷ Earle v. Tupper, 45 Vt. 274;

Howell v. Scoggins, 48 Cal. 355.

SECTION 4.

CONSEQUENTIAL DAMAGES FOR BREACH OF CONTRACT.

§ 45. Recoverable only when contemplated by the parties. [74] In an action founded upon a contract only such damages can be recovered as are the natural and proximate consequence of its breach; such as the law supposes the parties to it would have apprehended as following from its violation if at the time they made it they had bestowed proper attention upon the subject and had full knowledge of all the facts.¹ As otherwise expressed the damages which are recoverable must be incidental to the contract and be caused by its breach; such as may reasonably be supposed to have been in the contemplation of the parties at the time the contract was entered into.² Direct damages are always recoverable and consequential losses must be compensated if it can be determined that the parties contracted with them in view.³ It is not in the least essential to the existence of this liability that an actual breach of the agreement should have been in the minds of the parties or either of them. For anything which amounts to a breach of contract, whether foreseen or unforeseen, the party who is responsible therefor must answer.⁴ Here an important distinction is to be noticed between the extent of responsibility for a tort and that for breach of contract. The wrong-doer is answerable for all the injurious consequences of his tortious act which, according to the usual course of events and general experience, were likely to ensue, and which, therefore, when the act was committed, he may reasonably be supposed to have foreseen and anticipated. But for breaches of contracts the parties are not chargeable with damages on this principle. Whatever foresight, at the time of a breach, the defaulting party may have of the probable consequences, he is not generally held for that reason to any greater responsi-

¹ Leonard v. New York, etc. T. Co., 41 N. Y. 544, 567; Smith v. Western U. T. Co., 88 Ky. 104. Brayton v. Chase, 8 Wis. 456; Bridges v. Stickney, 38 Me. 361; Paducah L. Co. v. Paducah Water Supply Co., 89 Ky. 340.

² Williams v. Barton, 18 La. 404; Jones v. George, 61 Tex. 345, 354; Howe v. North, 69 Mich. 272, 281. ⁴ Wilson v. Dunville, 6 L. R. Ire. 210; Hamilton v. Magill, 12 id. 186,

³ Rhodes v. Baird, 16 Ohio St. 581; 202.

bility; he is liable only for the direct consequences of the breach, such as usually occur from the infraction of like contracts, and were within the contemplation of the parties when the contract was entered into as likely to result from its non-performance.¹ Those damages which arise upon the direct,

¹ *Hadley v. Baxendale*, 9 Exch. 341; *Candee v. Western U. T. Co.*, 34 Wis. 479; *Pacific Exp. Co. v. Darnell*, 62 Texas, 639; *Thomas, etc. Manuf. Co. v. Wabash, etc. Ry. Co.*, 62 Wis. 642; *Jones v. Nathrop*, 7 Colo. 1; *Smith v. Osborn*, 143 Mass. 185; *Frohesich v. Gammon*, 28 Minn. 476; *Western U. T. Co. v. Hall*, 124 U. S. 444.

The rule was very strictly applied in a case in which it was held that the vendor of diseased sheep who sold them without knowledge of their condition was not responsible for damages resulting to the vendee from their being placed with cattle, the vendor not being informed that this would be done. *Weaver v. Penny*, 17 Ill. App. 628. The last reason given is of doubtful cogency. See *Packard v. Slack*, 32 Vt. 9; *Smith v. Green*, 1 C. P. Div. 92, where it is said that one who sells diseased sheep may be charged with knowledge that the purchaser intends, or is almost certain, to put them with other sheep. See, also, vol. 2, ch. 14.

An employee who quits the service of his employer in violation of his contract is not liable for the loss of property following his act through the inability of the master to procure other help. *Riech v. Bolch*, 68 Iowa, 526.

A carrier who has not contracted to transport cattle received from a connecting carrier in the cars in which they came to his care and who has no notice that they are of a kind which it is unlawful to unload in the state in which they are received is not liable to the shipper because they

were seized and sold to pay a fine for such unloading, although the shipper protested against it. *McAlister v. Chicago, etc. R. Co.*, 74 Mo. 851.

Barges were not returned to their owner at the time agreed; and on account of the delay were swept from their moorings by an extraordinary ice gorge and lost. "All that the defendants could foresee by ordinary forecast as a result of the breach of their contract to return the boats would be the expense to the plaintiff in taking them himself. They are liable for damages, the primary and immediate result of the breach of their contract, and not for those which arise from a conjunction of this fault with other circumstances that are of an extraordinary nature." *Jones v. Gilmore*, 91 Pa. St. 310. See *Parmalee v. Wilks*, 22 Barb. 589, stated in § 37, *ante*.

For the breach of a contract to repair a tool, the loss of the material on hand when it ought to have been repaired may be recovered for; but not the profits which might have been made by working up such material with the tool, they being unusual, considering the value of the implement, and notice not having been given him who was to repair it. *Sitton v. Macdonald*, 25 S. C. 68.

The immediate result of the breach of a contract not to engage in the hotel business within the limits of a designated city during the time plaintiff was the proprietor of a certain hotel therein, the agreement being part of the consideration for its purchase, is the diversion of patron-

necessary and immediate effects are always recoverable, because every person is supposed to foresee and intend the direct and natural results of his acts; those which ensue in the ordinary course of things, considering the particular nature and

age therefrom; depreciation in the value of the hotel property is secondary; this last cannot be recovered for unless specially claimed. *Lashus v. Chamberlain*, 5 Utah, 140. Compare *Burckhardt v. Burckhardt*, 42 Ohio St. 474, in which it was held that one who purchased the real estate, personal property, firm name and good-will of a partnership business might prove as an element of his damage the value of the property with and without the good-will and trade-mark, and the difference in such value might, in the absence of more specific proof, be taken as the measure of damages. The Utah court remark of this case that it appears to stand alone.

The code of Georgia, expressing the rule deduced from the decisions of the court therein (*Coweta Falls Manuf. Co. v. Rogers*, 19 Ga. 417; *Cooper v. Young*, 22 id. 269; *Red v. Augusta*, 25 id. 386), provides that "remote or consequential damages are not allowed, unless they can be traced solely to the breach of the contract or are capable of exact computation, such as the profits which are the immediate fruit of the contract and are independent of any collateral enterprise entered into in contemplation of the contract." Sec. 2944. Under this provision it has been held that the purchaser of a saw-mill and outfit cannot recover against his vendor, who furnished machinery of a quality inferior to that called for by the contract, damages sustained from abandoning the business in which he had been engaged and in getting ready to use the mill, improvements made to

carry on the business of running the mill, loss of profits, purchase of material, payments made for help, nor for his personal services. The measure of his damages was the difference between the value of the machinery contracted for and the value of that in fact delivered at the time of delivery, or such difference as ascertained by a resale within a reasonable time thereafter. *Willingham v. Hooven*, 74 Ga. 233, 248.

Damages from injury to grain because of the failure of a warranted machine to work to the capacity specified, and which was sold with the understanding that it was to be used in securing a large crop, were held not recoverable; they could not be fairly considered such as would naturally arise from the breach of the contract or to have been contemplated by the parties as a probable result. *Wilson v. Reedy*, 32 Minn. 256; *Osborne v. Poket*, 33 id. 10; *Brayton v. Chase*, 8 Wis. 456. These cases carry the rule to the extreme. The Wisconsin case is probably overruled by cases referred to in *Thomas, etc. Manuf. Co. v. Wabash, etc. Ry. Co.*, 62 Wis. 642, 650. *Contra*, *Smeed v. Foord*, 1 E. & E. 602. See vol. 2, ch. 14.

If seed of a particular grain is sold to a farmer and as the result of its being impure because of the presence of seeds of foul and noxious weeds, though no injury results to the crop, the vendor is liable for damage to the farm by sowing it. *McMullen v. Free*, 13 Ont. 57.

The breach of a contract to furnish articles to be used in completing a building does not make the contractor liable for the loss of the rent, no ex-

subject-matter of the contract.¹ It is conclusively presumed that a party violating his contract contemplates the damages which directly ensue from the breach.² There are fixed rules for measuring damages of a pecuniary nature, which apply to

trinsic facts being alleged. *Liljengren F. & L. Co. v. Mead*, 42 Minn. 420.

Though the breach of a contract to furnish guards for the shops and work-houses in a prison enables an incendiary to set fire to the building, and the loss resulting is the direct and immediate consequence of the fire, it was not, in legal contemplation, of the failure to provide a watch. *Tennessee v. Ward*, 9 Heisk. 100, 133. This ruling is open to question. The agreement to maintain a guard, considered as a precaution, contracted for to insure the safety of the plaintiff's property, was such as was apparently intended to prevent, among other things, the loss which occurred, and hence that loss may properly be considered as within the contemplation of the parties when they contracted as a consequence of a breach. *Paducah L. Co. v. Paducah Water Supply Co.*, 89 Ky. 340.

A warehouseman who agrees to store goods at a particular place is liable to the bailor for the loss of those intrusted to him and which are stored in another place and destroyed by fire, the latter having insured them at the place where the contract provided they were to be stored. If the destruction of the goods must have inevitably taken place in the event they had been stored as agreed, the bailee might have been released. *Lilley v. Doubleday*, 7 Q. B. Div. 510.

A warehouseman who neglects to ship one bale of cotton out of a larger quantity is not liable for the cost of insurance for one day on the whole lot nor for the interest on

money which was borrowed because of his refusal to so do, no notice having been given him of the liability of the owner for these expenses. *Swift v. Eastern Warehouse Co.*, 86 Ala. 294.

¹*Booth v. Spuyten Duyvil R. M. Co.*, 60 N. Y. 487; *Hadley v. Baxendale*, 9 Exch. 841.

One who agrees to procure an assignment of a mortgage being foreclosed and then to forbear for a specified time to enable the promisee to enforce it, and who after procuring such assignment sells it to one who immediately proceeds to a sale and thereby extinguishes the promisee's interest in the mortgaged premises before the expiration of the agreed period of forbearance, is liable for the net value of the promisee's interest. *Gallup v. Miller*, 25 Hun, 298.

²Whether the parties who entered into a contract had in mind the damages which might follow its breach or not does not in the least vary the question of their liability or the measure of recovery, under ordinary circumstances; this is governed by the injury proximately resulting. *Collins v. Stephens*, 58 Ala. 543; *Dougherty v. American U. T. Co.*, 75 Ala. 168, 177; *Cohn v. Norton*, 57 Conn. 480, 492.

A railroad company which violates its contract to fence its track laid through a farm is supposed to have contemplated that animals on the farm would be exposed to injury from its trains; that damage would be done by trespassing animals and pasturage injured. *Louisville, etc. Ry. Co. v. Sumner*, 106 Ind. 55; *Same v. Power*, 119 id. 269.

[75] all persons without regard to their actual foresight of the particular elements. And this is also true of the direct damages from torts.¹

§ 46. **Illustrations of liability under the rule.** In an action to recover damages for the breach of a contract to harvest oats, where the petition stated that by reason of such breach the oats were entirely lost, the verdict given for their value was retained, the trial court having refused to instruct the jury that they were to be guided by the general rule of damages, namely, the difference between the contract price and what the labor would have cost, and having instructed them that the plaintiff was entitled upon proof of the case stated to recover the value if he took all reasonable precaution to prevent such loss.² In a case in Pennsylvania³ a party contracted with a manufacturer of bar iron to furnish pig iron in prescribed quantities at specified times; he made default, in consequence of which the manufacturer was obliged to get and use an inferior quality of iron in order to carry on his business, and thereby suffered loss with his customers. Sharswood, J., said: "When the vendor fails to comply with his contract the general rule for the measure of damages undoubtedly is the difference between the contract and the market price of the article at the time of the breach. This is for the evident reason that the vendee can go into the market and obtain the article contracted for at that price. But when the circumstances of the case are such that the vendee cannot thus supply himself the rule does not apply, for the reason of it ceases.⁴ . . . If an article of the same quality cannot be procured in the market its market price cannot be ascertained, and we are without the necessary *data* for the application of the general rule. This is a contingency which must be considered to have been within the contemplation of the parties, for they must be presumed to know whether such articles are of limited production or not. In such a case the true measure is the actual loss which the vendee sustains in his own manu-

¹ *Eten v. Luyster*, 60 N. Y. 252;
Lowenstein v. Chappell, 30 Barb.
241; *Horner v. Wood*, 16 Barb. 389;
ante, § 13.

² *Houser v. Pearce*, 13 Kan. 104. See
Prosser v. Jones, 41 Iowa, 674.

³ *McHose v. Fulmer*, 73 Pa. St. 365.

⁴ *Bank of Montgomery v. Reese*, 26
Pa. St. 143.

facture by having to use an inferior article, or not receiving the advance on his contract price upon any contracts which he himself had made in reliance upon the fulfillment of the contract by the vendor. We do not mean to say that if he undertakes to fill his own contracts with an inferior article, and, in consequence, such article is returned on his hands, he can recover of his vendor, besides the loss sustained on his contracts, all the extraordinary loss incurred by his attempting what was clearly an unwarrantable experiment. His legitimate loss is the difference between the contract price he was to pay his vendor and the price he was to receive. This is a loss which springs directly from the non-fulfillment of the contract."

The rule under consideration was comprehensively stated in an early case in Maine.¹ In general the delinquent party is holden to make good the loss occasioned by his delinquency. His liability is limited to direct damages, which, according to the nature of the subject, may be contemplated or presumed to result from his failure. Remote or speculative damages, although susceptible of proof and deducible from the non-performance, are not allowed. It was agreed between the owner of a rice mill and a planter that if the latter would bring his rice to the former's mill it should have priority in being beaten. Rice so brought was not beaten according to this agreement but was kept there to await another turn, and before it was beaten at all the mill and the rice in question were consumed by an accidental fire. It was held that damages for the loss could not be assessed as the consequence of the breach of the contract.² The damages for a breach of contract must be such as the party suffers in respect to the particular thing which is the subject of the contract, and not such as has been accidentally occasioned or supposed to be occasioned in his business or affairs.³ A defendant agreed to rent to the plaintiff a store for a year, to commence some weeks in the future. Relying upon this agreement the plaintiff sold his lease of a store he then occupied to M., agreeing to give

¹ *Miller v. Mariner's Church*, 7 Me. 55.

² *Ashe v. De Rossett*, 5 Jones' L. 299. *Contra*, *Lilley v. Doubleday*, 7 Q. B. Div. 510.

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³ *Batchelder v. Sturgis*, 3 Cush. 201; *Hayden v. Cabot*, 17 Mass. 169; *State v. Thomas*, 19 Mo. 613; *Clark v. Moore*, 8 Mich. 55; *Johnson v. Matthews*, 5 Kan. 118.

[77] possession about the time he would be entitled to go into possession of the store rented of the defendant, M. allowing the plaintiff to occupy a part of the store in the meantime. The defendant refused to give the lease in accordance with his agreement. The plaintiff's goods were packed by him to put them in the space they were permitted to occupy in M.'s store, and suffered some damage therefrom. It was held that this damage was not the result of the defendant's breach of contract. Nor was he entitled to interest on his stock of goods, which by the defendant's refusal to fulfill his contract the plaintiff had been obliged to keep elsewhere, and was prevented from exposing for sale for the period of fifteen days, as the defendant's act did not necessarily prevent a sale of the stock for that length of time.¹ In a similar case the lessor was not liable to the lessee for money paid for clerk hire nor for losses resulting from the purchase of goods. While the former may have supposed that the latter would make preparations to occupy the store he could not know what it would be necessary for him to do.² One merchant agreed with another that he would not enter judgment on a bond given him except on a contingency named. The contract was violated, and as a result the fact that judgment was entered was published in a commercial journal known as the "Black List," with the effect of injuring plaintiff's credit. Such publication was an event the parties could have foreseen.³

§ 47. Liability not affected by collateral ventures. Parties when they enter into contracts may well be presumed to contemplate the ordinary and natural incidents and consequences of performance or non-performance; but they are not supposed to know the condition of each other's affairs, nor to take into consideration any existing or contemplated transactions, not communicated nor known, with other persons.⁴ Few persons would enter into contracts of any considerable extent

¹ Lowenstein v. Chappell, 30 Barb. 241.

² Cohn v. Norton, 57 Conn. 480, 492.

Loss of profits are too remote to be considered where there is a breach of such a contract. Alexander v. Bishop, 59 Iowa, 572.

³ Blair v. Kinch, 10 L. R. Ire. 234.

⁴ Horner v. Wood, 16 Barb. 386; Cuddy v. Major, 12 Mich. 368; Masterton v. Mayor, 7 Hill, 61; Story v. New York R. Co., 6 N. Y. 85; Bridges v. Stickney, 38 Me. 361; Barnard v. Poor, 21 Pick. 378; Fox v. Harding, 7 Cush. 516.

as to subject-matter or time if they should thereby incidentally assume the responsibility of carrying out, or be held legally affected by other arrangements over which they have no control and the existence of which are unknown to them. In awarding damages for the non-performance of an existing contract the gains or profits of collateral enterprises in which the party claiming them has been induced to engage by relying upon the performance of such a contract cannot be included. In an action for breach of a warranty of a horse the plaintiff cannot recover as special damage the loss of a bargain for its resale at a profit, though the contract for such resale had actually been completed before the unsoundness was discovered.¹

§ 48. Distinction between consequential liability in tort and on contract. The distinction between the liability for [78] consequential damages resulting from a tort and the damages recoverable for a breach of contract is forcibly illustrated by comparing an English case² and two Wisconsin cases.³ In the first case a railroad company negligently induced plaintiff and his wife and child to leave the train in the night at a wrong station; no conveyance could be had and they were obliged to take a long walk in a rain to reach their destination. In consequence of the exposure and fatigue the wife was taken sick. The action to recover damages was considered as being brought on the contract for carriage, and they were held too remote. In the earlier of the Wisconsin cases the action was upon the contract of a railway company to convey the plaintiff and about eighty

¹ *Clare v. Maynard*, 6 Ad. & El. 519; *Walker v. Moore*, 10 B. & C. 416; *Lawrence v. Wardwell*, 6 Barb. 423; *Williams v. Reynolds*, 6 B. & S. 495; *Harper v. Miller*, 27 Ind. 277; *Jones v. National Printing Co.*, 18 Daly. 92

The text is quoted with approval in *Mitchell v. Clark*, 71 Cal. 163, which was an action for the breach of a contract to pay plaintiff's creditor a sum of money intrusted to defendant for that purpose. Damages resulting to plaintiff by reason of his creditor's attaching and selling his property

were not such as were the natural consequence of the breach. To the same effect are *Wallace v. Ah Sam*, 71 Cal. 197; *Cohn v. Norton*, 57 Conn. 480, 493; *Wetmore v. Pattison*, 45 Mich. 439; *Hunt v. Oregon P. Ry. Co.*, 36 Fed. Rep. 481; *Illinois C. R. Co. v. United States*, 16 Ct. of Cls. 312, 334; *Cates v. Sparkman*, 73 Texas, 619; *Houston, etc. R. Co. v. Hill*, 63 id. 384.

² *Hobbs v. London, etc. Ry. Co.*, L. R. 10 Q. B. 111.

³ *Walsh v. Chicago, etc. R. Co.*, 42 Wis. 23; *Brown v. Same*, 54 id. 342.

others from one station to a given place and back on a named day by a special train, which was to leave to return at a stated hour. It was alleged that they were conveyed to the place designated, but no cars were furnished to convey them back, and the breach was charged to be wilful and fraudulent; that by reason thereof the plaintiff was greatly injured in bodily health, suffered great pain and anxiety of mind, lost much time from business and was subjected to indignities and insults from employees of the company. It was held, the action being upon contract, that the trial court erred in refusing to charge that the plaintiff could not recover for disappointment of mind, sense of wrong or injury to his feelings, and in charging that, if the defendant's conduct was wilful and malicious, the jury might award full compensatory, though not punitive, damages, "embracing such loss of time, such injury to health, such annoyance and vexation of mind, and such mental distress and sense of wrong as the jury might find was the immediate result of defendant's misconduct, and must necessarily and reasonably have been expected to arise therefrom to the plaintiff." Such damages were held too remote; they could not have been in contemplation when the contract was made. The court quoted and adopted the reasoning of the several judges in the English case. The other Wisconsin case was an action for negligence, and the facts were [79] nearly like those in the Hobbs case. Recovery was allowed for the sickness caused by the necessary walk of the female plaintiff to her destination.¹

§ 49. **Criticism of the Hobbs case.** The doctrine of the Hobbs case which is stated in the last preceding section made some impression upon the law in similar cases in a few states; its influence is most seen in cases ruled soon after the opinions of the judges who decided it were received in this country.² As has been stated elsewhere³ the tendency of American authority is in opposition to the view promulgated therein.⁴

¹ This case has been discussed *ante*, § 35, where other cases on the subject are collected.

² See *Walsh v. Chicago, etc. R. Co.*, 42 Wis. 28; *Indianapolis, etc. R. Co. v. Birney*, 71 Ill. 391.

³ *Ante*, § 85.

⁴ Massachusetts may be an exception to the rule, it being held there that in an action for the breach of a contract to carry on a railroad there is no connection between the agreement and the arrest of the passenger by the conductor of the train, who

In addition to the cases cited in the previous discussion attention is directed to a Texas decision in which the English case and those which have followed it are said to be rested upon too narrow ground;¹ and which holds that a railway company which has violated its contract by carrying a passenger beyond his destination is liable to him for the discomfort, inconvenience, sickness, expenses, costs and charges which are the direct, natural and proximate result. The Hobbs case stands but little better in England than it does in this country; indeed, it is practically overruled there. The court of appeal, queen's bench division, has unanimously held that it is a probable result of turning horses which have been transported on a railway out of a stable in which it had been contracted that they should be sheltered that some of them would take cold while their owner was finding room for them elsewhere; and damages resulting might be recovered.² In the case last cited Bramwell, L. J., said, referring to the Hobbs case, "I do not see why a passenger who, by default of the railway company, was obliged to walk home in the dark might not recover in respect of such damage, it being an event which might not unreasonably be expected to occur." Brett, L. J., observed, "Why was the damage to the wife too remote? There was no accommodation or conveyance to be obtained when the parties were put off the train, so that it was not only reasonable that they should walk, but they were obliged to do so. Why was it that which happened was not the natural consequence of the breach of contract? Suppose a man let lodgings to a woman and then turned her out in the middle of the night with only her night clothes on, would it not be a natural consequence that she would take a cold? . . . It is not, however, necessary for me to say more than that I am not contented with it, for there is a difference between such a case and the present one. People do not get out of a train and walk home at night without catching cold, and it is not nearly so inevitable a consequence that a person getting

was a police officer, and who wrongfully refused to receive the ticket tendered, and delivered the passenger to another police officer by whom he was confined in a cell with the result that illness followed. *Murdock v. Boston & A. R. Co.*, 183 Mass. 15.
¹ *L. & G. N. Ry. Co. v. Terry*, 62 Texas, 380.
² *McMahon v. Field*, 7 Q. B. Div. 591.

out of a train under such circumstances as in the Hobbs case should catch cold as that horses turned out as these were in this case should suffer. There is, therefore, a difference, though I own I do not see much between this case and that."

§ 50. Liability under special circumstances. The leading English case¹ on the scope of recovery for the breach of a contract established two propositions which have been very generally accepted. As expressed by Baron Alderson they are: "Where two parties have made a contract which one of them has broken, the damages which the other ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either as arising naturally — that is, according to the usual course of things — from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendant, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances from such a breach of contract."² The first of these rules has been considered in the preceding sections. It is to be remembered that there is no relaxation of the rule confining the recovery to the damages naturally and proximately resulting from the breach in cases where

¹Hadley v. Baxendale, 9 Exch. 358.

²Griffin v. Colver, 16 N. Y. 489. Criticisms upon the language used in the extract quoted in the text have been made by various judges and writers; but the principle enumerated therein has received general ap-

proval. Occasionally a judge intimates that the conditions of business have so changed since the case under consideration was decided that it is no longer applicable in its entirety. See Daughtery v. American U. T. Co., 75 Ala. 168, 178.

there are such known special circumstances. Indeed, the same strictness exists to confine the recovery to the immediate consequences. The general principle of compensation is that it should be equal to the injury. It is a rule based on that principle that the amount of the benefit which a party to a contract would derive from its performance is the measure of his damages if it be broken.¹ It is a rule of interpretation, too, that the intention of the parties is to be ascertained from the whole contract, considered in connection with the surrounding circumstances known to them both. If it appear by such circumstances that the contract was entered into, and known by both parties to be entered into, to enable one of them to serve or accomplish a particular purpose, whether to secure special gain or to avoid an anticipated loss, the liability of the other for its violation will be determined and the amount of damages fixed with reference to the effect of the breach in hindering or defeating that object. The proof of such circumstances makes it manifest that such damages were within the contemplation of the parties. Looking alone at a contract of this character, silent as to the circumstances which were in view, such damages are consequential and sometimes appear to arise very remotely and collaterally to the undertaking violated. But when the contract is considered in connection with the extrinsic facts there is established a natural and proximate relation of cause and effect between its breach and the injury to be compensated.² If all such facts as are admissible to justify the proof of consequential damages were recited in the contract as the law connects them with it when known, or if the legal obligation which the law imposes by reason of them had been expressed in words by the parties, such damages would be direct and not

¹ *Alder v. Keighley*, 15 M. & W. 117.

² In *Fox v. Everson*, 27 Hun, 885, the defendant sold plaintiff clover seed with which was mixed plaintiff seed. A recovery was allowed for the difference between the value of pure seed and that actually sown and for the depreciation in value of the farm on account of the plaintiff seed. It was contended that there

was no liability for the last item because it was not proven that defendant knew the seed was bought for the purpose of being sown. The contention was overruled because that is the purpose for which such seed is usually purchased. But the vendor was not apprised of the fact that the seed sold was to be mixed with timothy seed, and hence was not liable for the loss of the latter.

consequential. In a case in Wisconsin the plaintiff was a butcher, and the defendant agreed to furnish him with what ice he might require for a season, knowing that the plaintiff needed it to preserve fresh meat. About the last of July the defendant stopped supplying ice and refused to furnish any more, in consequence of which plaintiff lost considerable meat. This loss the plaintiff recovered. The court say: "As the defendant was acquainted with all the special circumstances in respect to this contract — knew for what purpose the ice agreed to be furnished by him was to used,— he should fully indemnify the plaintiff for the loss he sustained by the non-delivery of the ice; and he was therefore justly chargeable in damages for the meat spoiled in consequence of the inability of the plaintiff to procure ice elsewhere."¹ This case was not one of simple contract of sale. The special circumstances, [81] known to both parties, made it more than that in its

¹ Hammer v. Schoenfelder, 47 Wis. 455. See Manning v. Fitch, 138 Mass. 273; Beeman v. Banta, 118 N. Y. 538.

In Jones v. George, 61 Texas, 345 (see S. C., 56 id. 149), plaintiff applied to defendant, a druggist, for a quantity of Paris green; by mistake he was supplied with chrome green, a substance similar in appearance but not possessing the same properties. The vendor knew that the article called for was desired to prevent the destruction of plaintiff's cotton crop by the cotton worm which had for years been very destructive. Without knowing the mistake the chrome green was applied to the cotton, and failed to produce the desired result. Evidence was given to show that Paris green would have had a beneficial effect. It was ruled that there was not a technical warranty that Paris green was delivered, but an implied contract that such was the fact. In answer to the contention that it is not enough to entitle a party to recover damages for breach of contract to show that without the breach relied on the injury would not have

been received when it results from an unforeseen or unexpected cause, or from a cause which no reasonable human exertion could counteract, the court observed, "but if it appears that the contract was made for the express purpose of avoiding a loss likely to occur from a known natural cause, which could be controlled and avoided; that this was known to the contracting parties, and that compliance with the contract would have prevented the injury by destroying the thing which immediately inflicts it, then it is believed that the breach of such a contract must be said, within the meaning of the law, to be the direct cause of the injury. In such case there is 'an immediate and natural relation between the act complained of and the injury without the intervention of other and independent cause;' for a cause which is subject to control and contemplated by the parties to a contract, looking to its avoidance or control, cannot be said to be an 'independent cause.'"

aims and consequences, although the terms in which it was made, considered alone, imported only a contract of sale. The vendor, knowing the purpose for which the ice was wanted, was held by implication to undertake to deliver it as agreed in order that the vendee should not suffer loss on his fresh meat from his inability to preserve it for want of ice. Such being the contract, the loss which occurred from its breach was the direct consequence thereof. It is to be observed that the implication from the vendor's knowledge of the special circumstances required performance of no additional act to fulfill the contract. It merely enjoined on him the duty to perform it in view of more serious consequences than those which usually follow a vendor's default. The principle that the injured party is entitled to compensation proportioned to the actual injury is paramount, and overrides any rule not adapted to measure compensation in such a special case. The vendor is thus admonished that if he fails to deliver the property as agreed he cannot satisfy the injury to the vendee by paying the difference of a higher market price unless the article can be obtained in market; that the loss will be the value of the property which the ice was needed to preserve.¹

§ 51. Further illustrations and discussion of the rule. In a New York case² the plaintiff having contracted to sell to the state of Ohio a large quantity of bullets of a certain quality and at a fixed price, deliverable at Columbus, made a contract with the defendant at New York by which the latter agreed to manufacture and deliver to him the same quantity and quality of bullets; at the time of making it he informed the defendant of his arrangement with the state of

¹ The contract in suit provided that the manufacturer should furnish, deliver and put in running order by a specified day machinery for a cotton-seed oil mill. By reason of a breach a quantity of seed purchased for grinding was damaged. Parol evidence was received to show that time was of the essence of the contract, and that the purchase of seed in advance of the period fixed for the

completion of the mill was within the contemplation of the parties. *Van Winkle v. Wilkins*, 81 Ga. 93; *Dennis v. Stoughton*, 55 Vt. 871; *Goodloe v. Rogers*, 10 La. Ann. 631; *Lobdell v. Parker*, 8 La. 328. Compare *Brayton v. Chase*, 8 Wis. 456, which is inconsistent with *Hammer v. Schoenfelder*, 47 id. 455, stated *supra*.

² *Messmore v. New York S. & L. Co.*, 40 N. Y. 422.

Ohio and that he was contracting with him for the bullets in order to fulfill that agreement. The contract between these parties was in writing, but did not contain any allusion to the special object of making it. It was held, notwithstanding, that it was competent to prove such antecedent contract and parol proof was admissible to establish that the defendant was informed that the plaintiff made the contract in question [82] with a view to performing the other; and that the proper measure of damages was the difference between the price at which the defendant was to furnish the bullets and that the plaintiff was to receive. It appeared that the market price advanced so that the bullets could not be obtained below the latter price; the market price was considerably higher, but the recovery was limited as above stated, for that gave the plaintiff compensation for his actual loss and that was the loss which was in contemplation by the parties when the contract was made. Where the contract relates to commodities commonly purchasable in the market it is safe to say that the purchaser is made whole when he is allowed to recover the difference between the contract price and the value of the article in the market at the time and place of delivery, because he can supply himself with this article by going into market and making his purchase at such price, and these are all the damages he is ordinarily entitled to recover, for nothing beyond this was within the contemplation of the parties when they contracted. If, however, the vendor knows that the purchaser has an existing contract for a resale at an advanced price, and that the purchase is made to fulfill such a contract, the profits on such resale are those contemplated by the parties. In other words, on the ordinary contract of sale the damages contemplated are those which would result with reference to market value if the subject of the contract have such a value; otherwise, on the basis of its actual value, as it may be ascertained by proof or for the use to which the property is commonly applied, whether known or not.¹ But if the contract of purchase is made with a view to a known resale already contracted or any known special use, the damages which are contemplated to result from the vendor's breach are those

¹ *Rhodes v. Baird*, 16 Ohio St. 578; *Borries v. Hutchinson*, 18 C. B. (N. S.) 465.

which would naturally follow on the basis of the contract for resale or other special use, known to the vendor when the contract was made. The contemplation of damages will include such as ordinarily arise according to the intrinsic nature of the contract and the surrounding facts and circumstances made known to the parties at the making of it.¹

¹*Davis v. Talcott*, 14 Barb. 611; *Cobb v. I. C. R. Co.*, 38 Iowa, 601; *Haven v. Wakefield*, 39 Ill. 509; *Illinois C. R. Co. v. Cobb*, 64 Ill. 128; *Winne v. Kelley*, 84 Iowa, 339; *Van Arsdale v. Rundel*, 82 Ill. 63; *Rogers v. Bemus*, 69 Pa. St. 432; *Hinckley v. Beckwith*, 13 Wis. 81; *Leonard v. New York, etc. T. Co.*, 41 N. Y. 544; *Scott v. Rogers*, 81 N. Y. 676; *Hexter v. Knox*, 63 N. Y. 561; *True v. International T. Co.*, 60 Me. 9; *Fletcher v. Tayleur*, 17 C. B. 21; *Squire v. Western U. T. Co.*, 98 Mass. 232; *Cory v. Thames Iron Works Co.*, L. R., 3 Q. B. 181; *Borradaile v. Brunton*, 8 Taunt. 535; *In re Trent & H. Co.*, L. R. 6 Eq. 396; *Dewint v. Wiltse*, 9 Wend. 325; *Dobbins v. Duquid*, 65 Ill. 464; *Shepard v. Milwaukee G. L. Co.*, 15 Wis. 318; *Richardson v. Chynoweth*, 26 Wis. 656; *Wolcott v. Mount*, 36 N. J. L. 262; *Benton v. Fay*, 64 Ill. 417; *Grindle v. Eastern Exp. Co.*, 67 Me. 317; *Hamilton v. Magill*, 12 L. R. Ire. 186, 204.

In *Borries v. Hutchinson*, 18 C. B. (N. S.) 445, the defendant contracted to sell to the plaintiff seventy-five tons of caustic soda, an article not ordinarily procurable in the market, at a given price, to be delivered on the rails at Liverpool for Hull, twenty-five tons in June, twenty-five tons in July and twenty-five tons in August: but he failed to deliver any until the 16th of September, between which day and the 26th of October he delivered twenty-six tons in all. At the time of entering into the contract the defendant was aware that the

plaintiffs were buying the soda for a foreign correspondent, but did not know until the end of August that it was designed for St. Petersburg. The plaintiffs had, in fact, contracted to sell the soda to Heitmann, a merchant at St. Petersburg, at an advanced price, and he had contracted to sell it to one Heinburger, a soap manufacturer of that place, for a still further advance. In consequence of the late delivery of the twenty-six tons, the plaintiffs were compelled to pay a higher rate of freight and insurance. This amounted to 40*l.* 17*s.* For their failure to deliver the remainder to Heitmann they were called upon to pay and actually paid 159*l.*, which he claimed as the compensation he had been obliged to pay Heinburger for the failure to perform his subcontract with him. In this action by the plaintiffs to recover from the defendant for the breach of his contract with them, it was conceded that they were entitled to recover the difference between the price (on the forty-nine tons undelivered) at which he had sold the caustic soda to them, and the price at which they had contracted to sell it to Heitmann, in other words, the loss of the profit on the resale; and it was held that they were also entitled to recover the 40*l.* 17*s.*, the excess of freight and insurance, which was the necessary result of the defendant's breach of contract, but that the defendant was not chargeable with the 159*l.* which the plaintiff had paid to Heitmann to compensate Heinburger for the loss

[83] § 52. **Market value; resale; special circumstances.**

Where an article had been bargained for for a peculiar and exceptional purpose unknown to the seller, and had no market [84] value, it was held that the vendor was liable for the damages which would have been sustained if it had been used for the purpose for which he supposed it would be used.¹ If the vendor has notice that his vendees have contracted to resell the article he will be held liable for loss of profits by such resale if he fails to fulfill his contract, though he was not informed of the price in the contract to resell, unless there is a market value for the article or the reselling price is of an unusual and exceptional character.² Since the decision of *Hadley v. Baxendale*,³ the rule first stated in that case for ascertaining damages which are recoverable for breach of contract, namely, that they be such as arise "naturally, i. e., according to the usual course of things from such breach of contract itself," has been universally assented to; and also what is said in the opinion of Alderson, B., to the effect that if a contract be made under special circumstances, which are unknown to the party breaking it, they cannot be taken into consideration for the purpose of enhancing the damages; that such a defaulting party, at the most, can only be supposed to have had in his contemplation the amount of injury which would arise from such a breach generally in the great multitude of cases unaffected by special circumstances.⁴ His

of his bargain; this was held too remote a damage. As to the latter item, Erle, C. J.: "He (the defendant) had no notice of the subsequent resale; and it is not to be assumed that the parties contemplated that he was to be held responsible for the failure of any number of subsales. These could not in any sense be considered as the direct, natural or necessary consequence of the breach of the contract he was entering into." *Hinde v. Liddell*, L. R. 10 Q. B. 265.

¹ *Cory v. Thames Iron Works Co.*, L. R. 3 Q. B. 181.

² *Booth v. Spuyten Duyvil R. M. Co.*, 60 N. Y. 487; *Horne v. Midland Ry.*

Co., L. R. 8 C. P. 181; *Lewis v. Rountree*, 79 N. C. 122.

³ 9 Exch. 341.

⁴ *Griffin v. Colver*, 16 N. Y. 490; *Western U. T. Co. v. Graham*, 1 Colo. 230; *Sanders v. Stuart*, 1 C. P. Div. 326; *Great Western Ry. Co. v. Redmayne*, L. R. 1 C. P. 329; *Masterton v. Mayor*, 7 Hill, 61; *Cuddy v. Major*, 12 Mich. 368; *Johnson v. Mathews*, 5 Kan. 118; *Lawrence v. Wardwell*, 6 Barb. 423; *Portman v. Middleton*, 4 C. B. (N. S.) 322; *Gee v. Lancashire, etc. Ry. Co.*, 6 H. & N. 211; *Hales v. London, etc. Ry. Co.*, 4 B. & S. 66; *Travis v. Duffau*, 20 Texas, 49; *Fox v. Harding*, 7 Cush. 516.

observations, however, in favor of a more extended liability, embracing damages brought within the contemplation of the parties at the time of contracting by communication of special circumstances, have been the subject of some criticism and conflict of opinion. In England, however, the cases have been uniformly decided in conformity to the doctrine of that case;¹ but there have been *dicta* in several of a contrary tendency, especially with reference to its application to carriers, who were supposed to have no option to refuse to accept goods offered for transportation, in view of enlarged responsibility on account of notice of special circumstances, unless an increased compensation be paid.² The tendency of the decisions there

¹ If the goods contracted for are of a particular shape and description, and the party who is to furnish them knows that the contract is substantially like one the purchaser has made with a customer of his, and that it is made to enable the purchaser to fulfill such contract, and there is no market for the goods, the latter may recover as damages for the breach the profit he would have made had he been able to supply his customer, and also damages recovered against him by the latter for the resulting breach. In estimating such last-mentioned damages the judgment of a foreign court will be regarded as establishing a reasonable sum for their computation. The liability of the purchaser to his customer for a penalty if he failed to keep his contract with him must have been known to the original vendor. *Grebert-Borgnis v. Nugent*, 15 Q. B. Div. 85.

² In *Borries v. Hutchinson*, 18 C. B. (N. S.) 445, and in *Smood v. Foord*, 1 E. & E. 602, the damages were larger and the recovery sustained by reason of the defendant having notice of the purpose of the other party in making the contract. *Hobbs v. London, etc. Ry. Co.*, L. R. 10 Q. B. 111; *Smith v. Green*, 1 C. P. Div. 92; *Simpson v. London, etc. Ry. Co.* 1 Q.

B. Div. 274; *Wilson v. General Iron S. Co.*, 47 L. J. (N. S.) (Q. B.) 239.

In *British Columbia Saw Mill Co. v. Nettleship*, L. R. 3 C. P. 499, the plaintiffs delivered to the defendant for carriage to Vancouver's Island several cases of machinery intended for the erection of a saw mill. The defendant knew generally that the cases contained machinery. On the arrival of the vessel at her destination, one of the cases which contained parts of the machinery was missing, and without these parts the mill could not be completed. The plaintiffs were obliged to replace these parts from England at a cost, including freight, of 353*l.* 17*s.* 9*d.*, and suffer a delay of twelve months. A fair rate of hire of the machinery, applied to the purposes for which it was required by the plaintiffs, would have been for twelve months 2,646*l.* 2*s.* 3*d.*, and the plaintiffs sought to recover that amount, but it was held not recoverable, because the defendant did not know that the missing case contained portions of the machinery which could not be replaced at Vancouver's Island, and without which the rest could not be put together. Willes, J., said: "The conclusion at which we are invited to arrive would fix upon the ship-owner,

[86] appears to be to require the special purpose of the contract to be so far in view when the contract is made that it is reasonable to infer a tacit acceptance of it as made for the accomplishment of that object, and a tacit consent to be bound to

beyond the value of the thing lost and the freight, the further liability to account to the intended mill-owners, in the event of a portion of the machinery not arriving at all or arriving too late through accident or his default, for the full profits they might have made by the use of the mill, if the trade were successful and without a rival. If that had been presented to the mind of the ship-owner at the time of making the contract, as the basis upon which he was contracting, he would at once have rejected it. And though he knew from the shippers the use they intended to make of the articles, it could not be contended that the mere fact of knowledge, without more, would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him. To my mind that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it. Several circumstances occur to one's mind in this case to show that there was no such knowledge on the defendant's part that would warrant the conclusion contended for by the plaintiffs. In the first place the carrier did not know that the whole of the machinery would be useless if any portion of it failed to arrive, or what that particular part was. And that suggests another consideration. He did not know that

the part which was lost could not be replaced without sending to England. And applying what I have before suggested, if he did know this, he did not know it under such circumstances as could reasonably lead to the conclusion that it was contemplated at the time of the contract that he would be liable for all these consequences in the event of a breach. Knowledge on the part of the carrier is only important if it forms part of the contract. It may be that the knowledge is acquired casually from a stranger, the person to whom the goods belong not knowing or caring whether he had such knowledge or not. Knowledge, in effect, can only be evidence of fraud or of an understanding by both parties that the contract is based upon the circumstances which are communicated."

In the subsequent case of *Horne v. Midland Ry. Co.*, L. R. 7 C. P. 588, the defendant, as a carrier, was guilty of a negligent delay in the transportation of goods consigned to fill a special contract at an exceptionally high price. The carrier had notice that the goods were for a purchaser who would not take them unless they were offered on time; but the carrier was not informed of the contract price. It was considered that the notice was not sufficient to charge the defaulting carrier with damages, computed on the basis of the loss of the bargain for such an unusual and exceptional price. It was also held that the notice must be such as leads to the inference that the carrier accepts the goods assenting to the increased responsibility as part of the contract.

more than the ordinary damages in case of default on that account; otherwise the damages in respect of that object [87] are not deemed to have been within the contemplation of the parties. This is probably also the doctrine of the American

Kelly, C. B., said on appeal (L. R. 8 C. P. 136): "The goods with which we have to deal are not the subject of any express statutory enactment; the case in regard to them depends on the common law, taken in connection with the acts relating to the defendant's railway company. Now it is clear, in the first place, that a railway company is bound, in general, to accept goods such as these and carry them as directed to the place of delivery, and there deliver them. But suppose that an intimation is made to the railway company, not merely that if the goods are not delivered by a certain date they will be thrown on the consignor's hands, but in express terms stating that they have entered into such and such a contract, and will lose so many pounds if they cannot fulfill it; what is then the position of the company? Are they the less bound to receive the goods? I apprehend not. If then they are bound to receive and do so without more, what is the effect of the notice? Can it be to impose on them a liability to damages to any amount, however large, in respect of goods which they have no option but to receive? I cannot find any authority for the proposition that the notice, without more, could have any such effect. It does not appear to me that the railway company has any power such as was suggested to decline to receive the goods after such a notice, unless an extraordinary rate of carriage be paid. Of course, they may enter into a contract, if they will, to pay any amount of damages for the non-performance of their contract, in con-

sideration of an increased rate of carriage, if the consignors are willing to pay it; but in the absence of any such contract expressly entered into, there being no power on the part of the company to refuse to accept the goods or to compel payment of an extraordinary rate of carriage by the consignor, it does not appear to me that any contract to be liable to more than the ordinary amount of damages can be implied from mere receipt of the goods after such a notice as before mentioned."

In *Elbinger Actien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473 (approved in *Grebert-Borgnis v. Nugent*, 15 Q. B. Div. 85), the plaintiff contracted for the purchase of six hundred and sixty-six sets of wheels and axles, which he designed to use in the manufacture of wagons; and the wagons he had contracted to sell and deliver to a Russian company by a certain day, or forfeit two roubles a wagon per day. The defendant, who contracted to sell the wheels and axles, was informed of the other contract, but not of the amount of the penalties. Some delay occurred in the plaintiff's deliveries, by the defendant's fault, and in consequence the plaintiff had to pay 100*l.* in penalties; and the action was brought to recover that sum of the defendant. There was no market in which the goods could be obtained, and it was therefore contended in behalf of the defendant that only nominal damages could be recovered. The court held the defendant liable for substantial damages, not for the penalties the plaintiff had been obliged to pay, the defendant having

courts. The parties are not supposed to actually intend to pay damages by any other than a legal standard, unless they [88] formally liquidate them, whether there are special circumstances or not. They know the legal principle of com-

no notice of them, but the reasonable value of the use of the wagons during the delay. A verdict of 100*l.* was sustained. But the court, by Blackburn, J., remarked: "If we thought that this amount could only be come at by laying down as a proposition of law that the plaintiffs were entitled to recover the penalties actually paid to the Russian company, we should pause before we allowed the verdict to stand." After referring to *Hadley v. Baxendale* he continued: "But an inference has been drawn from the language of the judgment, that whenever there has been notice, at the time of the contract, that some unusual consequence is likely to ensue, if the contract is broken the damages must include that consequence; but this is not, as yet, at least, established law. In *Mayne on Damages* (p. 10, 2d ed. by Lumley Smith), in commenting on *Hadley v. Baxendale*, it is said: 'The principle laid down in the above judgment, that a party can only be held responsible for such consequences as may be reasonably supposed to have been in the contemplation of both parties at the time of making the contract, and that no consequence which is not the necessary result of a breach can be supposed to have been so contemplated, unless it was communicated to the other party, are, of course, clearly just. But, it may be asked, with great deference, whether the mere fact of such consequences being communicated to the other party will be sufficient, without going on to show that he was told that he would be answerable for them, and consented to undertake such a liability.

. . . The law says that every one who breaks a contract shall pay for its natural consequences; and, in most cases, states what those consequences are. Can the other party, by merely acquainting him with a number of further consequences, which the law would not have implied, enlarge his responsibility, without any contract to that effect?' We are not aware of any case in which *Hadley v. Baxendale* has been acted upon in any such way as to afford an answer to the learned author's doubts; and, in *Horne v. Midland Ry. Co.*, L. R. 8 C. P. 131, much that fell from the judges in the exchequer chamber tends to confirm those doubts." In this case the court held that the plaintiff was not entitled to damages for the delay, exceeding the penalty he was bound for and had paid to his vendee.

In *Hinde v. Liddell*, L. R. 10 Q. B. 265, the defendant contracted to supply the plaintiff two thousand pieces of grey shirtings, to be delivered on the 20th of October, certain, at so much per piece, the defendant being informed that they were for shipment. Shortly before the 20th of October the defendant informed plaintiff that he would be unable to complete his contract by the time specified; and, thereupon, the plaintiff endeavored to get the shirtings elsewhere, but, there being no market in England for it, that kind of shirtings could only be procured by a previous order to manufacture it. The plaintiff, therefore, in order to ship according to his contract with his sub-vendee, procured two thousand pieces of other shirtings, of a somewhat su-

compensation and the rules subsidiary to it; and when they do not liquidate the damages they are content to enter into the contract and leave the measure of liability to be decided by law; they know that the law will require them to make com- [89]

perior quality, at an increase of price, which the sub-vendee accepted, but paid no advance in price to plaintiff. The plaintiff recovered against the defendant this excess over the contract price. It is manifest that the plaintiff suffered damage to that amount, by reason of delivering the substituted article to his vendee, without realizing anything for having procured an article of superior quality. Is it possible that if there had been no subcontract which necessitated this loss, and the plaintiff had the article on hand, that he could have recovered damages by that standard? It would have been said that no loss could be inferred from such a purchase. *Borries v. Hutchinson* was approved and said to be directly in point, and the same judge, Blackburn, J., said, in giving judgment: "In the present case the goods are for a foreign market; and it was admitted that the only reasonable thing the plaintiff could do was to put himself in the same position as if the defendants had fulfilled their contract, by obtaining a somewhat dearer article. I do not see on what principle it can be said that the plaintiff is not entitled to recover this difference in price. We do not decide anything as to what the effect of a notice of the plaintiff's subcontract might have been. Under the circumstances, the value of the goods contracted to be supplied by the defendants, at the time of their breach of contract, was the price the plaintiff had to give for the substituted article."

In *Grebert-Borgnis v. Nugent*, 15 Q. B. Div. (1885) 85, it is said that a

vendor who contracts with a purchaser knowing that the latter has a foreign customer for the articles contracted for must understand that if such purchaser fails to fulfill his contract he will be liable to his customer for damages; and while the judgment of a foreign court will not be held binding as to the amount of damages, it will be assumed that the sum fixed thereby is reasonable.

In *Simpson v. London, etc. Ry. Co.*, 1 Q. B. Div. 274, the plaintiff, who was a manufacturer of cattle food, was in the habit of sending samples of his goods to cattle shows, with a show tent and banners, and attending there himself to attract custom. He intended to exhibit some of these samples at the Newcastle show, and delivered them for transmission to the defendants. The contract was made with the defendants' agent at a cattle show at Bedford, where the plaintiff had been exhibiting his samples, and where the defendants had an agent and office on the show ground for the purpose of seeking traffic. The evidence as to the terms of the contract was that a consignment note was filled up by the plaintiff's son consigning the goods as "boxes of sundries" to "Simpson & Co., the show ground, Newcastle on Tyne," and that he indorsed the note "must be at Newcastle on Monday certain," meaning the next Monday, the 20th July. Nothing was expressly said as to the plaintiff's intention to exhibit the goods at Newcastle, nor as to the goods being samples. They did not arrive until several days after time, and when the show

pensation in case of a breach for damages which directly arise therefrom in view of the intrinsic nature of the contract, and of the special circumstances known to them when it was made [90] which disclose some particular object different from or

was over. It was found that the plaintiff obtained custom by exhibiting his samples at shows, but no evidence was given as to his prospects with regard to the Newcastle show in particular. A verdict by consent was entered for 20*l.* beyond a sum which had been paid in, with leave to move to enter the verdict for the defendants, if the court should be of opinion that the plaintiff was not entitled to recover for either loss of time in waiting for the goods or loss of profits. It was held that the plaintiff was entitled to the verdict. Cockburn, C. J., said: "The law, as it is to be found in the reported cases, has fluctuated; but the principle is now settled that, whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object."

In *Jameson v. Midland Ry. Co.*, 50 L. T. Rep. 426, the plaintiff delivered a parcel at defendant's office addressed to M., Stand 23, Show Ground, etc.; nothing was said by him. The label so addressed was sufficient notice that the parcel was being sent to a show, and defendant was liable for the loss of profits and expenses resulting from its delay.

In *Mayne on Dam.* 81, the author says: "In the present state of the authorities, therefore, I would suggest that in place of the third rule

supposed to be laid down by *Hadley v. Baxendale*, the law may perhaps be as follows:

"First—Where there are special circumstances connected with a contract which may cause special damages to follow if it is broken, mere notice of such circumstances given to one party will not render him liable for the special damage, unless it can be inferred from the whole transaction that he consented to become liable for such special damage.

"Secondly—Where a person having knowledge or notice of such special circumstances might refuse to enter into the contract at all, or might demand a higher remuneration for entering into it, the fact that he accepts the contract without requiring any higher rate will be evidence, though not conclusive evidence, from which it may be inferred that he has accepted the additional risk in case of breach.

"Thirdly—Where the defendant has no option of refusing the contract and is not at liberty to require a higher rate of remuneration, the fact that he proceeded in the contract after knowledge or notice of such special circumstances is not a fact from which an undertaking to incur a liability for special damages can be inferred.

"Fourthly—Even if there were an express contract by the defendant to pay for special damages, under the circumstances last supposed, it might be questioned whether such a contract would not be void for want of consideration. Take the case of a railway passenger who buys his ticket, informing the clerk of some

beyond that which would be suggested by the mere words of the contract.¹ Doubtless it is essential in order to bring within the contemplation of the parties damages different from and larger in amount than those which usually ensue that the special circumstances out of which they naturally proceed shall have been known to the party sought to be made liable in such manner, at the time of contracting, as to make it manifest to him that if compensation in case of a breach on his part is accorded for actual loss it must be for a loss resulting from that special state of things which those circumstances portended. Damages are not the primary purpose of contracts, but are given by law in place of and as a compensation and equivalent for something else which had been agreed to be done and has not been done. What the

particular loss which would arise from his being late. Suppose the clerk were to undertake that the company would be answerable for the loss, and that such undertaking should be held to be within the sphere of his duty. Would it not be purely gratuitous? The consideration for any promise by the company, arising from the payment of the fare, would be exhausted by their carrying the passenger to his destination or paying the ordinary damages for failure to do so. What would there be left to support the special undertaking to pay an exceptional penalty?"

¹Booth v. Spuyten Duyvil R. M. Co., 60 N. Y. 487. In this case Church, C. J., said, referring to the English cases: "Some of the judges in commenting upon it (the doctrine under consideration) have held that a bare notice of special circumstances which might result from a breach of the contract, unless under such circumstances as to imply that it formed the basis of the agreement, would not be sufficient. I concur with the view expressed in these cases, and I do not think that the court in Hadley v. Bax-

endale intended to lay down any different doctrine." But the defendant in this case was held to be liable for the loss sustained on a contract which the plaintiffs had with the New York Central Railroad Co., by reason of the defendant's breach, and that loss was held to be brought within the contemplation of the parties by mere notice, generally, that there was a contract depending on the defendant's performance.

In Snell v. Cottingham, 72 Ill. 161, it was held that a contractor who fails to finish a railroad by the time limited in his contract cannot be held for the loss occasioned to the owner of the road by reason of another contract between him and a third party, for the use of the road after the time it should have been completed, even though he may have known of the existence and the terms of such other contract at the time of entering into his own, unless he expressly agrees to such a rate of damages. A similar doctrine is laid down in Bridges v. Stickney, 88 Ma. 369; Hunt v. Oregon P. Ry. Co., 86 Fed. Rep. 481. See Clark v. Moore, 3 Mich. 55.

[91] damages would ordinarily be on such a default is immaterial if the contracting party assume the obligation which he has broken with a knowledge of a peculiar state of facts connected with the contract which indicated that other damages would result from a breach, and the latter are claimed. To confine the injured party's recovery in such case to the lighter damages which usually follow such a breach, where no such known special facts exist, and exclude those which were thus brought within the contemplation of the parties, would be to sacrifice substantial rights to arbitrary rule; to set aside the principle which entitles a party to compensation commensurate with his injury to give effect to a rule formulated to render that principle effectual; it would be to apply a subordinate rule where it has no application instead of the principle, which is paramount and always applicable. What are the usual damages which result from the breach of a contract? There is certainly no customary amount, nor is there any rule of damages which is universal like the principle for allowance of due compensation. If it is a contract of sale and the vendor refuses to complete it, one rule is to ascertain that compensation by the difference between the contract price and the market value, because if the article which is the subject of the contract can be obtained in market at a market price the vendee is thereby enabled to supply him without loss unless the market price has increased. That rule goes no further, but the principle does. Where the vendee cannot obtain the article in the market, nor at all if the vendor refuses to perform his contract, that rule is not applicable, and then resort [92] must be had to other elements of value; and recourse is had to the principle to determine the measure of redress; even a contract of resale made by the vendee and of which the vendor had no notice may be considered.¹ And if the

¹ *France v. Gaudet*, L. R. 6 Q. B. 199; *McHose v. Fulmer*, 73 Pa. St. 865.

France v. Gaudet, *supra*, was an action for the conversion of the property sold, and hence is not to be considered as authority to the full extent of the proposition to which it is cited. If the article the vendor has con-

tracted to supply or an article of the same quality cannot be procured in the market, it is presumed that such fact was within the contemplation of the parties to the contract. *McHose v. Fulmer*, *supra*. But this rule is denied in an English case (*Thol v. Henderson*, 8 Q. B. Div. 457). There was a contract to deliver goods which

goods were not bought for resale and had no market value, but were intended for some special use, the damages would be computed according to the value for the use to which the property was most obviously adapted unless the vendor knew of the intention to apply them to a different one.¹ Their delivery in the case where a contract of resale existed would have enabled the vendee to obtain the reselling price, and in the other to avoid the loss which has otherwise resulted from being deprived of the property. Such recoveries are not unusual. It may be said that sales are generally made of articles having a market value. True. But there is no uniform relativeness between the contract and market prices. The defaulting vendor will pay nominal damages when the market price is less than the contract price, and substantial damages according to the excess of the former at the time the goods should have been delivered. When the vendor refused to deliver ice according to his contract, knowing when he made the agreement that it was wanted as a means of preserving

were not obtainable in the market; the purchaser had entered into a contract for their sale. The vendor had no knowledge of the particular contract, but was aware that the goods were ordered for the purpose of reselling them. Such knowledge was held not to bring the case within the rule of *Hadley v. Baxendale*, so as to allow the recovery of profits which would have been made if there had not been a breach of the contract. This is too strict an application of the rule, because it was immaterial to the vendor who his purchaser's customer was; the former had knowledge sufficient to act as an incentive to the prompt fulfillment of his contract, and to apprise him of the fact that its breach would specially damage the vendee. See *Loescher v. Disterberg*, 26 Ill. App. 520, which is in harmony with *McHose v. Fulmer*, *supra*.

In *Hamilton v. Magill*, 12 L. R. Ir. 186, one of the points especially relied upon by the defendant was

that at the time the contract in suit was made the plaintiff had not actually completed his contract for the sale of the property purchased, and that the case should be treated as if the defendant had no other notice than that it was bought for resale generally. The answer of the court was that it appears "illogical and contrary to principle that a person who, having an offer, enters into a contract with another, which if carried out would enable him to accept that offer, but refrains from actually accepting it until he has entered into the contract, should be in a worse position than one who makes a contract for sale on the chance of afterwards purchasing from another the goods which he has previously contracted to sell. To establish such a distinction would place the speculator in a more advantageous position than the prudent merchant."

¹ *Cory v. Thames Iron Works Co.*, L. R. 8 Q. B. 181.

fresh meat in the prosecution of the vendee's business, and the ice could not be obtained in market, what should be deemed the usual damages for a breach of the contract? Certainly not what had been the market price when ice was plenty and could be had from other sources; but its value when it should, according to the contract, have been delivered and when the vendor, as the fact probably may be, alone could supply it, and when the vendee must have it or lose a certain amount of meat, notwithstanding his best endeavors by other means to preserve it.¹

If the contract is made to serve a particular purpose, not communicated and known to both parties, nor indicated by the subject-matter of the contract, and the loss in respect to that purpose is so exceptional as neither to be within the contemplation of the parties at the making of the contract, nor [93] within the first branch of the rule laid down in *Hadley v. Baxendale*, it cannot be recovered; but where the injury is within the contemplation of the parties, if they give the subject consideration when the contract is made, they are admonished by the prevalence of the principle of compensation in the law that if they do not perform the alternative of making reparation on the scale of equivalence to the actual injury will be compulsory; and there is no need of any agreement to submit to such a legal consequence. The law as laid down in *Hadley v. Baxendale* has been generally accepted in this country; it includes all such damages as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.² And in accordance with the doctrine of that case, it is sufficient if the special circumstances under which the contract was actually made were communicated to the party sought to be charged, and the damages resulting from the breach are such as both parties would reasonably contemplate would be the amount of the injury which would ordinarily follow from a breach under those circumstances. As said by Selden, J.: "The broad general rule . . . is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this

¹ *Hammer v. Schoenfelder*, 47 Wis. 455. ² 9 Exch. 858.

rule is subject to but two conditions. The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation; and they must be certain both in their nature and in respect to the cause from which they proceed.”¹ And this leads naturally to the consideration of the certainty which is necessary to warrant the recovery of damages.

SECTION 5.

REQUIRED CERTAINTY OF DAMAGES.

§ 53. **Must be certain in their nature and cause.** [94] Damages must be certain both in their nature and in respect to the cause from which they proceed. Judge Selden said that the requisite that the damages must not be remote, but the proximate consequence, is in part an element of the required certainty.² In the preceding pages the requirement that the damages be the natural and proximate result of the act complained of has been discussed; but mainly with reference to the consequences as a whole. Now it remains to consider the certainty necessary not only in regard to the consequences as a whole but also in detail. A fatal uncertainty may infect a case where an injury is easily provable, but the alleged responsible cause cannot be sufficiently established as to the whole or some part of that injury. So it may exist where a known and provable wrong or violation of contract appears, but the alleged loss or injury as a result of it cannot be certainly shown. Many of the illustrations already given apply to the first, as where the injury is not the natural or proximate result of the act complained of; then the relation of cause and effect does not exist between the alleged cause and the alleged injury. This uncertainty may be further illustrated by the case of one who complained that the defendant had taken his flat from his ferry, and that being obliged to go in search of it in order to cross the river he left his horses attached to a wagon standing on the bank, and while he was gone they ran into the river

¹Griffin v. Colver, 16 N. Y. 494; ²Griffin v. Colver, 16 N. Y. 494.
Faulkner, etc. Ry. Co. v. Pritchard,
77 Ga. 412, 418.

and were drowned.¹ Their loss was not a natural consequence of the taking of the flat which the defendant could foresee as a probable result of his wrongful act; there was a more im-
[95] mediate cause in the negligence of the owner; and after the event it cannot be ascribed with the requisite certainty to the defendant's act although it was the beginning of the series of facts which culminated in that loss.² A grantee of land cannot recover as damages for the breach of the grantor's covenant against incumbrances because of an existing inchoate right of dower in the premises, a sum paid by himself to an auctioneer for selling them to a person who refuses to complete the purchase on discovering the incumbrance.³

In an action for the wrongful revocation of an agreement to submit a controversy to arbitration the plaintiff is not entitled to recover damages for the trouble and expense incurred in making the agreement; but he can recover for his loss of time, and for his trouble and necessary expenses in preparing for a hearing, such as employing counsel, taking depositions, paying witnesses and arbitrators, so far as such preparations are not available for a subsequent trial in court.⁴

A defendant chartered the plaintiff's vessel from Liverpool to Puerto Cabello at a stipulated freight; a clause was afterwards added to the charter-party allowing the defendant to send on a part of the cargo to Maracaibo, with a proviso that any expense incurred by so doing should be borne by the charterer. Under pretense of an attempt by the master to evade the customs on the part so shipped, the custom-house authorities at Puerto Cabello wrongfully imposed a fine of \$500 on him, and detained the vessel for several months; but would have allowed her to depart if the fine had been paid, which the master had not the means to pay and did not. The

¹ *Gorden v. Butts*, 2 N. J. L. 334.

² See *Walker v. Goe*, 8 H. & N. 395; S. C., 4 id. 350; *Dubuque Ass'n v. Dubuque*, 30 Iowa, 176; *Hofnagie v. New York, etc. R.*, 55 N. Y. 608; *Davis v. Fish*, 1 G. Greene (Iowa), 406; *Lewis v. Lee*, 15 Ind. 499; *Ashley v. Harrison*, 1 Esp. 49; *Barber v. Lesiter*, 7 C. B. (N. S.) 175; *Collins v. Cave*, 4 H. & N. 225; *Everard v.*

Hopkins, 2 Bulst. 332; *Walker v. Moore*, 10 B. & C. 416; *Hayden v. Cabot*, 17 Mass. 169; *Green v. Mann*, 11 Ill. 618; *Hargous v. Ablon*, 3 Denio, 406; *Brayton v. Chase*, 3 Wis. 456; *Chatterton v. Fox*, 5 Duer, 64.

³ *Harrington v. Murphy*, 109 Mass. 299.

⁴ *Pond v. Harris*, 113 Mass. 114.

government agreed afterwards to pay the master \$5,000 for the wrongful detention, but did not. It was held by the court of exchequer that the owner of the vessel could recover from the charterer neither the loss sustained by the detention [96] nor the expense incurred in repairing the damage to the ship in consequence thereof, nor for the costs of legal proceedings taken by him in respect to the ship, nor for the fine.¹

§ 54. Liability for the principal loss extends to details and incidents. Where the alleged wrong or breach of contract is shown with the requisite certainty to be the cause of the injury in question, it is also to be deemed the cause of all its concomitant and incidental details which are constituent parts of the injury, including necessary and judicious expenditures made to stay or efface the wrong or limit its consequences.² A riparian owner brought an action for polluting the waters of a stream running through his farm. He was held entitled to recover for loss of an opportunity of renting his grist-mill, the diminution in the rental value of his farm, and the inconveniences he may have been put to in the use of the same, resulting directly from the conduct of the defendant.³ A plaintiff's house was injured by the partial falling in of the partition wall between it and the defendant's house, which was caused by digging too near the wall for the purpose of deepening the cellar under it. No notice was given by the defendant of his intention to deepen his cellar, and evidence was offered to show that the excavation was done in a careless and negligent manner, and also to show that the business of the plaintiff, who kept an ice-cream saloon, and made cakes and other articles in that line, was interrupted for several days. The court held that the plaintiff was entitled to such damages as would be sufficient to reinstate the wall and the house in as good condition as they were prior to the injury, and to compensate him for the loss consequent upon the interruption of his business; and to show the latter, he might prove its usual profits prior to the wrong.⁴ If a collision be-

¹ *Sully v. Duranty*, 83 L. J. (Exch.) 319.

² *McDaniel v. Crabtree*, 21 Ark. 431; *Smith v. Condry*, 1 How. (U. S.) 35; *Loker v. Damon*, 17 Pick. 284.

³ *Gladfelter v. Walker*, 40 Md. 3.

⁴ *Brown v. Werner*, 40 Md. 15; *White v. Moseley*, 8 Pick. 356; *Simmons v. Brown*, 5 R. I. 299; *Allison v. Chandler*, 11 Mich. 542.

Walrath v. Redfield, 11 Barb. 368 (see S. C., 18 N. Y. 457), was an ac-

tween vessels results in disabling one of them so that her owners cannot use her for a voyage for which she has been engaged, though no regular charter-party has been entered into, the damages resulting from the loss of the profits of such voyage are the result of the collision.¹ If logs are deliberately stored in a stream which is navigable for their transportation

tion on the case for damages to the plaintiff's saw-mill and other property, occasioned by the defendant in constructing a dam and dike below such mill, and thereby causing the water to flow back upon the mill, and rendering it incapable of being used. The plaintiffs were held entitled to recover the value of the use of their mill during the time they were necessarily deprived of its use, and the amount which it was permanently diminished in value by the erection of the dam; but could not. They cannot recover the amount of a loss upon saw logs on hand at the time of the injury, sustained either in consequence of a deterioration in their value or by a depression in the market price. The damages in respect to the logs were too speculative, uncertain, remote and contingent to be allowed even upon proof that the plaintiffs could not, by the use of ordinary diligence, have procured the logs to be sawed elsewhere, and could not have disposed of them before sawing. In actions of tort, where there has been no wilful injury, the plaintiff can only recover the damages necessarily resulting from the act complained of, and he cannot conduct himself in such a manner as to make them unnecessarily burdensome.

A more reasonable rule and one in better accord with the principle of holding a wrong-doer liable for such consequences as would naturally and in the usual course of things result from his conduct was laid down in *McTavish v. Carroll*, 17

Md. 1, an action for damages for obstructing a right of way for repairing a mill-race. The declaration alleged that the obstruction prevented the repair of the race, whereby the mill became idle and could not be worked, and the plaintiff lost the custom and trade thereof, "and the use of the same for grinding his own grain, and was, therefore, at great expense, obliged to carry it to other mills." Held, that under this declaration, evidence that the plaintiff was owner of a large body of land around his mill, and was accustomed to grind the grain raised thereon at this mill for his cattle, horses, hands and family, and in consequence of its stoppage had been compelled to carry his grain to another mill, at a greater distance, is admissible. *Hinckley v. Beckwith*, 13 *Wis.* 81.

But in such a case there can be no recovery for diminished profits arising from the manufacture of flour. *Todd v. Minneapolis, etc. Ry. Co.*, 39 *Minn.* 186.

A more satisfactory rule is sustained by *Terre Haute v. Hudnut*, 112 *Ind.* 542, where the operations of a mill which had an established business were suspended by an overflow, and machinery in it was damaged to such an extent as to make repairs necessary. The net earnings of the past and present were proven as a basis of estimating the damage.

¹ *Owners of the Gracie v. Owners of the Argentino*, 14 *App. Cas.* 519; affirming *The Argentino*, 18 *Prob. Div.* 191.

so as to prevent the entry of logs owned by another, and in a stream which empties into the one so blocked, the person who is responsible therefor is liable to the other for the wages and board of the latter's men while waiting a reasonable time to get his logs out, for the expense of moving one crew of men out and another in, for the increased cost of driving the logs the next season, and for interest on the contract price for making the drive during such time as the payment thereof was delayed; but not for the loss of supplies left in the woods.¹

§ 55. Only the items which are certain recoverable. [97]

The charterer of a vessel who was subjected to expense in getting her off from a gas pipe which was an unlawful obstruction to the navigation of a river, and upon which she caught in passing, while navigating with due care, may maintain an action against those who laid the pipe to recover for such expense, but not for any delay in his business or other consequential damages.² Where the defendant was enjoined from removing his negroes, and upon an order of seizure they were taken out of his possession, and a decree subsequently rendered in his favor, it was held his damages would, ordinarily, be what their labor would have been worth had they continued in his possession. But he would also be entitled to [98] damages for any loss that was the direct, proximate and natural consequence of the removal of the negroes out of his possession, which were not remote and speculative, involving inquiries collateral to the consideration of the wrongful act. And so he could not recover as damages counsel fees incurred in defending the suit nor expenses involved in employing an agent to attend to his other business whilst he was engaged in such defense; nor what would or might have been the profits of his business had not his possession of the negroes in suit been interrupted.³ The plaintiff's oxen were stolen in Vermont and taken to the defendant, and being found in his possession in New York were demanded and refused. The plaintiff then resorted to legal process to gain possession, and succeeded, but incurred expense therein. He was held not entitled to re-

¹ *McPheters v. Moose River L. D. Co.*, 78 Me. 329.

² *McDaniel v. Crabtree*, 21 Ark. 431.

³ *Benson v. Walden, etc. Gas L. Co.*, 6 Allen, 149.

cover such expense as part of his damages for the conversion, in a subsequent action.¹ These expenses were not rejected because a remote or uncertain incident of the wrong but because they were costs of a judicial proceeding in which such allowable expenses are collectible, and if not thus compensated cannot be recovered. The expense of regaining property tortiously taken is a part of the injury and recoverable.² Where goods wrongfully seized are taken from the wrong-doer by another, their owner may, in an action against the former, recover the amount paid the other wrong-doer to get them back.³ In an action upon an attachment bond the rule restricting the recovery to the natural and proximate damages will exclude any claim for injuries to credit and business.⁴ But where a party took a lease of a ferry, and covenanted to maintain and keep the same in good order, but instead of doing so diverted travelers from the usual landing to another landing owned by himself, by means whereof a tavern-stand belonging to the plaintiff situate on the first landing was so reduced in business as to become tenantless, it was held in an action by the [99] landlord for breach of the contract that he might assign, and was entitled to recover as damages the loss of rent on the tavern-stand.⁵ Where a negro was hired to make a crop and was taken away by the owner in the middle of the year, whereby the crop was entirely lost, it was held that the proper measure of damages was the hire of the negro paid in advance, the rent of the land and the expenses incurred for the purpose of making the crop.⁶

§ 56. Recovery for successive consequences. Where the injury to be recovered for consists of several items variously related consequentially to the alleged cause, the right to each must be decided upon the same principles as where only one inseparable injurious effect is in question. It may happen that such items are successive, and the first may in some sort operate as cause in respect to later effects. When this is the

¹ Harris v. Eldred, 42 Vt. 89.

² Bennett v. Lockwood, 20 Wend. 228.

³ Keene v. Dilke, 4 Exch. 888.

⁴ State v. Thomas, 19 Mo. 618;
Weeks v. Prescott, 53 Vt. 57, 74;

Braunsdorf v. Fellner, 76 Wis. 1; Anderson v. Sloane, 72 id. 566; Pollock v. Gantt, 69 Ala. 373. See vol. 8, ch. 25.

⁵ Dewint v. Wiltse, 9 Wend. 825.

⁶ Hobbs v. Davis, 30 Ga. 423.

case a recovery for items subsequent to the first will depend on whether the act complained of is the efficient cause of the entire damage as represented by all such items, and whether they are consequences which ought reasonably to have been contemplated to ensue, or in case of contract whether they may fairly be supposed to have been within the contemplation of the parties at the time of contracting. This is well illustrated by an English case. The defendant contracted to deliver a threshing machine to the plaintiff, a farmer, within three weeks. It was the latter's practice, known to the defendant, to thresh his wheat in the field and send it thence direct to market. At the end of three weeks plaintiff's wheat was ready in the field for threshing; and on his remonstrating at the delay in the delivery of the machine the defendant several times assured him it should be sent forthwith. The plaintiff having unsuccessfully tried to hire another machine was obliged to carry home and stack the wheat; which, while so stacked, was damaged by rain. The machine was afterwards delivered to the plaintiff, who paid the defendant the contract price. The wheat was then threshed; and it was found necessary, owing to its deterioration by the rain, to kiln-dry it. When dried and sent to market it sold for a less price than it would have fetched had it been threshed at the time fixed by the contract for the delivery of the machine, and then sold, the market price of wheat having meanwhile fallen. It [100] was held in an action for the non-delivery of the machine that the plaintiff was entitled to recover for the expense of stacking the wheat, the loss from the deterioration by the rain and the expense of kiln-drying it, but not the loss by the fall in the market, the latter being too uncertain to have been contemplated, and not the natural result of the breach.¹ There is much reason for holding that the latter loss was also recoverable.² The case referred to is much more satisfactory than a number of American cases which hold that a farmer cannot recover damages resulting to his crops from delayed delivery

¹ Smeed v. Foord, 1 E. & E. 602.

Co., 14 Mich. 489; Collard v. South-

² Ward v. New York C. R. Co., 47 eastern Ry Co., 7 H. & N. 79; Weston N. Y. 29; Sturgess v. Bissell, 46 N. Y. v. Grand Trunk Ry. Co., 54 Me. 376; 462; Scott v. Boston, etc. Co., 106 Peet v. Chicago, etc. R. Co., 20 Wis. Mass. 468; Sisson v. Cleveland, etc. R. 594.

or the failure to work as warranted of a harvesting machine which was sold with the knowledge that it was to be used in securing the purchaser's grain.¹

§ 57. **Illustrations of the rule of the preceding section.** In an action for negligent driving whereby the plaintiff's horse was injured it appeared that the horse was sent to a farrier for six weeks for the purpose of being cured, and at the end of that time it was ascertained that it was damaged to the extent of 20%. It was held that the plaintiff was entitled to recover for the keep of the horse at the farrier's, the amount of the farrier's charges, and the difference in its value at the time of the accident and at the end of the six weeks, but not for the hire of another horse during that period.² Had a claim been made for the loss of the use of the injured horse during his treatment at the farrier's it would have been a proper item of damages.³ A tradesman took a ticket to go from L. to H. On arriving at an intermediate station he found no train ready to take him to H. the same night, as there should have been according to the published time-bill. He slept at that place and in the morning paid 1s. 4d. fare to H. In consequence of the delay he failed to keep appointments with his customers, and was detained for many days. The latter was not deemed within the contemplation of the parties. The court told the jury that the plaintiff would have been entitled to charge the [101] company with the expense of getting to H., but he had no right to cast upon the company the remote consequences of remaining the night at the intermediate place. He was entitled to the fare thence to H., and perhaps the 2s. for his bed and refreshments. A motion for a new trial on the ground of misdirection was refused. Pollock, C. B., said: "In actions for breach of contract the damages must be such as are capable of being appreciated or estimated. Mr. Wilde was invited

¹ Fuller v. Curtis, 100 Ind. 287; Prosser v. Jones, 41 Iowa, 674; Wilson v. Reedy, 82 Minn. 256; Osborne v. Poket, 83 id. 10; Brayton v. Chase, 8 Wis. 456, probably overruled by cases referred to in Thomas, etc. Manuf. Co. v. Wabash, etc. Ry. Co., 62 id. 642, 650.

² Hughes v. Quentin, 8 C. & P. 708; Clare v. Maynard, 7 C. & P. 741.

³ Albert v. Bleecker St. etc. R. Co., 2 Daly, 393; Bennett v. Lockwood, 20 Wend. 223; Walrath v. Redfield, 11 Barb. 368; Gillett v. Western R. Co., 8 Allen, 560; The Glaucus, 1 Lowell, 366; Sweeney v. Port Burwell Harbor Co., 17 Up. Can. C. P. 574.

at the trial to state what were the damages to which the plaintiff was entitled. He said general damages. The plaintiff is entitled to nominal damages at all events, and such other damages of a pecuniary kind as he may have really sustained as a direct consequence of the breach of the contract. Each case of this description must be decided with reference to the circumstances peculiar to it; but it may be laid down as a rule that, generally, in actions upon contracts no damages can be given which cannot be stated specifically, and that the plaintiff is entitled to recover whatever damages naturally result from the breach of contract, but not damages for the disappointment of mind occasioned by the breach of contract.¹ A subsequent English case was decided by the queen's bench in 1875 on this state of facts: The plaintiff, wife and two children of five and seven years old respectively, took tickets on the defendant's railway from W. to H. by the midnight train. They got into the train but it did not go to H., but along another branch to E. where the party were compelled to get out. It being late at night the plaintiff was unable to get a conveyance or accommodation at an inn; and the party walked to his house, a distance of between four and five miles, where they arrived at about three o'clock in the morning. It was a drizzling night and the wife caught cold and was laid up for some time, and unable to assist her husband in his business as before, and expenses were incurred for medical attendance.² Three items of loss and injury came under consideration: first, the inconvenience, as it was called, of having to walk home; second, the expense of the wife's sickness; and third, the loss of her services. The last two items being coincident in time [102] and relation to the defendant's breach of contract were considered together. Only the first was allowed. It was remarked that the plaintiffs did their best to diminish the inconvenience to themselves, and they had no alternative but to walk; that it was not to be doubted that the inconvenience was the immediate and necessary consequence of the breach of the defendant's contract to convey them to H. Cockburn, C. J., said: "I am at a loss to see why that inconvenience should

¹ *Hamlin v. Great Northern Ry.* ² *Hobbs v. London, etc. Ry. Co., L. Co.*, 1 H. & N. 408. See *Denton v. R.* 10 Q. B. 111.
ibide, 5 El. & Bl. 860.

not be compensated by damages in such an action as this. . . . If the jury are satisfied that in the particular instance personal inconvenience or suffering has been occasioned, and that it has been occasioned as the immediate effect of the breach of contract, I can see no reasonable principle why it should not be compensated for." And again: "So far as the inconvenience of the walk is concerned, that must be taken to be reasonably within the contemplation of the parties; because if a carrier engages to put a person down at a given place and does not put him down there but puts him down somewhere else, it must be in the contemplation of everybody that the passenger put down at the wrong place must get to the place of his destination somehow or other. If there are means of conveyance for getting there he may take those means and make the company responsible for the expense; but if there are no means I take it to be law that the carrier must compensate him for the personal inconvenience which the absence of those means has necessitated. That flows out of the breach of contract so immediately that the damage must be admitted to be a fair subject-matter of damages. But in this case the wife's cold and its consequences cannot stand upon the same footing as the personal inconvenience arising from the additional distance which the plaintiffs had to go. It is an effect of the breach of contract in a certain sense, but removed one stage; it is not the primary but the secondary consequence of it." The objection to what is termed the "secondary consequence" is that it is not a consequence so certain to occur as to be among those to be anticipated from such a breach, it happening from other than the usual state of the weather; but it was not any more a secondary consequence than is the burning of a second building by a continuous fire, or the injury to the grain by [103] rain in *Smeed v. Foord*. It is said in the same opinion already quoted from that "the nearest approach to anything like a fixed rule is this: That to entitle a person to damages by reason of a breach of contract, the injury for which compensation is asked should be one that may fairly be taken to have been contemplated by the parties as the possible result of the breach of contract. Therefore you must have something immediately flowing out of the breach of contract complained of, something immediately connected with it, and not

merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of. To illustrate that I cannot take a better case than the one now before us: Suppose that a passenger is put out at a wrong station on a wet night and obliged to walk a considerable distance in the rain, catching a violent cold which ends in a fever, and the passenger is laid up for a couple of months, and loses through this illness the offer of an employment which would have brought him a handsome salary. No one I think who understood the law would say that the loss so occasioned is so connected with the breach of contract as that the carrier breaking the contract could be held liable." True, there the sickness would be the cause of an accidental loss, but in the case under discussion the question was not of such a loss. On the contrary it was the expense and loss of time incident to the sickness itself. Was not that "a result of the breach" which was natural and proximate, and to be contemplated under the other circumstances of the breach for which the defendant was held responsible?'

¹ Blackburn, J.: "It is a contract by which the railway company had undertaken to carry four persons to Hampton Court, and in fact that contract was broken when they landed the passengers at Esher instead of Hampton Court. The contract was to supply a conveyance to Hampton Court, and it was not supplied. Where there is a contract to supply a thing and it is not supplied, the damages are the difference between that which ought to have been supplied and that which you have to pay for, if it be equally good; or, if the thing is not obtainable, the damages would be the difference between the thing which you ought to have had and the best substitute you can get upon the occasion for the purpose. . . . When he is not able to get a conveyance at all, but has to make the journey on foot, I do not see how you can have a better rule than that which the

learned judge gave to the jury here, namely, that the jury were to see what was the inconvenience to the plaintiffs in having to walk, as they could not get a carriage." As to damage being recoverable for the illness of the wife, he said: "I think they are not, because they are too remote. On the principle of what is too remote, it is clear enough that a person is to recover in the case of a breach of contract the damages directly proceeding from that breach of contract and not too remotely. Although Lord Bacon had, long ago, referred to this question of remoteness, it has been left in very great vagueness as to what constitutes the limitation, and therefore I agree with what my lord has said to-day, that you make it a little more definite by saying such damages are recoverable as a man, when making a contract, would contemplate would flow from a breach

[104] § 58. **Same subject.** In an action under the code it appeared that the defendant delivered tickets to the plaintiff about the 1st of March, 1852, for transportation from New York to San Francisco; one entitled him to a passage to Graytown, at the mouth of Nicaragua river, in a specified ship which was to sail on the 5th of that month; another entitled him to a passage up that river and through the lake of that name to San Juan del Sur, on the Pacific ocean; and the other from the latter place to his destination, on a steamer named, which was advertised to leave about fifteen days after the plaintiff would arrive at the starting port according to the usual course of conveyances. The plaintiff was carried on his [105] first ticket, and arrived at Graytown March 15th, where he was detained eleven days. He then started for San Juan del Sur. He arrived at a place on the way on the 31st of March when he was taken sick. There he received news that the steamer on which he was entitled to take passage under his third ticket was lost on the 27th of the previous month, but the fact was not known to the defendant at the time of selling the tickets nor until about the 20th of April. The plaintiff arrived at San Juan del Sur on the 4th of April and remained there until the 9th of May, endeavoring, but unsuc-

of it. For my own part, I do not feel that I can go further than that. It is a vague rule, and as Bramwell, B., said, it is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night or day; but on the question now before the court, though you cannot draw the precise line, you can say on which side the line the case is." Mellor, J.: "I quite agree . . . that for the mere inconvenience, such as annoyance and loss of temper or vexation, or for being disappointed in a particular thing which you have set your mind upon, without real physical inconvenience resulting, you cannot have damages. That is surely sentimental, and not a case where the word inconvenience, as I here use it, would apply. But I

must say, if it is a fact that you arrived at a place where you did not intend to go to, where you are placed by reason of the breach of contract of the carriers at a considerable distance from your destination, the case may be otherwise. It is admitted that if there be a carriage you may hire it and ride home, and charge the expense to the defendant. The reason why you may hire a carriage and charge the expense to the company is with a view simply of mitigating the inconvenience to which you would otherwise be subject; so that where the inconvenience is real and substantial, arising from being obliged to walk home, I cannot see why that should not be capable of being assessed as damages in respect of inconvenience."

cessfully, to procure a passage to San Francisco. He then returned to New York. He remained sick until long after he returned home, with a fever peculiar to the climate of Nicaragua. It was held that the time he lost by reason of his detention on the isthmus; his expenses there, and of his return to New York; the time he lost by reason of his sickness after he returned home and the expenses of such sickness, so far as the same were occasioned by the defendant's negligence and breach of duty, as well as the amount originally paid for his passage, were legitimate and lawful damages which the plaintiff was entitled to recover.¹

The damages which are recoverable for breach of contract are limited to the direct and immediate consequences; but the right to indemnity is not satisfied by compensation for the first item of loss if there are others so identified with it that the injury as a whole naturally comprehends all and they together constitute the immediate consequence. A party whose breach of contract leaves the other party in such a situation that sickness is its natural, immediate and probable consequence causes by the same act the direct pecuniary losses which are its usual and natural concomitants, as loss of time and the expense of medical and other attendance. If by reason of the sickness some extraordinary or unusual loss occurs for want of ability on his part to attend to his affairs it is a loss which cannot be considered as having entered into the contemplation of the parties; and the same must be the [106] conclusion, if the sickness were not the natural and probable consequence of the act complained of, but the result of some other or secondary cause. Where sickness is the direct or proximate consequence of a wrongful act, the pain and suffering are also elements of the injury for which compensation may be recovered.²

¹ *Williams v. Vanderbilt*, 28 N. Y. 580; *Meagher v. Driscoll*, 99 Mass. 217; *Heirn v. McCaughan*, 32 Miss. 281; *Pennsylvania R. Co. v. Books*, 17; *Porter v. Steamboat N. E.*, 17 57 Pa. St. 339; *Ward v. Vanderbilt*, 4 Mo. 290; *Yonge v. Pacific M. etc. Abb. App. Dec.* 521; *Indianapolis, Co.*, 1 Cal. 353; *Pearson v. Duane*, 4 etc. R. Co. v. Birney, 71 Ill. 391; *Klein Wall* 605; *The Zenobia*, 1 Abb. Adm. v. Jewett, 26 N. J. Eq. 474; *Ransom* 80; *The Canadian*, 1 Brown Adm. v. New York, etc. R. Co., 15 N. Y. 11. 415; *Ohio, etc. R. Co. v. Dickerson*,

² *Fillebrown v. Hoar*, 124 Mass. 59 Ind. 317; *Whalen v. St. Louis, etc.*

The earlier cases, especially in jurisdictions in which exemplary damages are recoverable, generally held that the person whose breach of contract, fraud or other wrongful act causes another to be sued, under such circumstances that the suit is an injurious consequence for which he is liable, is bound to respond in damages for the expenses which are the necessary and legal incidents of the suit.¹ If one's property is taken, injured or put in jeopardy by another's neglect of duty imposed by contract, or by his wrongful act, any necessary expense incurred for its recovery, repair or protection is an element of the injury. It is often the legal duty of the injured party to incur such expense to prevent or limit the damages; and if it is judicious and made in good faith, it is recoverable though abortive.²

§ 59. Required certainty of anticipated profits. In another class of cases the question of the *certainty of damages* is more distinctively involved. They are cases in which the act complained of is plainly actionable and easy of proof, and the actual injury occasioned thereby consists in destroying or impairing arrangements from which it is alleged that pecuniary advantages would have resulted. Such effects may be produced by the refusal of a party to fulfill his contract, or by tortious acts by which some business scheme is frustrated. The pecuniary advantages which would have been realized but for the defendant's act must be ascertained without the aid which their actual existence would afford. The plaintiff's right to recover for such a loss depends on his proving with sufficient certainty that such advantages would have resulted, and, therefore, that the act complained of prevented them.³

Ry. Co., 60 Mo. 823; Pittsburg, etc. R. Co. v. Andrews, 89 Md. 829; Johnson v. Wells, etc. Co., 6 Nev. 224.

¹ Philpot v. Taylor, 75 Ill. 809; Dixon v. Fawcus, 3 El. & El. 587; Collen v. Wright, 7 E. & B. 301; Randall v. Trimen, 18 C. B. 786; Anderson v. Sloane, 72 Wis. 566. *Contra*, Marvin v. Prentice, 94 N. Y. 295; Burton v. Henry, 90 Ala. 281; Winkler v. Roeder, 28 Neb. 155.

² Watson v. Lisbon Bridge, 14 Me. 201; Hughes v. Quentin, 8 C. & P.

703; Gillet v. Western R. Co., 8 Allen, 560; Emery v. Lowell, 109 Mass. 197; Hoffman v. Union Ferry Co., 68 N. Y. 385; Jutte v. Hughes, 67 N. Y. 268; Loker v. Damon, 17 Pick. 284; Hamlin v. Great Northern Ry. Co., 1 H. & N. 408; Mailler v. Express P. L., 61 N. Y. 312; Smeed v. Foord, 1 E. & E. 602; Clark v. Russell, 110 Mass. 133; James v. Hodsden, 47 Vt. 127.

³ In actions to recover for personal injuries which disqualify the person injured from giving attention to the

If a vendor fails to deliver property pursuant to his contract, the vendee, having paid for it, is deprived of such benefit as such sale completed would have conferred, which is a loss equal to the value of the property at the time it should have been delivered, with interest from that time. This value can generally be proved with certainty. If the property has not been paid for the compensation is still adjusted with reference to the value and is the difference between the contract price and the value. Thus, the vendee is entitled to recover according to the advantage he would have derived from performance of the contract, namely, the profit he could have made by the bargain. He is entitled to such sum as would enable him to obtain the property if it is obtainable.¹ On the other hand, where a vendee breaks his contract, the property is left on the vendor's hands; his loss is equal to the difference be- [108] tween the contract price and any less sum the property is worth when the vendee was bound to take and pay for it. The loss he suffers is the profit he would have made by the completion of the sale.²

business in which he is engaged, it is error to receive testimony of the average profits made therein as a basis for estimating damages. *Bierbach v. Goodyear Rubber Co.*, 54 Wis. 208; *Masterton v. Mount Vernon*, 58 N. Y. 391; *Blair v. Milwaukee, etc. R. Co.*, 20 Wis. 262. This rule is disapproved of in *Terre Haute v. Hudson*, 112 Ind. 542, 552, and the New York case cited pronounced not in harmony with later cases in that state. See *Wakeman v. Wheeler & W. Co.*, 101 N. Y. 205; ch. 36, vol. 3.

¹In *Haskell v. Hunter*, 23 Mich. 305, an action was brought for damages for breach of a contract to sell and deliver lumber, and it appeared that a portion of the lumber had been delivered to the plaintiffs at a place other than that specified in the contract, and subject to a heavy bill of freight in consequence thereof. In the absence of any proof that the plaintiffs had accepted the same in satisfaction to that extent of the con-

tract, or had waived their right to compensation to that extent for the breach thereof, it was not proper to deduct the amount so delivered from the whole amount to be delivered. An instruction to the jury that the proper measure of damages is the difference between the contract price of the lumber not delivered and the wholesale price at the place of delivery was held to be erroneous. The true measure is the difference between the contract price and what it would have cost the plaintiffs to procure, at the place of delivery, and at the time or times when it was reasonable and proper for them to supply themselves with lumber of the kind and quality they were to receive on the contract; and if it were impracticable to supply themselves, except at retail rates, they were entitled to demand those rates of the defendants.

²*Gordon v. Norris*, 49 N. H. 376; *Haines v. Tucker*, 50 N. H. 307; Col-

§ 60. **Same subject.** In many cases the sum which shall represent the value to a vendee who has been disappointed in the receipt of property bargained for cannot be ascertained from proof of a market value, either because the article is not obtainable in market or because it is contracted for and must be obtained from the vendor to answer a particular purpose, and not for resale. Then, in applying the general rule that the damages for breach of contract are to be measured by the benefits which would have been received if the contract had been performed, resort must be had to the known or customary use of the property and such practical elements of value as the case presents. If the sale is made with a warranty, express or implied, that the article is of a particular description or suitable for a designated use, on a breach by the vendor the damages are properly computed according to the actual loss in respect to that object. The ascertainment of the damages may involve an inquiry into the advantages derivable from the delivery of articles of the required description or suitable for the contemplated use, and of losses occasioned by the breach with reference to the particular purpose of the contract as known to the parties. In such cases the same degree of certainty is not always attainable and there is much conflict of authority as to the proper scope of inquiry. The same considerations apply to the question of the proper mode of arriving at the amount of damage whatever be the nature of the contract. The injured party is entitled to gains prevented and losses sustained if he can prove them with sufficient certainty.¹ In *Fletcher v. Tayleur*² the action was brought against a ship-builder to recover damages for non-delivery of an iron

lins v. Delaporte, 115 Mass. 159; *Ullmann v. Kent*, 60 Ill. 271; *Sanborn v. Benedict*, 78 Ill. 310; *Camp v. Hamlin*, 55 Ga. 259; *McCracken v. Webb*, 36 Iowa, 551; *Dustan v. McAndrew*, 44 N. Y. 72; *Hayden v. Demets*, 53 N. Y. 426.

¹ In an action brought to recover the price of nine and one-half tons of fertilizer the defendant set up that plaintiff agreed to sell and deliver to him twenty tons of fertilizer at a

stipulated price, with notice that it was intended for use on defendant's cotton crop. Defendant was unable to buy the remaining quantity elsewhere, and plaintiff refused to deliver it. The land upon which the fertilizer was designed to be used was cultivated in a farmer-like manner. Upon a portion the fertilizer delivered was used. This portion produced between three hundred and four hundred pounds of seed cotton per

² 17 C. B. 21.

ship at the time appointed in the contract. The ship was intended by the plaintiffs and from the nature of her fittings the defendant must have known she was intended for a passenger ship in the Australian trade. The witnesses called on the part of the plaintiff stated that the vessel would, in all probability, have obtained, if completed by the time mentioned in the contract, at the then current rates, an outward freight of about 7,000£., and a gross freight home of about 9,500£., and that, allowing for the necessary outlay and expenses, the profits would in all probability have been a sum somewhat exceeding 7,000£. The amount of freight received by the plaintiffs when the ship sailed was 4,280£. The court submitted the case to

acre more than that adjoining, which was also planted in cotton—the quality and cultivation of each part being precisely the same. The court say: “The true rule seems to be that [the loss of] profits which have been sustained as the natural consequence of the breach or the wrongful act complained of are recoverable unless they are objectionable either on the ground of remoteness or of uncertainty. Those profits are usually considered too remote, among many others, which are not the immediate fruits of the principal contract, but are dependent upon collateral engagements and enterprises not brought to the notice of the contracting parties, and not therefore brought within their contemplation or that of the law. Those are considered uncertain which are purely speculative in their nature, and depend upon so many incalculable contingencies as to make it impracticable to determine them definitely by any trustworthy mode of computation. We would not be willing to say that the damages here claimed by the defendant by way of lost profits would have been recoverable if their ascertainment had been left to mere conjecture. The amount of

cotton or other crops which land produces is dependent upon so many varying contingencies as to render it very indeterminate. It will vary with the seasons, the adaptation of soil and climate, and its comparative exemption from the ravages of worms or other destructive insects. Speculative opinions of witnesses as to the probable influences of these operative causes would be a poor criterion for the measure of values. In this case, however, these difficulties are entirely removed. The character of the season is absolutely known. So is the precise effect of the fertilizer used during this particular season. No speculation is needed as to how much rain and how much sunshine were requisite to produce a given amount of crops to the acre, nor as to the probable effect of the fertilizer upon the different kinds of soil, or even the proportion of it best suited to the land, and, therefore, what would necessarily have been produced on the remainder, which is shown to have been in precisely the same state of cultivation, and similar in quality of soil.” *Bell v. Reynolds*, 78 Ala. 511. See *Goodsell v. Western U. Tel. Co.*, 53 N. Y. Super. Ct. 46; S. C., 58 id. 26.

[111] possible profits of a whaling or other voyage cannot be taken into consideration in estimating the damage against a master for running away with the vessel and abandoning the voyage.¹ Nor can a party recover damages for a contemplated advance in the price of real estate from the erection and operation of a brick factory on adjoining land, in an action for the breach of the agreement to erect and operate it.² But if lands are exchanged with an agreement as part of the consideration by one of the parties that he will make valuable improvements upon the tract conveyed by him, the damages resulting from his breach of contract are not too uncertain if the complaint alleges the difference between the value of the tracts at the time the exchange was made.³ In a late Wisconsin case there was a breach of contract to purchase and work a stone quarry, of which the plaintiff was to have one-half of the net profits so long as it could be profitably worked. The defendant refused to perform before any profits were realized. It was proven that the quarry had been worked at a profit for three years preceding the trial, and an estimate was made of profits based in part on earnings for another year. The court considered the loss of profits sufficiently established, and held that the time during which a recovery might be had therefor was for the jury.⁴

§ 61. **Warranty of seeds.** In a case where the defendant sold cabbage seed and warranted it to produce Bristol cabbages, which warranty was untrue, it was held that the damages recoverable were the value of a crop of Bristol cabbages such as would ordinarily have been produced that year, deducting the expense of raising it and also the value of the crop actually raised.⁵ What would have been produced from

¹ *Brown v. Smith*, 12 Cush. 366; *Schooner Lively*, 1 Gall. 314; *Boyd v. Brown*, 17 Pick. 453; *The Anna Maria*, 2 Wheat. 327; *Del Col v. Arnold*, 8 Dall. 333.

² *Dullea v. Taylor*, 35 Up. Can. Q. B. 395; *Rockford, etc. R. Co. v. Beckemeier*, 72 Ill. 267; *Watterson v. Alleghany V. R. Co.*, 74 Pa. St. 208.

³ *Wilson v. Yocum*, 77 Iowa, 569.

⁴ *Treat v. Hiles*, 81 Wis. 280.

⁵ *Passinger v. Thorburn*, 34 N. Y. 634; *Wolcott v. Mount*, 36 N. J. L. 262; *Van Wyck v. Allen*, 69 N. Y. 61; *White v. Miller*, 71 N. Y. 133; *Fenis v. Comstock*, 83 Conn. 513; *Page v. Pavey*, 8 C. & P. 769; *Randall v. Raper*, 96 Eng. C. L. 82; *Flick v. Weatherbee*, 20 Wis. 392; *Wagstaff v. Short Horn Dairy Co.*, 1 Cal. & E. 324.

other seed and of the kind warranted of course could not be proved directly, and it was not attempted; but the regularity of production under usual conditions is such that a judicial conclusion may be based upon it as sufficiently certain. Mere speculative profits, such as might be conjectured would be the probable result of an adventure defeated by the breach of contract, the gains from which are entirely conjectural and with respect to which no means exist of ascertaining even approximately the probable results, cannot under any circumstances be brought within the range of damages recoverable. In Georgia the rule is that for the breach of an implied warranty of the merchantable quality of seed for planting the damages are limited to the purchase-money with interest thereon and expenses incurred in planting and preparing for the planting of the seed.¹ In Tennessee only the difference in value between the seed purchased and that delivered can be recovered.² The cardinal rule in relation to the damages to be compensated on the breach of a contract is that the plaintiff must establish the *quantum* of his loss by evidence from which the jury will be able to estimate the extent of his injury; this will exclude all such elements of damage as are incapable of being ascertained by the usual rules of evidence to a reasonable degree of certainty.³ Instances of such uncertain [112] damages are profits expected from a whaling voyage and the gains which depend in a great measure upon chance; they are too purely conjectural to be capable of entering into compensation for non-performance of a contract.⁴ For a similar reason the loss of the value of a crop for which seed had been sown, the yield of which would depend upon the contingencies of weather and season, would be excluded as incapable of estimation with the degree of certainty which the law exacts in the proof of damages.⁵ The loss of profits following the

¹ Butler v. Moore, 68 Ga. 780.

² Hurley v. Buchi, 10 Lea, 846.

³ Wolcott v. Mount, 36 N. J. L. 271; Brigham v. Carlisle, 78 Ala. 243, quoting the text; Hair v. Barnes, 26 Ill. App. 580.

⁴ Wolcott v. Mount, 36 N. J. L. 271.

⁵ Injuries done to growing crops must be estimated with reference to

their condition at the time they are inflicted. Their value cannot be proven by showing the worth of similar crops which matured. Drake v. Chicago, etc. R. Co., 63 Iowa, 302; Sabine, etc. Ry. Co. v. Joachim, 58 Texas, 456; Texas, etc. R. Co. v. Young, 60 id. 201; G., C. & S. F. Ry. v. Holliday, 65 id. 512; Jones v. George, 61

breach of a contract to publish an advertisement are incapable of being estimated.¹ The damages resulting from the breach of a warranty of the breeding qualities of an animal are too contingent and uncertain to support a recovery when compensation for the services he renders is to be paid only when the animals served actually foal.² The same is true of the reduction of the number of members in a given class in a mutual benefit society, the effect being that the amount realized by the beneficiary under a certificate is thereby lessened. What the result would have been if the change which brought about such reduction had not been made is a mere matter of speculation.³ But if a vessel is under charter or engaged in a trade the earnings of which can be ascertained by reference to the usual schedule of freights in the market, or if a crop has been sown and the ground prepared for cultivation, and the complaint is that because of the inferior quality of the seed a crop of less value is produced, by these circumstances the means would be furnished to enable the jury to make a proper estimate of the injury resulting from the loss of profits of this character.⁴

§ 62. Prospective growth of orchard. An instructive case arose in Ohio involving this question of uncertainty.⁵ The action was on a contract by which the defendant agreed to make a lease to the plaintiff for the term of ten years of certain lands on which to plant and cultivate a peach orchard. The breach consisted in the failure to make a lease and in defendant causing the plaintiff, within two years from his taking possession, and after the peach trees were planted, to be evicted from the premises. On the trial the plaintiff was permitted

id. 345; S. C., 56 id. 149; *Gresham v. Taylor*, 51 Ala. 505. *Contra*, *Payne v. Railroad, etc. Co.*, 38 La. Ann. 164, 168.

And on account of the uncertainty involved in the maturing of crops the damage sustained by injuries done thereto cannot be reduced by efforts to show what might have been realized if another crop had been planted on the land on which that injured was growing. *G., C. & S. F. Ry. v. Holliday*, *supra*.

¹ *Tribune Co. v. Bradshaw*, 20 Ill. App. 1.

² *Connoble v. Clark*, 38 Mo. App. 470.

³ *Supreme Lodge Knights of Pythias v. Knight*, 117 Ind. 489, 500.

⁴ *Wolcott v. Mount*, 36 N. J. L. 271; *Owners of the Gracie v. Owners of the Argentino*, 14 App. Cas. 519, affirming *The Argentino*, 13 Prob. Div. 191; *Bell v. Reynolds*, 78 Ala. 511, quoted from in note to preceding section.

⁵ *Rhodes v. Baird*, 16 Ohio St. 573.

to give evidence of the probable profits that might in the future be realized from the orchard, judging from the number of crops and the prices of peaches in the county for the last ten or fifteen years. This evidence was held by the appellate court to be incompetent, because too uncertain and speculative: "To the extent that the damages depended on the loss of the use of the property, its market value at the time of the eviction, subject to the performance of the contract on the part of the plaintiff, furnished the standard for assessing the damages. If it had no general market value its value should have been ascertained from the witnesses whose [113] skill and experience enabled them to testify directly to such value in view of the hazards and chances of the business to which the land was to be devoted.¹ This would only be applying the same principle for ascertaining the value of property which, by reason of its limited use, had no market value, which is adopted with reference to proving the present worth of the future use of property which, by reason of its being in greater demand, has a market value. In the case of property of the former description, the range for obtaining testimony as to the value is, of course, more circumscribed than it is in the case of property of the latter description. But in either case the proving of the value of the property by witnesses having competent knowledge of the subject is more certain and direct than to undertake to do so by submitting to the jury, as grounds on which to make up their verdict, the supposed future profits. The profits testified to . . . were remote and contingent, depending on the character of the future seasons and markets, and a variety of other causes of no certain and uniform operation."

§ 63. Profits of special contracts. The liability for the profits which would have resulted from the performance of a contract is co-extensive with the power to contract; and the government is liable therefor to the same extent as an individual.² The right of a party to recover the profits he would have made in fulfilling a contract depends solely upon the fault of the other party to it, and plaintiff's ability to show

¹ *Griffin v. Colver*, 16 N. Y. 489; ² *Danolds v. State*, 89 N. Y. 86.
Giles v. O'Toole, 4 Barb. 261; *New-*
brough v. Walker, 8 Gratt. 16.

that the profits claimed were reasonably certain to have been realized but for the wrongful act complained of. It is not an insuperable objection to their recovery that they cannot be directly and absolutely proved. The general uncertainty attending human life and the special contingencies as to its duration on account of the physical condition of an individual whose rights are involved do not prevent the recovery of damages for causing his death or injuring his person. An agreement by one person to support another during life is an entire continuing contract upon the total breach of which the obligor is liable for full and final damages estimated to the time the person who was to be supported would probably die.¹ It is the constant practice to so assess damages in actions to recover for personal injuries. In the nature of things where performance has been prevented the proof of profits cannot be direct and absolute. The injured party must, however, introduce evidence legally tending to establish damage and sufficient to warrant a jury in coming to the conclusion that the damages they find have been sustained; but no greater degree of certainty in this proof is required than of any other fact which is essential to be established in a civil action. If there is no more certain method of arriving at the amount the injured party is entitled to submit to the jury the particular facts which have transpired and to show the whole situation which is the foundation of the claim and expectation of profit, so far as any detail offered has a legal tendency to support such claim.²

¹ Schell v. Plumb, 55 N. Y. 592.

² Griffin v. Colver, 16 N. Y. 489; Giles v. O'Toole, 4 Barb. 201; Newbrough v. Walker, 8 Gratt. (Va.) 16; Taylor Manuf. Co. v. Hatcher Manuf. Co., 39 Fed. Rep. 440, 446 (quoting the text); Brewing Co. v. McCann, 118 Pa. St. 314; Dart v. Laimbeer, 107 N. Y. 664; Wakeman v. Wheeler & W. Manuf. Co., 101 N. Y. 205, 217 (quoting the text).

The difficulty of fairly estimating the injury done an unknown author by the breach of a contract to publish his first book is not necessarily

insuperable. Gale v. Leckie, 2 Stark. 107; Bean v. Carleton, 51 Hun, 318. Compare Bean v. Carleton, 12 N. Y. Sup. 519. Nor the net proceeds which might have been derived from the sale of tickets to hear a noted lecturer. Savery v. Ingersoll, 46 Hun, 176. This is a very doubtful proposition in the absence of proof of an advance sale of tickets. See Bernstein v. Meech, 130 N. Y. 354. Nor the damages resulting to a hotel from the violation of a contract to maintain a depot at a certain point. Houston, etc. Ry. v. Molloy,

§ 64. **Masterton v. Mayor.** In the leading case in [114] New York¹ which has been extensively cited and approved the plaintiffs agreed to furnish and deliver marble wrought in a particular manner, from a designated quarry, for a public

64 Texas, 607. But it is otherwise with the breach of a contract to publish an advertisement (*Tribune Co. v. Bradshaw*, 20 Ill. App. 1); and to furnish a mule for the cultivation of land: in such case the damage resulting to crops is too uncertain. *Harper v. Weeks*, 89 Ala. 577; *Luce v. Hoisington*, 56 Vt. 436.

There are some cases in Michigan which are not in harmony with the principle stated in the text nor with the current of modern authority. In *McKinnon v. McEwan*, 48 Mich. 106, there was a breach of a contract to furnish boilers at the time agreed upon. The purchaser alleged that the boilers were to be used in his steam mill and salt block for running and operating the same; that they were the only boilers he would have to furnish steam; that the capacity of his salt block was two hundred barrels per day; that without the boilers he could not manufacture any salt,—all of which facts were known to the vendor. The purchaser sought to recoup, as damages resulting from inability to prosecute his business, what he might have made from the use of the boilers. The court, by Marston, J., said: “In the present case the contract is silent as to the particular business which was to be carried on in the use of these boilers. That, it is said, was well known to both the contracting parties. But admitting all this, would not the profits to be made in the manufacture of salt be dependent upon many other things

besides the performance of this contract—a necessary supply of fuel, which the defendant claims to have had, of brine, of machinery for pumping the same, of proper vats, of grainers, pipes and other things necessary to carry on successfully and profitably the manufacture of that commodity, the certainty or probability even, even if all these things did exist and were in proper order, of their remaining in like condition? But supposing the party had completed the boilers and had put them in place, but had failed to make all the necessary connections; no use could be made of the boilers in such a condition; would the damages be the same? In other words, ‘where the chattel was itself only part of something else, which was rendered useless for want of it, should the profit of the entire chattel be recovered? If a vessel were delayed in port for want of a bowsprit, should a loss of freight, to the amount perhaps of thousands of pounds, be obtained in damages?’ Very many questions similar to this might be put, and if the rule contended for by plaintiff in error were to prevail, in many cases the breach of a very simple contract, or failure in some part, might bring ruin upon the parties failing, where no such loss was contemplated. The adoption of such a rule would be extremely dangerous. If such consequences are to follow, it is much better that the parties, when contracting, expressly pro-

¹ *Masterton v. Mayor*, 7 Hill, 61. See *Jones v. Judd*, 4 N. Y. 411; *Danolds v. State*, 89 id. 26; *Taft v. Tiede*,

55 Iowa, 370; *Bernstein v. Meech*, 130 N. Y. 354.

building. The quantity necessary to fill their contract was eighty-eight thousand eight hundred and nineteen feet, for which they were to be paid a specified price. They afterwards contracted with the proprietors of that quarry for the marble.

vide for such enlarged responsibility. Where the damages claimed, as in this case, largely exceed the contract price of the materials and labor to be furnished and performed by the party in default, we may well question the justice of such a conclusion in the absence of a clear showing that such a result was anticipated by the parties."

In *Allis v. McLean*, 48 Mich. 428, the vendor sold machinery for use in connection with a saw-mill. When the contract was made he was notified that one condition of the purchase was that the machinery was to be received on a day certain, and notice was given that for every day's delay the purchaser would be damaged \$150. Cooley, J., speaking for the court, said: "The profits of running a saw-mill are proverbially uncertain, indefinite and contingent. They depend upon many circumstances, among which are capital, skill, supply of logs, supply and steadiness of labor; and one man may fail while another prospers, and the same man may fail at one time and prosper at another, though the prospective outlook seems equally favorable at both times. Estimates of profits seldom take all contingencies into the account, and are therefore seldom realized; and if damages for breach of contract were to be determined on estimates of probable profits, no man could know, in advance the extent of his responsibility. It is therefore very properly held, in cases like the present, that the party complaining of a breach of contract must point out elements of damage more certain and more di-

rectly traceable to the injury than prospective profits can be. *Fleming v. Beck*, 48 Pa. St. 309; *Pittsburg Coal Co. v. Foster*, 59 id. 365; *Strawn v. Coggsell*, 28 Ill. 457; *Frazer v. Smith*, 60 id. 145; *Howe Machine Co. v. Bryson*, 44 Iowa, 159. But this case is thought to be different because here the fair rental value of the mill is proved, and it is said that this was certainly lost. But we do not know that that was the case. If the mill had been in condition to rent at that time, there may have been no customer for it on terms the owner would have consented to grant; and if customers were abundant and satisfactory, it cannot be assumed that the whole rental value is lost when a mill stands idle. The wear and tear of machinery and buildings in use is something, and it is not improbable that the landlord would take this among other things into account in determining what should be the rent. But in this case it does not appear that rent was lost or could have been lost, for it is not shown that defendants desired to rent or would have consented to do so if a customer had offered." To the same effect are *Talcott v. Crippen*, 52 Mich. 633; *Petrie v. Lane*, 67 id. 454. See *First Nat. Bank v. Thurman*, 69 Iowa, 693.

It is conceded by the writer of the opinion in *McKinnon v. McEwan*, *supra*, that profits which would arise as the direct result of work done at the contract price may be recovered; and that they may be recovered in cases of torts. Both these propositions are established in Michigan. *Burrell v. New York, etc. Salt Co.*,

When the plaintiffs had delivered fourteen thousand seven hundred and seventy-nine feet and had on hand at the quarry three thousand three hundred and eight feet ready for delivery, the defendants suspended the performance of the con-

14 Mich. 89; *Allison v. Chandler*, 11 id. 558; *Mueller v. Bethesda Spring Co.*, 50 N. W. Rep. 319; *Oliver v. Perkins*, 52 N. W. Rep. 609. It is also admitted that there is another class of cases within which the case before the court came where the authorities differ as to the right of the injured party to recover such profits as were claimed. The inference from these statements is that the court did not intend to hold that profits are never recoverable. This is made more clear by the observations of Cooley, J., in *Allis v. McLean*, *supra*. But it is not clear from both cases that their result is not to establish the rule that profits are not recoverable for the breach of a contract, unless it is so stipulated therein or the article which is the subject of the contract is one which "at all times finds a ready sale at a current market price," or unless contracts are dependent one upon another, in which case, if the second contract is broken, "the loss of definite and fixed profits under the other is a necessary and immediate consequence." *Allis v. McLean*, *supra*.

In *McKinnon v. McEwan*, Marston, J., said that in *Hadley v. Baxendale* "the court held the loss of profits while the mill was kept idle could not be recovered, because it did not appear the carrier knew that the want of the shaft was the only thing which was keeping the mill idle. The court also intimated that a different rule might have prevailed had the facts been fully known to the carrier. Of course, no such question was before the court in that

case, and intimations given upon facts that may perhaps appear in some future case are not usually relied upon." The opinion lays stress on the fact that the contract was silent as to the business to be carried on with the boilers which were to be furnished, and the knowledge of the parties was not regarded as material. It is conceded by Cooley, J., in *Allis v. McLean*, that the machinery was purchased with a view to the profits which its use was expected to produce, and that "the contract" to furnish it "would not be entered into if the profits were not expected and counted upon." It necessarily results, according to the general rule established by the authorities, that where the vendor has knowledge of the use to which the article he sells is to be put, though the written contract is silent, that he contemplates the injury which the vendee will sustain from his failure to comply with his agreement. The test which Judge Marston lays down that "the profits to be recovered must not be conjectural or speculative in their nature or dependent upon the chances of business or other contingencies, and must have reference to the nature of the contract and breach complained of," is as to the second alternative too latitudinarian, and, strictly applied, it is not consistent with the recovery of profits in any case. Profits are the result of business; the desire for them is the cause of business. It is true that profits will not be recoverable as a measure nor as an element of damages if they are purely conjectural, nor if they are speculative in the sense of de-

tract without any fault of the plaintiffs. They sought to recover the profits of the contract and also the damages to which they were subjected for the consequent violation of their subcontract for the marble at the quarry. Nelson, C. J., said: "It is not to be denied that there are profits or gains derivable from a contract which are uniformly rejected as too contingent and speculative in their nature and too dependent upon the fluctuation of the markets and chances of business to enter into a safe or reasonable estimate of damages. Thus any supposed successful operation the party might have made if he had not been prevented from realizing the proceeds of the contract at the time stipulated is a consideration not to be taken into the estimate. Besides the uncertain and contingent issue of such an operation in itself considered it has no legal or necessary connection with the stipulations between the parties, and cannot, therefore, be presumed to have entered into their consideration at the time of contracting. It has accordingly been held that the loss of any speculation or enterprise in which a party may have embarked, relying on the proceeds to be derived from the fulfillment of an existing contract, constitutes no part of the damages to be recovered in case of breach. So, a good bargain made by a vendor, in anticipation of the price of the article sold; or an advantageous contract of resale made by a vendee confiding in the vendor's promise to deliver the article, are considerations excluded

pending on contingencies which are possible and not probable. The chances of business include many things, both sufficiently certain as a basis for the administration of justice and too uncertain therefor. The authorities cited in the discussion devoted to this subject, and especially the more recent ones, are opposed to the view taken by the Michigan court in both the cases considered. The uncertainty connected with the profits claimed was magnified. Damages resulting from the discontinuance or interruption of an established business are proved with sufficient certainty by showing what

the profits of the business have been. See *Oliver v. Perkins*, 52 N. W. Rep. 609. Of course, if there has been a change in the conditions it is taken into account. Cases in which damages are allowed for the breach of partnership agreements are an example. There are three recent and well considered cases in Wisconsin which are in harmony with the writer's view of the law, and which are not materially different in their facts from the Michigan cases considered. *Jones v. Foster*, 67 Wis. 296; *Cameron v. White*, 74 id. 425; *Treat v. Hiles*, 81 id. 280.

as too remote and contingent to affect the question of damages. . . . When the books and cases speak of the profits anticipated from a good bargain as matters too remote and uncertain to be taken into account in ascertaining the true measure of damages they usually have reference to de- [115] pendent and collateral engagements entered into on the faith and in expectation of the performance of the principal contract. The performance or non-performance of the latter may, and doubtless often does, exert a material influence upon the collateral enterprises of the party; and the same may be said as to his general affairs and business transactions. But the influence is altogether too remote and subtle to be reached by legal proof or judicial investigation. And besides, the consequences, when injurious, are as often, perhaps, attributable to the indiscretion and fault of the party himself as to the contract of the delinquent contractor. His condition, in respect to the measure of damages, ought not to be worse for having failed in his engagement to a person whose affairs are embarrassed than if it had been made with one in prosperous or affluent circumstances.¹ But profits or advantages which are the direct and immediate fruits of the contract entered into between the parties stand upon a different footing. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was made, and formed, perhaps, the only inducement to the arrangement. The parties may have entertained different opinions concerning the advantages of the bargain, each supposing and believing that he had the best of it; but this is mere matter of judgment, going to the formation of the contract, for which each has shown himself willing to take the responsibility, and must, therefore, abide the hazard." Applying these principles to the case the learned judge said: "The plaintiffs' claim is substantially one for not accepting goods bargained and sold; as much so as if the subject-matter of the contract had been bricks, rough stones or other article of commerce used in the process of building.

¹ Dom. B. 3, tit. 5, § 2, art. 4.

The only difficulty or embarrassment in applying the general rule grows out of the fact that the article in question does not appear to have any well-ascertained market value. But this cannot change the principle which must govern, but [116] only the mode of ascertaining the actual value, or rather the cost to the party producing it. Where the article has no market value an investigation into the constituent elements of the cost to the party who has to furnish it becomes necessary, and that compared with the contract price will afford the measure of damages. The jury will be able to settle this upon evidence of the outlays, trouble, risk, etc., which enter into and make up the cost of the article in the condition required by the contract at the place of delivery. . . . It has been argued that, inasmuch as the furnishing of the marble would have run through a period of five years — of which about one year and a half only had expired at the time of the suspension — the benefits which the party might have realized from the execution of the contract must necessarily be speculative and conjectural; the court and jury having no certain *data* upon which to make the estimate. If it were necessary to make the estimate upon any such basis the argument would be decisive of the present claim. But in my judgment no such necessity exists. When the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on the day of the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose and not at the time fixed for full performance. . . . It will be seen that we have laid altogether out of view the subcontract . . . and all others that may have been entered into by the plaintiffs as preparatory and subsidiary to the fulfillment of the principal one with the defendants. Indeed, I am unable to comprehend how these can be taken into the account, or become the subject-matter of consideration at all in settling the amount of damages to be recovered for a breach of the principal contract. The defendants had no control over or participation in the making of the subcontracts, and are certainly not to be compelled to assume them if improvidently entered into. On the other hand, if

they were made so as to secure great advantages to the plaintiffs, surely the defendants are not entitled to the gains which might be realized from them. In any aspect, therefore, [117] these subcontracts present a most unfit as well as unsatisfactory basis upon which to estimate the real damages and loss occasioned by the default of the defendants. . . . And yet, the fact that these subcontracts must ordinarily be entered into preparatory to the fulfillment of the principal one shows the injustice of restricting the damages in cases like the present to compensation for the work actually done, and the item of the materials on hand. We should thus throw the whole loss and damage that would or might arise out of contracts for further materials, etc., entirely upon the party not in default. If there was a market value of the article in this case, the question would be a simple one. As there is none, however, the parties will be obliged to go into an inquiry as to the actual cost of furnishing the article at the place of delivery; and the court and jury should see that in estimating this amount it be made upon a substantial basis, and not left to rest upon loose and speculative opinions of witnesses. The constituent elements of the cost should be ascertained from sound and reliable sources; from practical men, having experience in the particular department of labor to which the contract relates. It is a very easy matter to figure out large profits upon paper; but it will be found that these, in a great majority of the cases, become seriously reduced when subjected to the contingencies and hazards incident to actual performance. A jury should scrutinize with care and watchfulness any speculative or conjectured account of the cost of furnishing the article that would result in a very unequal bargain between the parties, by which the gains and benefits, or, in other words, the measure of damages against the defendants, are unreasonably enhanced. They should not overlook the risks and contingencies which are almost inseparable from the execution of contracts like the one in question, and which increase the expense independently of the outlay in labor and capital."

§ 65. Violation of lease. Plaintiff agreed with defendant to take a lease of premises belonging to the latter for the purpose, as he knew, of carrying on a trade which plaintiff was

about to commence. Defendant wilfully refused to carry out his agreement, and plaintiff was unable for fifteen weeks to commence business. Specific performance of the agreement was decreed and damages were awarded for loss of profit.¹ In a Georgia case² the lessors of a hotel failed to keep it in repair as they had agreed. The lessee was allowed to recoup for the loss of custom and the profits he might have made if the covenant had been kept; and it was sufficient for him to show facts which enabled the jury to approximate his losses.

§ 66. Profits of labor. Where a party has contracted to perform labor from which a profit is to spring as a direct result of the work done at the contract price, and is prevented from earning this profit by the wrongful act of another party, its loss is a direct and natural result which the law will presume to follow the breach of the contract; and he is entitled to recover it without special allegations in his declaration. The amount of damage may be established by showing how much less than the contract price it will cost to do the work or perform the contract.³ Actual damages clearly include the direct and actual loss which a plaintiff sustains *propter rem ipsam non habitam*. And in case of such contracts the loss of profits, among other things, is the difference between the

¹ Jaques v. Millar, 6 Ch. Div. 153. The cases of Alexander v. Bishop, 59 Iowa, 572; Brockway v. Thomas, 36 Ark. 518; Beidler v. Fish, 14 Ill. App. 623, are not in accord with the English case.

² Stewart v. Lanier House Co., 75 Ga. 582.

³ Léonard v. Beaudry, 68 Mich. 310; Atkinson v. Morse, 63 id. 276; Goodrich v. Hubbard, 51 id. 62; Mississippi & R. R. B. Co. v. Prince, 34 Minn. 71; Oldham v. Kerchner, 79 N. C. 106; Jolly v. Single, 16 Wis. 280; Kinney v. Crocker, 18 id. 74; Burrell v. New York, etc. Co., 14 Mich. 84; Hinckley v. Beckwith, 13 Wis. 31; McAndrews v. Tippet, 39 N. J. L. 105; United States v. Speed, 8 Wall. 77; Doolittle v. McCullough, 12 Ohio St. 360; Middekauff v. Smith, 1 Md. 343; Clark v.

Mayor, 4 N. Y. 338; Cook v. Commissioners of Hamilton, 6 McLean, 612; Frye v. Maine, etc. R. Co., 67 Me. 414; Lentz v. Choteau, 42 Pa. St. 435; James v. Adams, 8 W. Va. 568; Cramer v. Metz, 57 N. Y. 659; Story v. New York, etc. R. Co., 6 N. Y. 85; Devlin v. Mayor, 63 N. Y. 8; Hoy v. Grenoble, 34 Pa. St. 9; Thompson v. Jackson, 14 B. Mon. 114; Fox v. Harding, 7 Cush. 516; Milburn v. Belloni, 39 N. Y. 53; Elizabethtown, etc. R. Co. v. Pottinger, 10 Bush, 185; Wallace v. Tumlin, 42 Ga. 462; United States v. Smith, 94 U. S. 214; Somers v. Wright, 115 Mass. 292; Richmond v. D. & S. C. R. Co., 40 Iowa, 264; Fail v. McRee, 36 Ala. 61; Goldman v. Wolff, 6 Mo. App. 490; Dennis v. Maxfield, 10 Allen, 138; Skagit Ry. & L. Co. v. Cole, 2 Wash. St. 57.

cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exerts his skill, uses his capital and assumes the risks which attend the enterprise. Wherever profits are advisedly spoken of as not a subject of damages it will be found that something contingent upon future bargains, or speculations, or state of the market is referred to, and not the difference between an agreed price of something contracted for and its ascertainable value or cost.¹

§ 67. **Profits from commercial ventures.** The success of business ventures is not antecedently certain in an absolute sense; they are generally undertaken in reliance upon probabilities based upon the law of demand and supply. Though speculative in their inception by anticipating future values, they are generally retrospectively examined when they become subjects of judicial investigation, and then such values are capable of proof. If the business, the profits from which are in question, is a trading business they must depend on a succession of purchases of stock of some sort for sale, or the employment of labor or material to be purchased for its production, and a [119] succession of sales to prospective customers. Where the injury complained of is an interruption or prevention of such a business, or causes a diminution of it, it is scarcely possible to establish damages to a very high degree of certainty. In many cases the best conclusion will be merely a probable one. The rule of law is the same in all cases that the damages be proved with certainty; but a greater degree of certainty being attainable in some cases than is possible when the result sought depends on the chances of future bargains, the law will not permit the proof which is certain to be neglected, and resort be made to that which is less satisfactory; though the latter in other cases is the best the nature of the case admits of, and must be received as the only guide to the proper amount of compensation, and is then available.²

¹ Philadelphia, etc. R. Co. v. Howard, 13 How. (U. S.) 344. Texas, 51; Same v. Molloy, 64 Texas, 607; Kelly v. Miles, 58 N. Y. Super.

² Fairchild v. Rogers, 82 Minn. 269; Ct. 495; Oliver v. Perkins, 52 N. W. Alexander v. Breeden, 14 B. Mon. Rep. 609; — Mich. —; Treat v. Hiles, 154; Houston, etc. Ry. Co. v. Hill, 70 81 Wis. 280.

§ 68. **Profits on dissolution of partnership.** One partner may maintain an action at law against another for a breach of the copartnership articles in dissolving before the time limited therefor. And the action is maintainable before the expiration of the period for which the partnership was to continue. The damages are the profits which would have accrued to the plaintiff from the continuation of the partnership business, and which are lost by its unauthorized dissolution.¹ The object of commercial partnerships is profit. This is the motive upon which men enter into the relation. The only legitimate beneficial consequence of continuing a partnership is the making of profits. The most direct and legitimate injurious consequence which can follow upon an unauthorized dissolution of a partnership is the loss thereof. Unless that loss can be made up to the injured party it is idle to say that any obligation is imposed by a contract to continue a partnership for a fixed period.² It is safe to say that such profits cannot be proved except to a reasonable probability. The profits immediately before the dissolution may be shown as a competent fact for the consideration of the jury. In *Bagley v. Smith*³ Judge Johnson said: "It seems to me quite obvious that [120] outside of a court of justice no man would undertake to form an opinion as to prospective profits of a business with-

¹ *Bagley v. Smith*, 10 N. Y. 489; *Treat v. Hiles*, 81 Wis. 280.

² *Id.*; *McNeill v. Reid*, 9 Bing. 68; *Gale v. Leckie*, 2 Stark. 107; *Mitchell v. Read*, 84 N. Y. 556; *Burckhardt v. Burckhardt*, 42 Ohio St. 474, 498, citing the text and applying the principle to the breach of a contract for the sale of the good-will of a business.

In *Reiter v. Morton*, 96 Pa. St. 229, 242, the measure of damages for the wrongful dissolution of a manufacturing partnership was held to be the actual money value of the plaintiff's interest in the firm at the time of the breach. "What would the interest sell for to a person willing to buy and having the means to buy? As illustrating this question the act-

ual state and condition of the property, business and assets of the firm at the time, together with proof of actual results accomplished, whether of profit or loss or both, in the past, would be competent evidence. Beyond this, at least so far as conjectural profits in the future are concerned, it would not be safe to go."

Where one partner rendered services and the other furnished the capital, there being no time fixed for the duration of the partnership, the damages recoverable by the former for its wrongful dissolution were the value of his services, skill, etc., in conducting the partnership business, and not his share of profits for any specific time. *Ball v. Britton*, 58 Texas, 57.

³ 10 N. Y. 489.

out in the first place informing himself as to its past profits, if that fact were accessible. As it is a fact in its nature entirely capable of accurate ascertainment and proof, I can see no more reason why it should be excluded from the consideration of the tribunal called upon to determine conjecturally the amount of prospective profits than proof of the nature of the business, or any other circumstance connected with its transaction. It is very true that there is great difficulty in making an accurate estimate of future profits, even with the aid of knowing the amount of past profits. This difficulty is inherent in the nature of the inquiry. We shall not lessen it by shutting our eyes to the light which the previous transactions of the partnership throw upon it. Nor are we more inclined to refuse to make the inquiry, by reason of its difficulty, when we remember that it is the misconduct of the defendants which has rendered it necessary." In a subsequent case, where the business in the past had been a losing one, it was held error to charge, as the plaintiff requested, that the jury were not confined in estimating damages to the rate of profits at the time of dissolution, but might consider and give damages for profits that would probably have been made by the higher prices; and might consider the present and probable future rate during the balance of the partnership, though the court added: "It requires some care. You are not to guess about this matter. If you can rationally see through this that the profits would have been greater in the future, and are greater at the present time than at the time of the dissolution, and you believe that the present increased profits, if such there would be, are likely to continue and increase, and you can satisfy yourselves of this in your own mind, then you have the right to look through the remainder of the time of the partnership, making a very careful estimate in regard to what the profits might probably be." The supreme court regarded the instruction to give damages for profits that would *probably* have been made by the *higher prices*, and authorizing the jury to consider the present and probable future rate, as going beyond any previous case in favor of speculative and contingent profits; the former case was referred to as adhering to the rule of certainty. The court say, also, "The case at bar differs from that case, and the cases cited therein, inasmuch [121]

as in those cases where the court was submitting the question of damages to the jury they were no longer prospective; but at the time of the trial in those cases respectively, the time had expired up to which the profits in question were to be estimated. In such cases all the *data* for ascertaining what profits might have been obtained from the business could be furnished by witnesses and there was no need of resorting to conjecture."¹ This case insists on a more rigid rule than the former one. It was, however, a case in which there was very little *data* for finding even a probable profit.²

§ 69. **Commercial agencies.** The contracts between commercial agents and their principals embody as many elements of uncertainty as are usually found in combination; among others (at least where the compensation is based upon commissions) the state of trade, quality and price of the goods offered, the skill, energy and industry with which the business is prosecuted, the credit of the parties to whom sales are made, and the acceptance of the agent's orders by his principal, are all considerations which tend to make the damages sustained by an agent by reason of the wrongful revocation of his agency so uncertain as to be difficult, if not impossible, of ascertainment.³ Past sales do not afford a safe basis for estimating future profits because the conditions may not remain as they were.⁴ But if the agent at the time of the revocation of his authority had agreements for sales which he could have consummated but for the wrongful act of his principal he is entitled to his commissions on them, if it is clear that they would have been made. Mere expectations, doubtful offers or other vague or indefinite assurances of intention to purchase are speculative. The loss of employment is an element of damage, but no standard can be fixed for ascertaining

¹ Van Ness v. Fisher, 5 Lans. 236.

² See Dobbins v. Duquid, 65 Ill. 464; Park v. C. & S. W. R. Co., 43 Iowa, 636; Smith v. Wunderlich, 70 Ill. 426; Sewall's Falls Bridge v. Fisk, 23 N. H. 171; Shafer v. Wilson, 44 Md. 268; Lacour v. Mayor, 3 Duer, 406; St. John v. Mayor, 13 How. Pr. 527; Richmond v. Dubuque, etc. R. Co., 83 Iowa, 423; Satchwell v. Will-

iams, 40 Conn. 371; Schile v. Brokhus, 80 N. Y. 614; Treat v. Hiles, 81 Wis. 280.

³ Union Refining Co. v. Barton, 77 Ala. 148; Brigham v. Carlisle, 78 id. 243; Stern v. Rosenheim, 67 Md. 503.

⁴ Ibid.; Washburn v. Hubbard, 6 Lans. 11; Hair v. Barnes, 26 Ill. App. 580.

the extent of it.¹ If the principal has accepted orders from his agent and refused to fill them the commission thereon may be recovered;² but not damages which resulted to the business of the agent otherwise.³ A more liberal rule of compensation was evidently in contemplation by the New York court of appeals in a recent case.⁴ The contract sued upon provided that if plaintiff should sell fifty of defendant's machines to one firm in Mexico for every such sale he should have the exclusive agency of the machines in that locality, they to be furnished by defendant at the lowest price, and plaintiff to receive a commission. Two such sales were made, the order for one of which was filled, the other order was not filled; the contract was repudiated. Agencies were established by plaintiff at the places where these sales were made. The court observed that these agencies were to be exclusive and to have some permanency. They were valuable to the plaintiff, and though there was difficulty in ascertaining the damages he sustained, it was not greater than existed in other cases where profits had been recovered. There were some facts in the case upon which a jury could base a judgment, not certain nor strictly accurate, but sufficiently so for the administration of justice; such as the fact that sales had been made before the breach and afterwards; the qualifications of the agent and those who operated under him to make sales; the facilities for carrying on business, and like facts would have warranted a verdict which would have approached as near the proper measure of justice as the nature of the case and the infirmity which attaches to the administration of the law will allow.⁵ In a late Michigan case there was an unauthorized revocation of the sole agency for the sale of an article. The agent's recovery was measured by the profits he might have realized if there had been no breach of

¹ *Beck v. West*, 87 Ala. 213.

² *Taylor Manuf. Co. v. Hatcher Manuf. Co.*, 39 Fed. Rep. 440.

³ *Ibid.*

⁴ *Wakeman v. Wheeler & W. Manuf. Co.*, 101 N. Y. 205. See *Meylert v. Gas Consumers' Benefit Co.*, 26 Abb. N. C. 262; § 62, *ante*.

⁵ In *Howe Machine Co. v. Bryson*, 44 Iowa, 159, a majority of the court

held that an agent could not recover as damages for the breach of a contract to furnish him machines to sell on commission the profits which might have been realized if the contract had been performed. The New York court in the case considered in the text concur with the two Iowa judges who dissented.

the principal's contract. In order to determine what they would have been proof of the actual sales of the article made by the agent's successor during the term the former was entitled to the agency was admissible.¹

§ 70. **Tortious interference with business.** In actions for torts injurious to business the extent of the loss is provable by the same testimony, and recovery may be had for such as is proved with reasonable certainty; it is enough to show what the profits would probably have been.² Certainty is very desirable in estimating damages in all cases; and where from the nature and circumstances of the case a rule can be discovered by which adequate compensation can be accurately measured, it should be applied to actions of tort as well as to those upon contract. The law, however, does not require impossibilities; and cannot, therefore, demand a higher degree of certainty than the nature of the case admits. If a regular and established business is wrongfully interrupted the damage thereto can be shown by proving the usual profits for a reasonable time anterior to the wrong complained of.³ But it is otherwise where the business is subject to the contingencies of weather, breakages, delays, etc.⁴ There is no good reason for requiring any higher degree of certainty in respect to amount of damages than in respect to any other cause. Juries are allowed to act upon probabial as well as direct and positive proof. And nature of the case the amount of the damages mated with certainty, or only a part of them mated, no objection is perceived to placing bef

¹ *Mueller v. Bethesda Mineral*. the conversion of the Spring Co., 50 N. W. Rep. 319. he was to use in ex

² *Allison v. Chandler*, 11 Mich. 542; In *Jones v. Cal*
Dennery v. Bisa, 6 La. Ann. 365; manufacturer of
Shepard v. Milwaukee G. L. Co., 15 fully prevented fro
Wis. 318; *Sewall's Falls Bridge v.* business, recovere
Fisk, 23 N. H. 171; *Schile v. Brok-* extent that the m
hahus, 80 N. Y. 614; *Oliver v. Per-* tracted for would l
kins (Mich.), 52 N. W. Rep. 609. a profit. The esti

³ *Goebel v. Hough*, 26 Minn. 252; yond that point we
Terre Haute v. Hudnut, 112 Ind. 542. speculative and re

⁴ *Cushing v. Seymour*, 80 Minn. 301. ents v. State, 77 N.
 In this case plaintiff had entered into the preceding case
 contracts for threshing grain before

the facts and circumstances of the case having any tendency to show damages or their probable amount, so as to enable them to make the most intelligible and accurate estimate which the nature of the case will permit. This should, of course, be done with such instructions and advice from the court as the circumstances may require, and as may tend to prevent the allowance of such damages as may be merely possible, or too remote or fanciful in their character to be safely considered as the result of the injury.¹

¹ *Allison v. Chandler, supra*. In this case Christiancy, J., said: "Since, from the nature of the case (one of injury to business), the damages cannot be estimated with certainty, and there is risk of giving by one course of trial less, and by the other more, than a fair compensation — to say nothing of justice — does not sound policy require that the risk should be thrown upon the wrongdoer instead of the injured party? However this question may be answered, we cannot resist the conclusion that it is better to run a slight risk of giving somewhat more than actual compensation than to adopt a rule which, under the circumstances of the case, will, in all reasonable probability, preclude the injured party from the recovery of a large proportion of the damages he has actually sustained from the injury, though the amount thus excluded cannot be estimated with accuracy by a fixed and certain rule." *Gilbert v. Kennedy*, 22 Mich. 129.

In *Holden v. Lake Co.*, 53 N. H. 552, the action was case for so interfering with the natural flow of the river, on which the plaintiffs had a mill for the manufacture of woolen goods, as to diminish its production. Upon the question of damages one of the plaintiffs was permitted to state that the cost of the raw material manufactured at their mill in

producing a yard of cloth was about one-half the value of a yard of cloth when finished. There was no evidence as to the cost of manufacturing a yard of cloth, nor the number of yards manufactured, either monthly or otherwise, but only the aggregate amount of business in dollars annually; and the falling off in the aggregate business during the dry months of summer, when the plaintiffs claim they were injured, as compared with the average of the other months of the year. The court say: "It is difficult to see what other rule could have been applied to show what the effect of the alteration was, than by showing the facts before and after the change, and how the change affected the stream and the plaintiffs' rights. . . . The cost of the cloth would be made up of the cost of raw materials and of the labor expended in the manufacture. The profits, if anything, would be ascertained by deducting from the market value, first, the cost of material, and then the expense of manufacture. But it seems that the expense was not ascertained in that way, nor the profits. When the millowner keeps his whole force through the year on full pay, then the amount he manufactures less than the full amount for the year would be so much dead loss, without regard to the profits on a single yard; and the value of the work lost by lack of

[123] § 71. Chances for prizes and promotions. In an action against a common carrier for negligently delaying the transportation of models made to compete for a prize until the award was made, the judges differed as to the measure of damages, and it was left undecided whether they should be given for the labor and materials used in making the models, or whether the chance for the prize might be taken into consideration. Patteson, J., favored the latter; he said: "The goods were made for a specific purpose, which had been

water would be found by deducting the cost of raw material from the value of the cloth that would have been made with a full supply of water."

In *Richmond v. Dubuque, etc. R. Co.*, 33 Iowa, 422, the railroad company and an elevator company at Dubuque entered into an agreement containing these stipulations: that the latter would erect a building suitable "for receiving, storing, delivering and handling all grain that shall be received by the cars of said railroad company not otherwise consigned." In a supplement to this contract it was further provided that the elevator company "should receive and discharge for the said railroad company all through grain at one cent a bushel," etc., and that the elevator should have the handling of all through grain at that price per bushel. It was also provided that in case the grain was held in store for the railroad company more than ten days, then the elevator company should have a certain per cent per bushel. The contract, by its terms, extended for a period of fifteen years, and at the option of the railroad company it was to be extended fifteen years more, but no times of payment were provided for therein. In an action against the railroad company for refusing to give the elevator company the handling of grain accord-

ing to the contract, the court held that in the estimate of damages the plaintiffs were entitled to recover not only loss of profits which would have resulted to them had the "through grain" been delivered as per contract, but also the loss of profits resulting from the plaintiffs being deprived of the storage of the grain as stipulated. There was allowed \$57,750 for the prospective profits of handling through grain at one cent per bushel during the period of the contract, and \$11,250 for prospective profits on storage of grain. The court say, in reference to the last item: "There is not entire certainty as to the amount that ought to be allowed, but this is no reason why none should be given. The law is satisfied with a just and true approximation to the true amount." See *Howe Machine Co. v. Bryson*, 44 Iowa, 159; *Fultz v. Wycoff*, 25 Ind. 321; *Flick v. Wetherbee*, 20 Wis. 392; *Heard v. Holman*, 19 C. B. (N. S.) 1; *Simmons v. Brown*, 5 R. I. 299; *McKnight v. Ratcliff*, 44 Pa. St. 156; *The Narragansett, Olcott*, 388; *Douty v. Bird*, 60 Pa. St. 48; *Hanover R. Co. v. Coyle*, 55 Pa. St. 396; *Chapman v. Kirby*, 49 Ill. 211; *Ludlow v. Yonkers*, 43 Barb. 493; *Todd v. Minneapolis, etc. Ry. Co.*, 39 Minn. 186; *Ingram v. Lawson*, 6 Bing. N. C. 212; *Savery v. Ingersoll*, 46 Hun, 176.

defeated by the negligence of the defendant, and they have become useless." Erle, J., said: "I have great doubts [124] whether that chance was not too remote and contingent to be the subject of damages."¹ In a similar case in Pennsylvania the plaintiff had delivered to the defendants, who were common carriers, a box containing plans and specifications to be forwarded to a committee at a distant place, who had offered a premium of \$500 to the successful competitor for the best plans for a public building. The plaintiff's drawings were so delivered to be transported for such competition. In consequence of the defendants' negligence they were not delivered at their destination until after the premium had been awarded. There was no evidence on the part of the plaintiff to show that there was any probability that his plans would have been adopted; and there was some evidence introduced by the defendant to the contrary. On this ground it was held that the plaintiff was entitled to only nominal damages. But it was held that such proof was admissible to show the value of the plaintiff's opportunity to compete; and that the loss of this was the direct and immediate effect of the negligence complained of.² Strong, J., said: "It is doubtless true that in all actions for breach of contract the loss or injury must be a proximate consequence of the breach. A remote or possible loss is not sufficient for compensation. There is no measure for those losses which have no direct and necessary connection with the stipulations of the contract, or which are dependent upon contingencies other than the performance of the contract, and which are, therefore, incapable of being estimated. With no certainty can it be said that such losses are attributable to the wrongful act or omission of him who has violated his engagement. But, on the other hand, the loss of profits or advantages which must have resulted from a fulfillment of the contract may be compensated in damages when they are the direct and immediate fruits of the contract; and must, therefore, have been in the contemplation of the parties when it was made. Applying this rule to the present case, why was not the loss of the opportunity to compete for the premium (whatever may have been its value) an immediate consequence

¹ *Watson v. Ambergate Ry. Co.*, 15 Jur. 448.

² *Adams Exp. Co. v. Egbert*, 36 Pa. St. 360.

of the breach of the contract? The company undertook to transport the box to the committee appointed to award the [125] premium. The purpose of the contract was to secure to the plaintiff the privilege of competition. Certainly, he must have had that in contemplation, and, if the company was informed of the object of the transmission, the loss of this privilege was in view of both parties at the time they entered into the contract. But whether known or not by the company, the loss was an immediate consequence of the negligent breach. We do not now stop to inquire whether the defendants can be held liable for every consequence, even though immediate, which cannot reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Perhaps if the special circumstances under which the contract was made, and which occasioned special and unusual injury to attend its breach, were unknown to the party which broke it, they could not be held to make compensation for more than the amount of injury which generally results from the breach of such contracts in cases unattended by any special circumstances." Again he said: "Suppose the engagement of the company had been directly to afford to the plaintiff an opportunity to compete for the premium offered, could he, for the breach of such an agreement, recover more than nominal damages without any proof that any actual injury had resulted from the breach? We think not. To entitle a plaintiff in an action founded on a contract to recover more than nominal damages for its breach, there must always be evidence that an actual, substantial loss or injury has been sustained, unless the contract itself furnishes a guide to the measurement of the damages; and even when there is some such proof and the amount is uncertain, courts have sometimes directed the jury to allow the smallest sum which would satisfy the proof.¹ A plaintiff claims compensation. The amount of that compensation is a part of his case. Whether, in the present case, the plaintiff sustained any actual injury depended upon the degree of probability there was that he would be a successful competitor if the contract had not been broken. If his plans were entirely defeated . . . it cannot be claimed

¹ *Lawton v. Sweeney*, 8 Jurist, 964; *Clunnes v. Pezzey*, 1 Camp. 8.

that he was damaged. He introduced, however, no evidence to show there was the least probability that the premium would have been awarded to him had his plans been [126] submitted to the committee in time." Damages cannot be recovered against a telegraph company because the inaccurate transmission of a message prevented a horse from being entered in competition for a purse.¹ The fact that an injured person was in the line of promotion from the position of fireman to engineer cannot be considered in awarding him damages.²

§ 72. Contingent advantage. The fact that the value of a contract or the advantage to be derived from it is contingent — that is, that the expected advantage depends on the concurrence of circumstances subsequently to transpire, and which may by possibility not happen — is not an insuperable objection to recovering damages for its loss. The chance, so to speak, of obtaining that advantage by performance of the contract and the conjunction of the necessary subsequent facts may be valuable. The nature of the contingency must be considered. If it is purely conjectural and cannot be reasonably anticipated to happen in the usual course of things it is too uncertain. There must be proof legally tending to show and sufficient to satisfy the jury that it would happen. The chance that a father would pay a son's debt to procure his release from custody has been held capable of estimation.³

§ 73. Uncertain mitigation of breach of marriage promise. In assessing damages for breach of a promise of marriage it would not be a legitimate subject for the jury to consider the consequences to the plaintiff, in mitigation of damages, of marrying the defendant and thereby forming an unhappy alliance, by reason of a want of that love and affection that a husband should bear his wife.⁴

§ 74. Failure to provide sinking fund. The damages to a creditor for the failure of a municipal corporation to fulfill its contract to provide a sinking fund as security for the debt

¹ *Western U. T. Co. v. Crall*, 39 Kan. 580.

³ *Macrae v. Clarke*, L. R. 1 C. P. 408.

² *Brown v. Chicago, etc. Ry. Co.*, 64 Iowa, 652.

⁴ *Piper v. Kingsbury*, 48 Vt. 480.

have been held not capable in their nature of legal computation; there is no legal standard by which they can be fixed; they are shadowy, uncertain and speculative.¹

SECTION 6.

THE CONSTITUENTS OF COMPENSATION, OR ELEMENTS OF DAMAGE.

[127] § 75. **Elementary limitation of damages.** The elementary limitation of recovery to a just indemnity for actual injury, estimated upon the natural and proximate consequences of the injurious act, fixes a logical boundary of redress in the form of compensation and furnishes a general test by which any particulars may be included or rejected. Recovery beyond nominal damages requires that actual injury be shown except in those cases where there are no pecuniary elements or measure, and the amount of the recovery is necessarily left to the discretion of the jury, as in cases of personal injury or defamation of character.² What are the elements of injury which may be compensated? This inquiry is a legal one and must be determined by the court; where the details are capable of pecuniary valuation the law affords some standard for measuring compensation for them. The elements of damage are always correlative to the right violated by the act complained of; and the amount of compensation, whether measured by legal rules or referred to the discretion of the jury, must depend on the nature of the right and the mode, incidents and consequences of the violative act.³ Each party

¹ *Memphis v. Brown*, 20 Wall. 289.

² In *Scott v. Williams*, 1 Dev. 376, an action for assault and battery and false imprisonment, its object being to determine whether the plaintiff who was held as a slave was not a freeman, more than nominal damages were given, though there seems to have been no proof of the actual damages.

In *Creech v. Creech*, 98 N. C. 155, an action upon an apprentice bond, evidence was given to show that the health of the apprentice had suffered by the master's improper treatment;

but it did not appear to what extent it had been injured. It was ruled not to be error to instruct the jury that they might determine if there was damage from that cause and fix the amount.

³ If land is injured by a wrongful act or taken under the power of eminent domain the owner may have his damages fixed with regard to its adaptability to any use to which it may be applied; he is not restricted to such damages as it sustained for the purpose it was used when the injury was done or it was taken.

to a contract has a legal right to performance by the other according to its legal import and effect. Any default is a violation of that right. The injured party is entitled to a [128] measure of compensation which will place him in as good condition as if the contract had been fulfilled. In other words, all the natural and proximate results of the act complained of will be considered with a view to giving him compensation for all gains prevented and all losses sustained. The particular stipulations of the contract and the alleged breach will circumscribe the inquiry; and the facts establishing the breach and its consequences will constitute its subjects.

§ 76. Damages for non-payment of money. On a contract for the mere payment of money the unpaid principal, together with the stipulated, or after maturity the lawful, rate of interest is the measure of damages. It is the invariable measure of recovery in a creditor's action against his debtor.¹ The failure to pay a debt when due may disappoint the creditor and embarrass him in his affairs and collateral undertakings; he may consequentially suffer losses for which interest is a very inadequate compensation; but they are remote and do not result alone from the default of his debtor. Money, like the staples of commerce, is in legal contemplation always in market and procurable at the lawful rate of interest; and the same principle which limits a disappointed vendee's recovery against his defaulting vendor to the market value of the commodity which is the subject of his contract restricts the creditor to the principal and interest. The practical difficulty to a creditor of borrowing the money, where the debtor is withholding the sum he owes and which is wanted, and that of a vendee in making a new purchase after he has paid the defaulting vendor for the goods needed, is the same. No party's condition, in respect to the measure of damages, should be worse for having failed in his engagement to a person whose

Boom Co. v. Patterson, 98 U. S. 403; to be awarded with regard to its use-
Fort Worth, etc. Ry. Co. v. Wallace, fulness to the whole farm. Brooks
74 Texas, 581; Same v. Hogsett, 67 id. v. Chicago, etc. Ry. Co., 73 Iowa, 179.
685. ¹ Fletcher v. Tayleur, 17 C. B. 21;

The damages for the loss of a grove Short v. Skipwith, 1 Brock. 103;
wholly situated upon a part of a farm Bender v. Fromberger, 4 Dall. 436;
which is separated from the larger Loudon v. Taxing District, 104 U. S.
tract included in it by a railroad are 771.

affairs are embarrassed than if the same result had occurred with one in prosperous or affluent circumstances.¹

§ 77. Greater damages than interest for failure to pay money. Where the obligation to pay money is special and has reference to other objects than the mere discharge of a debt, as where it is agreed to be done to facilitate trade,² and to [129] maintain the credit of the promisee in a foreign country; to take up commercial paper; pay taxes; discharge liens; relieve sureties; or for any other supposable ulterior object, damages beyond interest for delay of payment, according to the actual injury, may be recovered. A banker may be liable for damages not measured by interest for refusing to pay the check of his customer who has provided funds subject thereto. The credit of the drawer is likely to be injured by such refusal.³ In one such case for refusal to pay a check of 48ℓ. the jury gave a verdict of 500ℓ. damages, and there was no evidence that special damage had been sustained. This was deemed excessive and was reduced by consent to 200ℓ.⁴ The rule of *Hadley v. Baxendale* is applied to such cases.⁵ Bankers at Liverpool by letter of credit delivered to a customer undertook to accept drafts drawn abroad to be paid with his money deposited for that purpose. Before maturity they gave notice that they would be unable to pay the drafts at maturity and the customer was put to the expense of a commission to another party to take up the bills, of protesting them and of telegrams. These were held proper elements of damage.⁶ In another case the defendant's failure to meet the plaintiff's

¹ Domat, B. 3, tit. 5, § 2, art. 4; *Masterton v. Mayor*, 7 Hill, 61.

² A bank agreed to advance money to a customer with knowledge of the use he designed to make of it, and subsequently refused to do so. He was unable to procure the money elsewhere and was obliged to abandon his enterprise. There was a recovery of the actual damages sustained. *Manchester & O. Bank v. Cook*, 49 L. T. Rep. (1883), 674.

³ *Marzetti v. Williams*, 1 B. & Ad. 415; *Birchall v. Third Nat. Bank*, 17 Phila. 139.

⁴ *Rolin v. Steward*, 14 C. B. 595; *Boyd v. Fitt*, 14 Ir. C. L. (N. S.) 43; *Larios v. Gurety*, L. R. 5 P. C. 346; *Prehn v. Royal Bank of Liverpool*, L. R. 5 Exch. 92; *Patterson v. Marine N. Bank*, 130 Pa. St. 419. In *Schaffner v. Ehrman*, — Ill. —, 28 N. E. Rep. 917, a verdict for \$400 was sustained for a mistaken refusal to cash checks amounting to \$900.

⁵ *Id.*

⁶ *Prehn v. Royal Bank of Liverpool*, *supra*.

drafts caused a suspension of the latter's business at one place, injured it at another, and caused the loss of a valuable agency; all resulting losses were recoverable.¹

Where one person furnishes money to another to discharge an incumbrance upon the land of the person furnishing the money, and the person undertaking to discharge it neglects to do so, and the land is lost to the owner by reason of the neglect, the measure of damages may be the money furnished with interest, or the value of the land lost according to circumstances.² If the land-owner has knowledge of the agent's failure in time to redeem the land himself his damages [130] will be the money furnished with interest. But if the land-owner justly relies upon his agent to whom he has furnished money to discharge the incumbrance, and the land is lost without his knowledge, and solely through the fault of the agent, the latter will be liable for the value of the land at the time it is lost.³

§ 78. Liability for gains and losses. For breach of other contracts than to pay money the injured party is entitled to compensation for gains prevented and losses sustained. The gains prevented are those which would accrue to the contracting parties from the mutual performance of the contract. The damages for the total breach of a contract should include the value of it to the injured party. This is generally the measure. There are some exceptions, as in case of contracts for

¹ *Boyd v. Fitt, supra.*

² In actions upon covenants against incumbrances or covenants to pay off specific incumbrances, the damages are the diminution in value of the estate by reason of the incumbrances, and where the contract broken was to pay off a specific lien the owner may recover the whole amount of it, although no damage has been proved. *Lethbridge v. Mytton*, 2 B. & Ad. 772; *Carr v. Roberts*, 5 id. 78; *Loosemore v. Radford*, 9 M. & W. 657; *Hodgson v. Wood*, 2 H. & C. 649.

³ *Blood v. Wilkins*, 48 Iowa, 565; *Gallup v. Miller*, 25 Hun, 298.

The rule stated in the text does not apply where an individual accepts a deed for the land of another, and agrees with him to advance money to pay his debts, and to sell the land to raise money with which to repay himself the amount thus advanced, and where, after receiving the deed, he refuses to make the advancements. The liability of such person is not for the value of the land nor the sum which was to be advanced, but the actual damages sustained by the other party. *Turpie v. Lowe*, 114 Ind. 87, 54; *Stanley v. Nye*, 51 Mich. 232.

the sale of land where title unexpectedly cannot be made, and generally on covenants for title in conveyances of real estate.¹ By this general rule the party thus injured by a total breach is entitled to recover the profits of the particular contract which he shows, with sufficient certainty, would have accrued if the other party had performed. He is entitled to recover proportionately for a partial breach. And to ascertain these profits the nature and the special purpose of the contract, a subcontract, or other subsidiary and dependent arrangement within the contemplation of the parties at the time of contracting may be taken into consideration.²

¹ *Flureau v. Thornhill*, 2 W. Bl. 1078; *Worthington v. Warrington*, 8 C. B. 184; *Buckley v. Dawson*, 4 Ir. C. L. (N. S.) 211; *Sikes v. Wild*, 1 B. & S. 594; *Bain v. Fothergill*, L. R. 6 Exch. 59; S. C., L. R. 7 Eng. & Irish App. 158; *Baldwin v. Munn*, 2 Wend. 399; *Conger v. Weaver*, 20 N. Y. 140; *Pumpelly v. Phelps*, 40 id. 60; *Sweem v. Steele*, 5 Iowa, 352; *Drake v. Baker*, 34 N. J. L. 358. See ch. 8, vol. 2.

² *Mason v. Alabama Iron Co.*, 73 Ala. 270; *Jones v. Foster*, 67 Wis. 296; *Cameron v. White*, 74 id. 425; *Treat v. Hiles*, 81 id. 280; *Oliver v. Perkins* (Mich.), 52 N. W. Rep. 609; *Morgan v. Hefler*, 68 Me. 181; *Hadley v. Baxendale*, 9 Exch. 841; *McHose v. Fulmer*, 73 Pa. St. 365; *Van Arsdale v. Rundel*, 82 Ill. 63; *True v. International T. Co.*, 60 Me. 9; *Booth v. Spuyten Duyvil R. M. Co.*, 60 N. Y. 487; *Cassidy v. Le Fevre*, 45 id. 562; *Hexter v. Knox*, 63 id. 561; *Shepard v. Milwaukee Gas L. Co.*, 15 Wis. 318; *Frye v. Maine C. R. Co.*, 67 Me. 414; *Fultz v. Wycoff*, 25 Ind. 321; *Holden v. Lake Co.*, 53 N. H. 552; *Coweta Falls M. Co. v. Rogers*, 19 Ga. 416; *Fox v. Harding*, 7 Cush. 516; *Fletcher v. Tayleur*, 17 C. B. 21; *Masterton v. Mayor*, 7 Hill, 61; *Wolcott v. Mount*, 36 N. J. L. 262; *Passinger v. Thorburn*, 34 N. Y. 634; *Smith v. Chicago*,

etc. R. Co., 38 Iowa, 518; *Van Wyck v. Allen*, 69 N. Y. 61; *Ferris v. Comstock*, 33 Conn. 513; *France v. Gaudet*, L. R. 6 Q. B. 199; *Messmore v. New York S. & L. Co.*, 40 N. Y. 422; *Richmond v. D. & S. C. R. Co.*, 40 Iowa, 264; *Ward v. New York C. R. Co.*, 47 N. Y. 29; *Sisson v. Cleveland*, etc. R. Co., 14 Mich. 489; *Burrell v. New York etc. Co.*, 14 Mich. 84; *Maynard v. Pease*, 99 Mass. 555; *Bell v. Cunningham*, 3 Pet. 69; *Farwell v. Price*, 30 Mo. 587.

In *Pell v. Shearman*, 10 Exch. 766, the defendant covenanted with the plaintiff that if he would surrender to his lessor a certain lease they would, within two years or such period as should be agreed in a new lease, which the lessor had agreed to grant them, sink upon the demised premises a pit to the depth of one hundred and thirty yards for the purpose of finding coal, and, in case a marketable vein of coal should be reached, pay the plaintiff 2,500l. There was a breach of the contract, and evidence showing a reasonable probability that if the pit had been sunk such coal would have been discovered. Plaintiff's measure of damage was the amount of his loss by being deprived of the opportunity to find coal.

Machinery put into a mill failed to

§ 79. What losses elements of damage. Losses may be sustained in various ways in consequence of a breach of contract aside from gains prevented. First, a loss may consist of money, property or valuable rights which may be directly taken from the injured party by the breach. A servant improperly discharged before the period of his engagement has expired and unable to find any other employment, or one equally remunerative, is thereby deprived of the right to earn the stipulated wages. By that breach of contract he loses the whole or a part of what he was entitled to earn during the term he was engaged for; and he is entitled to recover accordingly.¹ An agent or bailee who, by breach of duty, converts his principal's property, or by neglect suffers it to be lost or destroyed, or by failure to assert his rights or doing it in a careless or inefficient manner subjects him to loss, must respond in damages according to the injury thus occasioned.²

§ 80. Same subject; labor and expenditures. Second, losses sustained may consist of labor or expenditures in preparation to perform or in part performance of the contract on the part of the plaintiff. Where a contract is partly performed by one party and, without his being in any default, the other stops him and prevents further performance, such part performance, in addition to the profits which could be

possess the capacity as to the quantity and quality of flour it was warranted to produce. The damages were measured by the amount paid upon it, the loss by reason of its defects, and the cost incurred in repairing the mill and putting it in condition to produce the quantity and quality of flour stipulated for. *Pennypacker v. Jones*, 106 Pa. St. 237.

¹*Sutherland v. Wyer*, 67 Me. 64; *Gifford v. Waters*, 67 N. Y. 80; *Gillis v. Space*, 63 Barb. 177; *Emerson v. Howland*, 1 Mason, 45; *Howe M. Co. v. Bryson*, 44 Iowa, 159; *Williams v. Anderson*, 9 Minn. 50; *Williams v. Chicago Coal Co.*, 60 Ill. 149; *Smith v. Thompson*, 8 C. B. 44.

²*White v. Smith*, 54 N. Y. 522;

Dodge v. Perkins, 9 Pick. 368; *Clark v. Moody*, 17 Mass. 145; *Frothingham v. Everton*, 12 N. H. 289; *Webster v. De Tastet*, 7 T. R. 157; *Rundle v. Moore*, 3 Johns. Cas. 86; *Blot v. Boiceau*, 3 N. Y. 78; *Maynard v. Pease*, 99 Mass. 555; *Stearine, etc. Co. v. Heintzmann*, 17 C. B. (N. S.) 58; *Allen v. Suydam*, 20 Wend. 321; *Bridge v. Mason*, 45 Barb. 37; *Mallough v. Barber*, 4 Camp. 150; *Perkins v. Washington Ins. Co.*, 4 Cow. 645; *Evans v. Root*, 7 N. Y. 186; *Scott v. Rogers*, 31 id. 684; *Nickerson v. Soesman*, 98 Mass. 364; *Trinidad Nat. Bank v. Denver Nat. Bank*, 4 Dill. 290; *De Tastet v. Crousillat*, 2 Wash. C. C. 132; *Lilley v. Doubleday*, 7 Q. B. Div. 510.

made by completing the contract, will enter into the estimate of damages for such breach. Should a vendor who had received part payment for goods bargained and sold refuse to [132] go on with the contract the vendee would be entitled to recover, in addition to the profits — the excess of the value of the goods above the contract price — the amount which he had paid towards the latter, for the same reason which supports his claim where he has paid the whole purchase price for the value of the property.¹ If a contract for particular work is partly performed and the employer then puts an end to the undertaking recovery may be had against him, not only for the profits the contractor could have made by performing the contract, but compensation also for so much as he has done towards performance.² Preparations for performance, which were a necessary preliminary to performance or within the contemplation of the parties as necessary in the particular case, rest upon the same principle.³

¹ *Copper Co. v. Copper Mining Co.*, 33 Vt. 92; *Woodbury v. Jones*, 44 N. H. 206; *Owen v. Routh*, 14 C. B. 327; *Bush v. Canfield*, 2 Conn. 485; *Loder v. Kekule*, 3 C. B. (N. S.) 128; *Smith v. Berry*, 18 Me. 122; *Berry v. Dwinel*, 44 Me. 255; *Wyman v. American P. Co.*, 8 Cush. 168; *Pinkerton v. Manchester & L. R.*, 42 N. H. 424.

² *McCullough v. Baker*, 47 Mo. 401; *Jones v. Woodbury*, 11 B. Mon. 167; *Derby v. Johnson*, 21 Vt. 17; *Chamberlin v. Scott*, 33 Vt. 80; *Friedlander v. Pugh*, 43 Miss. 111; *Polsley v. Anderson*, 7 W. Va. 202; *Danforth v. Walker*, 37 Vt. 239.

³ *United States v. Behan*, 110 U. S. 338; *Hale v. Hess*, 80 Neb. 42, 58 (quoting the two preceding propositions, but allowing profits only under the circumstances); *Bernstein v. Meech*, 130 N. Y. 354; *Masterton v. Mayor*, 7 Hill, 61. In the last case the marble at the quarry was taken into account in the estimate of damages. In *Nurse v. Barns*, T. Raym. 77, the defendant, in consideration of 10*l.*, promised to demise a mill to the

plaintiff, who laid in a large stock to employ it, which he lost, because the defendant refused to give him possession. A verdict of 500*l.* was approved. The stock so procured may more properly be classed as an expenditure on the faith of performance by the other party. See *post*, § 81. But the allowance of a loss for such expenditures rests on a similar principle.

In *Skinner v. Tinker*, 84 Barb. 833, an action was brought to recover damages for breach of a contract for a partnership. The plaintiff, a dentist of Brooklyn, and the defendant, a dentist of Havana, Cuba, entered into an agreement, in writing, at the latter place, in March, 1853, by which they were to do a joint business as dentists at Havana, to begin in October or November following, if the plaintiff should present himself. The agreement was silent as to the duration of the partnership. Thereupon plaintiff sold his business at Brooklyn and entered into bonds not to resume practice there, and made all prepara-

§ 81. Same subject ; damages by relying on performance.

[133] Third, such losses may consist of expenditures made by one party to a contract and damages from his own acts done on the faith of its being performed by the other, in further-

tions for carrying out his agreement. In May he received a letter from the defendant, declining to carry out the agreement on his part. On the trial the plaintiff proved these facts, and his readiness and an offer to fulfill, and recovered a verdict for \$4,000. On appeal Ingraham, J., said: "Performance on the part of the plaintiff by appearing in Havana, in October or November, as stated in the contract, was unnecessary because the defendant had given notice of his determination not to form a partnership. The plaintiff was then entitled to damages, if any were sustained, up to that time, but not to prospective damages."

Johnson v. Arnold, 2 Cush. 46, was an action to recover damages for the breach of a special contract by which, upon certain terms, the defendant agreed to furnish and keep the plaintiff supplied with a stock of goods for carrying on business in the defendant's store in another state, and the plaintiff undertook to carry it on for a share of the profits for a given term. It was held that in estimating the damages it was competent to allow the plaintiff compensation for the loss of his time and for the expenses of removing his family to and from the place where the business was to be carried on.

Noble v. Ames Manuf. Co., 112 Mass. 492, is apparently not consistent with the principle stated. The defendant, doing business in Massachusetts, wrote the plaintiff in the Sandwich Islands: "I am ready to offer you a foreman's situation at these works as soon as you may get here; pay, \$1,500 a year." The plaintiff

accepted the proposition and came, but the defendant refused to employ him. The court rejected the claim of compensation for the time and expenses in coming from the Sandwich Islands on the ground that those items preceded the taking effect of the contract, and were not in part performance. Morton, J., said: "All the plaintiff can claim is that he should be placed in as good condition as he would have been in if the contract had been performed. But the ruling (allowing these items) puts him in a better condition." On the trial those were the only items claimed. It was stated by plaintiff's counsel that no claim was made for business sacrifices in leaving the Islands and coming to defendant to perform the contract, and none for any loss of time or other loss or damage after the refusal of the defendant to employ him.

The contrary view is expressed in *Moore v. Mountcastle*, 72 Mo. 605, where plaintiff was allowed to recover for loss of time and expense in going to perform a contract. The expense incurred in taking another person with him to assist in the work he was to do was disallowed. His personal expenses and the loss of his time were "such damages as may be presumed necessarily to have resulted from the breach of the contract," and hence did not need to be specially pleaded.

In *Smith v. Sherman*, 4 Cush. 408, it was held that loss of time and expenses incurred in preparation for marriage are directly incidental to the breach of the marriage promise.

In *Durkee v. Mott*, 8 Barb. 428, on a contract to pay a certain price for

[134] ance of the object for which the contract purports to be made, or the object which was in the contemplation of the parties at the time of contracting.¹

§ 82. **Same subject; liabilities to third persons; covenants of indemnity.** Fourth, such losses may consist of sums necessarily paid to third persons, or of sums recovered and expenses incurred in actions brought by third persons in consequence of the defendant's breach of contract. They are those losses which may result from suretyship or the breach of any [135] duty or obligation of indemnity.² In such cases the

rafting logs which the defendant put an end to before the labor began, it was held the plaintiff might recover the immediate loss in preparing to perform the contract by providing men for that purpose.

Woodbury v. Jones, 44 N. H. 206, affirms the same doctrine. There the defendant proposed to the plaintiff, who was then living in Minnesota, that if he would come back to N. B. he might move into the defendant's house, and he would give the plaintiff and his wife a year's board, and he might carry on the defendant's farm on any terms he might elect. He accepted, and came back; defendant failed to make his offer good; the court held that it was competent for the jury to take into consideration in assessing the damages the expenses of removing to N. B.

In an action against the proprietor of a school for the breach of a contract to employ the plaintiff as a teacher, made for her by her father during her absence in Europe, the plaintiff was held not entitled to recover as part of her damages the expenses of her journey home, it not appearing that they were incurred in consequence of the contract, or were in the contemplation of the parties when it was made. *Benziger v. Miller*, 50 Ala. 206. See *Williams v. Oliphant*, 3 Ind. 271; *Bulkley v. United States*, 19

Wall. 37; *Dillon v. Anderson*, 43 N. Y. 231; *Hosmer v. Wilson*, 7 Mich. 294.

¹ *Dean v. White*, 5 Iowa, 266; *Grand Tower Co. v. Phillips*, 23 Wall. 471; *Driggs v. Dwight*, 17 Wend. 71; *Bunney v. Hopkinson*, 1 L. T. (N. S.) 53; *Smith v. Green*, 1 C. P. Div. 92; *Randall v. Newson*, 2 Q. B. Div. 102; *Leffingwell v. Elliott*, 10 Pick. 204; *Milburn v. Belloni*, 39 N. Y. 53; *Thoms v. Dingley*, 70 Me. 100; *Randall v. Raper*, E. B. & E. 84; *Borraile v. Brunton*, 8 Taunt. 535; *Brown v. Edgington*, 2 M. & G. 279; *Knowles v. Nunns*, 14 L. T. (N. S.) 592; *French v. Vining*, 102 Mass. 132; *Johnson v. Meyer's Ex'r*, 34 Mo. 255; *Rowland's Adm'r v. Shelton*, 25 Ala. 217; *Ferris v. Comstock*, 33 Conn. 513; *Zuller v. Rogers*, 7 Hun, 540; *Fisk v. Tank*, 12 Wis. 276; *Reggio v. Braggiotti*, 7 Cush. 166; *Jeter v. Glenn*, 9 Rich. L. 874; *Skagit Ry. & L. Co. v. Cole*, 2 Wash. St. 57; *Bernstein v. Meech*, 130 N. Y. 354; 29 N. E. Rep. 255. See *Mason v. Alabama Iron Co.*, 73 Ala. 270.

² *French v. Parish*, 14 N. H. 496; *Newburgh v. Galatian*, 4 Cow. 340; *Brooklyn v. Brooklyn City R. Co.*, 57 Barb. 497; *Holdgate v. Clark*, 10 Wend. 215; *Lincoln v. Blanchard*, 17 Vt. 464; *Kettle v. Lipe*, 6 Barb. 467; *Chamberlain v. Godfrey*, 36 Vt. 380; *Westervelt v. Smith*, 2 Duer, 449;

practical question will always be what the plaintiff was obliged or authorized to pay both in respect to the principal and incidental costs or expenses. If there has been a voluntary payment by the indemnified party or a compulsory payment resulting from a suit by which the indemnitor is not bound by his contract or in consequence of the lack of notice to defend, the question of the liability of the indemnified party to make such payment is open in his action for indemnity.¹ If there is an express indemnity against the result of a particular suit, whether the indemnitor is a party or not, the judgment binds him for the purposes of that contract.² But under a general covenant of indemnity against suits the covenantor has a right to defend either in the action against the indemnified party or in the latter's action upon the covenant of indemnity. There is a marked distinction between covenants which stipulate against the consequences of a suit and those which contain no such undertaking. In the latter class the judgment is *res inter alios acta*, and proves nothing except *rem ipsam* against the indemnitor, unless he has had notice and an opportunity to defend. The want of notice does not go to the cause

Illies v. Fitzgerald, 11 Texas, 417; *Braman v. Dowse*, 12 Cush. 227; *Spear v. Stacy*, 26 Vt. 61; *Hallock v. Belcher*, 42 Barb. 199; *Howard v. Lovegrove*, L. R. 6 Exch. 43; *Finckh v. Evers*, 25 Ohio St. 82; *Jarvis v. Sewall*, 40 Barb. 449; *Webb v. Pond*, 19 Wend. 423; *Rockefeller v. Donnelly*, 8 Cow. 623; *Chace v. Hinman*, 8 Wend. 452; *Warwick v. Richardson*, 10 M. & W. 284; *Gerrish v. Smyth*, 10 Allen, 803; *Ray v. Clemens*, 6 Leigh, 600; *Kip v. Brigham*, 6 Johns. 158; *Colter v. Morgan's Adm'r*, 12 B. Mon. 273; *Mayor v. Troy, etc. R. Co.*, 3 Lans. 270; *Lowell v. Boston, etc. R. Co.*, 23 Pick. 24; *Baynard v. Harrity*, 1 Houst. 200; *Robbins v. Chicago*, 4 Wall. 657; *Crawford v. Turk*, 24 Gratt. 176; *Duxbury v. Vermont, etc. R. Co.*, 36 Vt. 751; *Annett v. Terry*, 35 N. Y. 256; *Thomas v. Hubbell*, id. 120; *Binsse v. Wood*, 37 id. 526; *Armitage*

v. Pulver, id. 494; *Howe v. Buffalo, etc. R. Co.*, id. 297; *Spalding v. Oakes*, 42 Vt. 843; *Chamberlain v. Beller*, 18 N. Y. 115; *Stone v. Hooker*, 9 Cow. 154; *Scott v. Tyler*, 14 Barb. 202; *Bridgeport Ins. Co. v. Wilson*, 84 N. Y. 275; *Proprietors of L. & C. v. Lowell Horse R. Co.*, 109 Mass. 221; *Briggs v. Boyd*, 37 Vt. 534; *Colburn v. Pomeroy*, 44 N. H. 19; *Thomas v. Beckman*, 1 B. Mon. 81; *Robertson v. Morgan's Adm'r*, 3 id. 309; *Littleton v. Richardson*, 32 N. H. 59; *Gibson v. Love*, 2 Fla. 598.

¹ *Douglas v. Howland*, 24 Wend. 85; *Lee v. Clark*, 1 Hill, 56; *Duffield v. Scott*, 3 T. R. 374; *Aberdeen v. Blackmar*, 6 Hill, 324; *Rapelye v. Prince*, 4 Hill, 119.

² *Patton v. Caldwell*, 1 Dall. 419; *Rapelye v. Prince*, 4 Hill, 119; *Thomas v. Hubbell*, 15 N. Y. 405; *Chamberlain v. Godfrey*, 36 Vt. 380.

of action; the judgment is *prima facie* evidence only against the indemnitor and he is at liberty to defend against the demand on which it is founded.¹ If notice is expressly stipulated for the want of it will defeat the action.²

[136] As to the right to costs and expenses of defending a former suit brought to enforce a liability, against which there is an agreement or duty to indemnify, there is some conflict of decision. If a surety for a liquidated debt is sued upon it he is not bound to pay it to save costs; and he may recover of the principal the costs which he is compelled to pay as incident to a default judgment, and in addition the sum he is obliged to pay of the debt.³ And where the action is founded on a disputable liability or an unliquidated demand the rule in England, and generally in this country, allows the surety or indemnified party to give notice of the suit to the party ultimately liable and abide his directions; if he gives none, to make no defense; or if the facts are such as to render some defense reasonable and judicious and there is a probability of success, he is at liberty to defend; and such costs and expenses as are reasonable and incurred in good faith he will be entitled to recover as part of his indemnity. He may recover not only the costs taxed against him by the prevailing adverse party, but the costs of his defense.⁴ A man has no right

¹ Bridgeport Ins. Co. v. Wilson, 34 N. Y. 275; Smith v. Compton, 3 B. & Ad. 407; Reggio v. Braggiotti, 7 Cush. 166; Marlatt v. Clary, 20 Ark. 251; Boyd v. Whitfield, 19 Ark. 447; Collingood v. Irwin, 3 Watts, 806; Paul v. Witman, 3 W. & S. 407; Pitkin v. Leavitt, 18 Vt. 379; Train v. Gold, 5 Pick. 380; Baynard v. Har- rity, 1 Houst. 200.

² Bridgeport Ins. Co. v. Wilson, 34 N. Y. 275.

³ Hulett v. Soullard, 26 Vt. 295; Kemp v. Finden, 12 M. & W. 421; Ex parte Marshall, 1 Atk. 262; Baker v. Martin, 3 Barb. 634; Elwood v. Deifendorf, 5 Barb. 412; Bleaden v. Charles, 7 Bing. 246; Holmes v. Weed, 24 Barb. 546; Wynn v. Brooke, 5 Rawle, 106; McKee v. Campbell,

27 Mich. 497; Wright v. Whiting, 40 Barb. 240; Wallace v. Gilchrist, 24 Up. Can. C. P. 40; Craig v. Craig, 5 Rawle, 91; Robertson v. Morgan's Adm'r, 8 B. Mon. 307; Colter v. Same, 12 id. 278. See Pierce v. Williams, 23 L. J. (Exch.) 322.

⁴ Duxbury v. Vermont C. R. Co., 26 Vt. 751; Smith v. Compton, 3 B. & Ad. 407; Pitkin v. Leavitt, 18 Vt. 379; Hayden v. Cabot, 17 Mass. 169; Wynn v. Brooke, 5 Rawle, 106; New Haven & N. Co. v. Hayden, 117 Mass. 433; Bonney v. Seely, 2 Wend. 481; Howard v. Lovegrove, L. R. 6 Exch. 43; Ottumwa v. Parks, 43 Iowa, 119; Baxendale v. London, etc. R. Co., L. R. 10 Exch. 35; Collen v. Wright, 7 El. & Bl. 301; Westfield v. Mayo, 123 Mass. 100.

merely because he has an indemnity to defend a hopeless action and put the person guarantying to useless expense.¹ The rule formerly laid down was that if the defendant in the first action placed the facts before the person whom he sought ultimately to charge, and that person declined to intervene and left him to take his own course, it would be a question for the jury whether it was reasonable to defend or whether [137] the defense was conducted in a fair manner; in deciding that question the jury would have to consider whether it was more prudent to settle the matter by compromise, pay the money into court, or let judgment go by default.² And this is still probably the law. An agent, surety, or one expressly indemnified in respect to the liability sought by action to be fixed on him, who relies on the indemnity for security against loss, has no personal interest to defend where he can connect the indemnitor with that action so as to conclude him. But, where notice cannot be given, or for any reason is omitted, the defendant who depends on another for indemnity must necessarily so far defend the action as to obtain the best practicable assurance that the amount which he pays he will have a legal right to have reimbursed.

§ 83. **Indemnity to municipalities; counsel fees.** Municipal corporations charged with the duty of keeping public ways in repair have a right of indemnity against parties contracting to perform this duty if they fail to fulfill; and against parties who by abuse of license or tortiously put such ways out of repair, when such corporations have been compelled to pay damages to some person injured in consequence of such defect or want of repair.³ The corporation, not being *in pari delicto*, is not subject to the principle which excludes contribution or indemnity between wrong-doers, and has a right of

¹ *Gillett v. Rippon*, Moody & M. 406; *Boston v. Worthington*, 10 Gray, 496; *Lowell v. Boston, etc. R. Co.*, 23 Pick.

² *Mayne on Dam.* 74; *Mors-le-Blanch v. Wilson*, L. R. 8 C. P. 227. 24; *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475; *Ottumwa v. Parks*,

³ *Rochester v. Montgomery*, 72 N. Y. 43; *Iowa*, 119; *Duxbury v. Vermont C. R. Co.*, 26 Vt. 751; *Littleton v. Richardson*, 32 N. H. 59; *Proprietors of L. & C. v. Lowell H. R. Co.*, 109 Mass. 221.

Woburn v. Henshaw, 101 Mass. 198; *Stoughton v. Porter*, 18 Allen, 191;

recovery over against the party by whose fault the injury was suffered. Where notice has been given to the person primarily at fault to take upon himself the defense, he is bound by the judgment as to the damages paid and costs.¹ In such cases the demands for damages are unliquidated and generally [138] disputable, and a defense would be proper and judicious, whether the party ultimately liable has notice and assumes it or not. The costs taxed against the corporation, where a reasonable defense is made, in case of recovery, and the expense of the defense, including counsel fees, are proper items of damage for which it may claim indemnity. They are among the direct consequences of the defendant's fault and the breach of the implied promise or duty to save harmless.

In a Massachusetts case² Lord, J., said: "The difficulty is not in stating the rule of damages, but in determining whether in the particular case the damages claimed are within the rule. Natural and necessary consequences are subjects of damages; remote, uncertain and contingent consequences are not. Whether counsel fees are natural or necessary, or remote and contingent, in a particular case, we think may be determined upon satisfactory principles; and, as a general rule, when a party is called upon to defend a suit founded upon a wrong for which he is held responsible in law without misfeasance on his part, but because of the wrongful act of another against whom he had a remedy over, counsel fees are the natural and reasonably necessary consequence of the wrongful act of the other, if he has notified the other to appear and defend the suit. When, however, the claim against him is upon his own contract or for his own misfeasance, though he may have a remedy against another, and the damages recoverable may be the same as the amount of the judgment recovered against himself, counsel fees paid in defense of the suit against himself are not recoverable."³ It appears to the writer that such

¹ Id. In *Ottumwa v. Parks*, *supra*, the appeal was taken at the defendant's request.

where the party sought to be made liable to the city assumed the defense of the action against it, the taxable costs of that action were allowed so far as they were paid by the city; but the costs of an appeal were disallowed, there being no evidence that

² *Westfield v. Mayo*, 122 Mass. 100.

³ In *Chase v. Bennett*, 59 N. H. 394, an action for neglect of a clerk to index a mortgage, whereby plaintiff was induced to take a mortgage of the property supposing it to be unin-

expenses being recognized as not remote and contingent, the test here given for their allowance or rejection is not sound. They were allowed in that case, the plaintiff, a municipal corporation, having defended a suit for damages brought against it for a defect in a sidewalk caused by the defendant; but by the rule laid down, an innocent agent who does at the request of his principal a wrongful and injurious act, on being sued therefor would have no recourse for fees of counsel employed to defend that action.¹ And yet in this opinion the learned judge says: "Within this rule a master who is imme- [139] diately responsible for the wrongful acts of a servant, though there is no misfeasance on his part, might recover against such servant not only the amount of the judgment recovered against him, but his reasonable expenses, including counsel fees, if notified to defend the suit." Where there is an implied or express indemnity which covers the consequences of

cumbered, it was held that counsel fees paid in defending a suit by the prior mortgagee for the property were not damages for which the defendant was liable because they were not the natural and reasonable consequence of his neglect, and because he was not notified to defend that suit.

¹ See *Howe v. Buffalo, etc. R. Co.*, 37 N. Y. 297. In *Reggio v. Braggiotti*, 7 Cush. 166, the defendant sold to the plaintiff an article which he warranted to be one known in commerce as opium, with a view of its being sold as such; but it was not opium, or of any value; the plaintiff having sold with like warranty, relying on the defendant's warranty, had been sued by his vendee and compelled to pay damages and costs; he gave the defendant notice of that suit and requested him to defend it, and incurred large expenses in and about it. Shaw, C. J., said: "As they (the plaintiffs) gave notice to the defendants of the pendency of the first action, they are entitled to recover their taxable costs. See *Coolidge v. Brig-*

ham, 5 Met. 68. But the counsel fees cannot be allowed. They are expenses incurred by the party for his own satisfaction, and they vary so much with the character and distinction of the counsel that it would be dangerous to permit him to impose such a charge upon an opponent; and the law measures the expenses incurred in the management of a suit by the taxable costs." Counsel fees are here treated as in some sense uncertain in amount, and for this reason the party having a right of recovery over should not impose such a charge; but it is not correct to say that such services are so uncertain in value as to be incapable of being estimated. Nor is it satisfactory reasoning that because the charges of counsel vary no allowance whatever should be made for such an expense when it is among the natural and proximate consequences of the breach of contract. It was obviously as natural and proximate a consequence as the other expenses of the suit.

being sued and having to defend an action, all the usual concomitants of such a situation are necessarily within the contemplation of the parties; and if there is no objection of improvidence or bad faith the expense of counsel is obviously as proper to be allowed as the fees of witnesses, the clerk of the court or the sheriff. Davis, J.,¹ said, speaking generally: "All the cases recognize fully the liability of the principal where the relation of master and servant or principal and agent exists; but there is a conflict of authority in fixing the proper degree of responsibility where an independent contractor intervenes."²

§ 84. Liability for losses and expenses. In cases of express indemnity or where there is a duty of that nature springing from those relations the obligation is directly to reimburse expenses and losses; they are the immediate subjects of the contract or duty rather than the damages for the breach of either. But in many other cases suits against one person or party may result from the tort or breach of contract of another; and then, whether damages therefor, including the costs and expenses, may be recovered for such wrong or breach of contract will depend on whether such suits with the consequences and incidents in question were the natural and proximate result of the act complained of or were within the contemplation of the parties. Where a person falsely professes to act as an agent there is an implied warranty that

¹ Chicago v. Robbins, 2 Black, 418.

² See Randell v. Trimen, 18 C. B. 786; Moule v. Garrett, L. R. 7 Exch. 101; Baxendale v. London, etc. Ry., L. R. 10 Exch. 85; Fisher v. Val de Travers Asphalte Co., 1 C. P. Div. 511; Mors-le-Blanch v. Wilson, L. R. 8 C. P. 227; Randall v. Raper, 96 E. C. L. 84; Richardson v. Dunn, 8 C. B. (N. S.) 655; Ronneberg v. Falkland L. Co., 17 id. 1; Brown v. Haven, 37 Vt. 439; Neale v. Wyllie, 3 B. & C. 533; Lewis v. Peake, 7 Taunt. 153; Pennell v. Woodburn, 7 C. & P. 117; Penley v. Watts, 7 M. & W. 601; Jones v. Williams, id. 493; Walker v. Hatton, 10 id. 249; Smith v. Howell, 6 Exch. 780.

In Kiddle v. Lovett, 16 Q. B. Div. 605, a platform put up, under contract, for the plaintiff by the defendant, to enable the former to paint a house, fell because of defective construction and hurt a workman in plaintiff's employ. The latter settled an action brought by his employee and then sued defendant. The latter was held liable for nominal damages for the breach of his contract; but inasmuch as plaintiff had employed a competent contractor to build the platform and was free from negligence, he was not liable to the injured man and the amount paid him could not be recovered from the defendant.

he is such. If he have no authority and his pretense is false, either the party whom he assumed to represent¹ or the party dealing with him on the faith of his being an agent² may hold him answerable for all damages resulting from his unauthorized contracts; and among other things for costs of actions brought or defended in consequence of such contracts. So a party who sells property with an express or implied warranty of title is liable for the costs of a successful action, as well as damages recovered therein against his vendee, by which such title is overthrown and the vendee dispossessed or compelled to pay for the property to another person.³ The right of a party who has bought property with warranty of title to defend a suit brought against him based upon an adverse [141] claim, after he has given notice to the vendor and requested him to assume the defense, and his failure to reply or refusal to defend, stands upon somewhat different considerations from those which apply to sureties and others in similar situations. A vendee has a right to the property which he has purchased as between him and the vendor; and unless he is made aware that the vendor's title was defective, or that the suit of a third person for the property cannot for some reason be defended, he has a right to defend in reliance upon the warranty to the end that he may have and enjoy the fruit of his purchase. So if there is a warranty of any kind or quality the purchaser has a right to act upon the assumption that such warranty is true, and sell with like warranty, and defend suits for its breach.⁴ But if he has notice that his title is bad or that the warranty cannot be maintained he is under the

¹ Philpot v. Taylor, 75 Ill. 309.

² Collen v. Wright, 7 E. & B. 301; Hughes v. Graeme, 33 L. J. (Q. B.) 335.

³ Staats v. Ten Eyck, 3 Caines, 111; Pitcher v. Livingston, 4 Johns. 1; Rickert v. Snyder, 9 Wend. 416; Armstrong v. Percy, 5 id. 535; Ben-net v. Jenkins, 13 Johns. 50.; Waldo v. Long, 7 id. 173; Harding v. Larkin, 41 Ill. 413; Crisfield v. Storr, 36 Md. 129; Boyd v. Whitfield, 19 Ark. 447; Eldridge v. Wadleigh, 12 Me. 371; Ryerson v. Chapman, 66 Me. 557;

Williamson v. Williamson, 71 Me.

442; Brewster v. Countryman, 12 Wend. 446; Marlatt v. Clary, 20 Ark. 251; Giffert v. West, 33 Wis. 617;

Eaton v. Lyman, 24 Wis. 438; Stewart v. Drake, 9 N. J. L. 139; Holmes v. Sinnickson, 15 id. 313; Morris v. Rowan, 17 id. 304.

⁴ Hammond v. Bussey, 20 Q. B. Div. 79, stated in note to § 87; Clare v. Maynard, 7 C. & P. 741; Curtis v. Hannay, 3 Esp. 82; Swett v. Patrick, 13 Me. 9; Ryerson v. Chapman, 66 Me. 561.

same restrictions as all other parties who have a right of recovery over against unnecessary expense or an unrighteous resistance of an action which cannot be defended.¹ In an action on a warranty of the soundness of a horse which had been sold with like warranty, and in which the plaintiff had been beaten in a suit against him on his warranty, it was held he was not entitled to recover as special damage the cost incurred by him in the defense of the former action, for the jury found that by reasonable examination of the horse he might have discovered that it was unsound at the time he sold it.²

§ 85. **Bonds and undertakings; damages and costs.** Upon statutory bonds and undertakings to pay damages and costs resulting from the issue of certain writs, as an injunction, sequestration or attachment, in case it shall be decided that the party obtaining it was not entitled to it the recovery depends mainly upon the terms of the instrument; but "damages and costs" include, among other things, the costs incident to the particular writ and of the proceedings to procure its discharge, [142] including counsel fees, except in the federal courts.³ On principle and the weight of authority, where the prosecu-

¹ Short v. Kalloway, 11 A. & E. 28; Wrightup v. Chamberlain, 7 Scott, 598; Lunt v. Wrenn, 118 Ill. 168.

² Wrightup v. Chamberlain, *supra*.

³ Corcoran v. Judson, 24 N. Y. 106; Hovey v. Rubber T. P. Co., 50 N. Y. 835; Dunning v. Humphrey, 24 Wend. 31; Groat v. Gillespie, 25 Wend. 883; Edwards v. Bodine, 11 Paige, 223; Rose v. Post, 56 N. Y. 603; Coates v. Coates, 1 Duer, 664; Rosser v. Timberlake, 78 Ala. 162; Aldrich v. Reynolds, 1 Barb. Ch. 613; Pettit v. Mercer, 8 B. Mon. 51; Meshke v. Van Doren, 16 Wis. 319; Andrews v. Glenville Woolen Co., 50 N. Y. 282; Gear v. Shaw, 1 Pin. (Wis.) 608; Strong v. De Forrest, 15 Abb. 427; Troxell v. Haynes, 49 How. Pr. 517; Barton v. Fisk, 30 N. Y. 171; Tamaroa v. Southern Ill. University, 54 Ill. 334; Elder v. Sabin, 66 Ill. 126; Wilson v. McEvoy, 25 Cal. 170; Cum-

mings v. Burleson, 78 Ill. 281; Prader v. Grim, 13 Cal. 585; Guild v. Guild, 2 Met. 229; Brown v. Jones, 5 Nev. 374; Baggett v. Beard, 43 Miss. 120; Morris v. Price, 2 Blackf. 457; Raupman v. Evansville, 44 Ind. 392; Alexander v. Colcord, 85 Ill. 323; Garrett v. Logan, 19 Ala. 344; Steele v. Thatcher, 56 Ill. 257; Miller v. Garrett, 35 Ala. 96; Holmes v. Weaver, 52 id. 516; Noble v. Arnold, 23 Ohio St. 264; Riddle v. Cheadle, 25 id. 278; McRae v. Brown, 12 La. Ann. 181; Campbell v. Metcalf, 1 Mont. 378; Derry Bank v. Heath, 45 N. H. 524; Langworthy v. McKelvy, 25 Iowa, 48; Behrens v. McKenzie, 23 Iowa, 333; Wallace v. York, 45 Iowa, 81; Wilde v. Joel, 6 Duer, 671; Bonner v. Copley, 15 La. Ann. 504; Sandback v. Thomas, 1 Stark. 306; Pritchett v. Boevey, 1 C. & M. 775; Holloway v. Turner, 6 Q. B. 928. See Day v. Wood-

tion or defense of suits is rendered naturally and proximately necessary by a breach of contract or any wrongful act, the costs of that litigation, reasonably and judiciously conducted, paid or incurred, including reasonable counsel fees, are recoverable as part of the damages.¹

§ 86. **Necessity of notice to indemnitor.** Where a judgment recovered may by notice to one ultimately liable fix the amount which the latter is liable to pay to the party against whom the judgment is obtained, in some states notice is required in order to entitle the party sued to the ulterior recourse for the costs of defending; because the defense is to be made or not solely in the interest of the party who must [143] in the end be chargeable with the proper consequences of the liability upon which the judgment is founded; therefore, he is entitled to be consulted, and to have no expenses incurred and charged to him except at his request or with his sanction. Confined to cases covered by an obligation of indemnity and those where there is no right of the immediate defendant or party to the suit peculiar to himself to be asserted in the action, the rule is a wholesome one and rests upon sound principles. Of this class are actions against an agent, servant or surety for acts of which the master or principal must bear the whole responsibility; suits against which there is an express indemnity and those in which the party proceeded against is

worth, 13 How. (U. S.) 363; Oelrichs v. Spain, 15 Wall. 211.

Attorney fees not allowed in action for infringement of a patent. Teese v. Huntingdon, 23 How. 2.

Counsel fees for services rendered in the supreme court on appeal may be recovered for. Bolling v. Tate, 65 Ala. 417, overruling earlier cases.

¹ Hughes v. Graeme, 33 L. J. (Q. B.) 335; Ziegler v. Powell, 54 Ind. 173; Lawrence v. Hagerman, 56 Ill. 68; Krug v. Ward, 77 Ill. 603; Westfield v. Mayo, 122 Mass. 100; New Haven & N. Co. v. Hayden, 117 Mass. 433; Noyes v. Ward, 19 Conn. 250; Pond v. Harris, 113 Mass. 114; White v. Madison, 26 N. Y. 117; Henderson v. Squire, L. R. 4 Q. B. 170; Webber v.

Nicholas, 4 Bing. 16; Noble v. Arnold, 23 Ohio St. 264; Alexander v. Jacoby, id. 358; Godwin v. Francis, L. R. 5 C. P. 295; Ryerson v. Chapman, 66 Me. 557; Dubois v. Hermance, 56 N. Y. 673; Call v. Hagar, 69 Me. 521; Bonesteel v. Bonesteel, 30 Wis. 511; Ah Thaie v. Quan Wan, 3 Cal. 216. See Barnard v. Poor, 21 Pick. 378; Rice v. Austin, 17 Mass. 197; Guild v. Guild, 2 Met. 229; Arcambel v. Wiseman, 3 Dall. 306; Gould v. Barratt, 2 Mood. & Rob. 171; Malden v. Fyson, 11 Q. B. 292; In re United Service Co., L. R. 6 Ch. 212; Tindall v. Bell, 11 M. & W. 228; Dixon v. Fawcas, 8 E. & E. 537; Hammond v. Bussey, 20 Q. B. Div. 79; Murrell v. Fysh, 1 Cab. & E. 80.

sought to be made liable without actual misfeasance for the acts of another who must respond for the consequences of that liability.¹ The object of the notice is not to give a ground of action. If a demand be sued which the person indemnifying is bound to pay, and notice be given to him and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, the other party is estopped after such notice from disputing it or from claiming that the party sued was not bound to pay it.² Its effect is to let in the party who is bound to indemnify to defend the suit against the indemnified party and to preclude the former from showing, when sued for such indemnity, that the plaintiff has no claim for the alleged loss, or not to the amount alleged; that he made an improvident bargain, and that the defendant might have obtained better terms if the opportunity had been given to him.³ It is not necessary to the production of this result that the indemnitor should have notice in writing, or even express notice, of the action; notice may be implied from his knowledge of the action and participation in its defense.⁴ A formal request that he assume the defense of the action is not essential.⁵

In such actions two questions arise: first, has the plaintiff a legal cause of action; second, to what extent has he been damaged? The indemnifying party is entitled to his day in court on these questions. If he has notice to defend a suit brought against another who has a right of recovery over against him, [144] that opportunity is offered him; and the right to defend at his expense will depend on his answer, and he cannot be charged with costs of an improvident defense or one made contrary to his expressed will.⁶ If notice cannot be given it

¹ *Lowell v. Boston, etc. R. Co.*, 23 Pick. 24; *Proprietors of L. & C. v. Lowell H. R. Co.*, 109 Mass. 221; *Ottumwa v. Parks*, 43 Iowa, 119; *Apgar v. Hiler*, 24 N. J. L. 812; *Beckley v. Munson*, 22 Conn. 299; *Holmes v. Weed*, 24 Barb. 546; *Fisher v. Falls*, 5 Esp. 171; *Brooklyn v. Brooklyn City R. Co.*, 57 Barb. 497; *Finckh v. Evers*, 25 Ohio St. 82.

² *Duffield v. Scott*, 3 T. R. 874.

³ *Smith v. Compton*, 3 B. & Ad. 407; *French v. Parish*, 14 N. H. 496; *Port Jervis v. First Nat. Bank*, 96 N. Y. 550.

⁴ *Barney v. Dewey*, 13 Johns. 224; *Beers v. Pinney*, 12 Wend. 309; *Heiser v. Hatch*, 86 N. Y. 614; *Port Jervis v. First Nat. Bank*, 96 id. 550.

⁵ *Heiser v. Hatch*, *supra*.

⁶ See *New York State M. Ins. Co. v. Protection Ins. Co.*, 1 Story, 458.

is reasonable that the indemnified party should exercise some judgment whether to defend or not, where the amount is unliquidated or the demand disputable. Where he does so without notice and judgment is recovered against him it is *res inter alios acta* as to the first of these questions, and *prima facie* evidence on the second, though the contract of indemnity is general.

§ 87. **Same subject.** There are not the same reasons for notice to the party ultimately liable, though there are reasons for notice, where the action, the costs of which are claimed, is brought on some independent contract, or is the alleged result of a tortious act of such party; and where the party claiming for the costs of defending such action defended it to maintain his own legal rights derived from that party, and does not make the defense in his interest, he may still have his recourse to him for indemnity. A vendee, having a warranty of title, may defend a suit brought by a third person for the property without consulting his vendor. He has a right, as between himself and the latter, to retain the property and maintain, if he can, the title warranted to him; he is not obliged to content himself with a remedy on his warranty and acquiesce in any adverse claim that may be set up unless the circumstances show that it cannot be contested; he may defend a suit brought on his own warranty made to his vendee on the faith of the warranty of his vendor. A person purchasing from another who falsely pretends to be an agent may sue the supposed principal on that contract to enforce it. In case of defeat the expenses of such litigation are the natural and proximate result of the breach of contract and, if not improvidently incurred, are recoverable on the same principle as expenses incurred in other ways after a breach in furtherance of the object of a contract, or to lessen the damages which would otherwise result from its infraction. And such items will presently be considered as a distinct topic.¹

The authorities are in conflict on the necessity of notice, and no clear rule or principle can be deduced from them; but the foregoing views appear to be those supported by the best considered cases and most in harmony with the princi-

¹ *Hughes v. Graeme*, 33 L. J. (Q. B.) 335; *Ryerson v. Chapman*, 66 Me. 581; *post*, § 88.

ples applied in other analogous cases. Under certain conditions a notice may make the judgment conclusive evidence against the party notified in favor of one giving the notice and having a right of recovery over against him. This is the case where notice is given to a vendor by his vendee of proceedings founded upon an adverse title which becomes paramount.¹ So in case of other warranties, where the warrantee has acted upon them in such manner as was within the contemplation of the parties at the time of contracting, as by [146] giving like warranty and has been sued upon it.² It is

¹ *Thurston v. Spratt*, 52 Me. 202; *Boyd v. Whitfield*, 19 Ark. 447; *Marlatt v. Clary*, 20 Ark. 251; *Harding v. Larkin*, 41 Ill. 413; *Castleton v. Miner*, 8 Vt. 209; *Crisfield v. Storr*, 36 Md. 129.

² *Reggio v. Braggiotti*, 7 Cush. 166; *Collen v. Wright*, 8 E. & B. 647; *Randell v. Trimen*, 18 C. B. 786; *Brown v. Haven*, 37 Vt. 439; *Moule v. Garrett*, L. R. 7 Exch. 101; *Morsle-Blanch v. Wilson*, L. R. 8 C. P. 227.

In *Baxendale v. London, etc. Ry. Co.*, L. R. 10 Exch. 85, the case was that H. having contracted with the plaintiffs who were carriers for the carriage of two pictures from London to Paris, the plaintiffs contracted with the defendants for the carriage by them of the pictures over a part of the distance. The pictures were damaged on the journey by the defendants' negligence. H. thereupon brought an action against the plaintiffs, who gave notice of it to the defendants and requested them to defend it. They refused, and told the plaintiffs to take their own course. The latter defended the action brought against them by H. without success, and then sued the defendants to recover not only the damages found by the jury to have been sustained by H., but also the costs of the unsuccessful defense. The court held

that the costs were not recoverable, inasmuch as they could not be considered as the natural consequence of the defendants' default, the contracts between H. and the plaintiffs, and between the plaintiffs and the defendants, being separate and independent. The decision of the court of exchequer was in favor of recovery for these costs. Cleasby, B., said: "Now, in the first instance, the plaintiffs could obtain very little information to guide them either in defending the action or in settling it. They could not pay money into court, for the damage done by the water to the pictures was difficult to ascertain without a regular inquiry by persons competent to deal with the matter. Having regard to the nature of the claim, we certainly think they could not be expected either to settle the claim before action or to pay money into court; and we think it was the necessary consequence of the defendants' neglect that the plaintiffs should be put to the expense of ascertaining in a proper way the amount of their liability to Harding, in order that they might recover over against the defendants. . . . Clearly the plaintiffs were entitled to some costs. . . . The plaintiffs are entitled to recover from the defendants all costs incurred in having the amount of

a part of the contract of warranty that the warrantor shall defend the title; and by the warrantee giving notice when the title is attacked two objects are attained: first, it gives the defendant the advantage of the better information which the warrantor is supposed to possess in relation to the title; and second, saves the necessity of trying the same title [147] again in an action against the warrantor. The notice to the latter makes him privy to the record, and he is bound by it to the extent to which his rights have been tried and adjudged; and, in an action against him at the suit of the warrantee, in addition to the record, all that is necessary to be shown is

their liability ascertained. . . . law upon this question is given in Hammond v. Bussey, 20 Q. B. Div. (1887), 79, where Baxendale v. London, etc. Ry. Co., *supra*, is distinguished. The question decided is thus stated by the reporter: "The defendant contracted for the sale of coal of a particular description to the plaintiffs, knowing that they were buying such coal for the purpose of reselling it as coal of the same description. The plaintiffs did so resell the coal. The coal delivered by the defendant to the plaintiffs under the contract and by them delivered to their sub-vendees did not answer such description, but this could not be ascertained by inspection of the coal, and only became apparent upon its use by the sub-vendees. The sub-vendees thereupon brought an action for breach of contract against the plaintiffs. The plaintiffs gave notice of the action to the defendant, who, however, repudiated all liability, insisting that the coal was according to contract. The plaintiffs defended the action against them, but at the trial the verdict was that the coal was not according to contract, and the sub-vendees accordingly recovered damages from the plaintiffs. The plaintiffs thereupon sued the defendant for breach of contract, claiming as damages the amount of the

They are not entitled to the costs of any defense peculiar to themselves, such as that they were mere forwarding agents and not carriers." But a different view was taken in the exchequer chamber. Coleridge, C. J., said: "The defense was not, in my judgment, a reasonable defense. It was without any foundation in law, and there was no authority from the defendants, either express or implied, to set it up. This, however, does not dispose of the whole of the plaintiffs' claim. For it may be said, 'True, the defense was ill-advised and unauthorized; still the plaintiffs were obliged to do something to ascertain their liability, and they at least are entitled to such an amount of costs as they would have incurred had they allowed judgment to go by default upon a writ of inquiry.' But I think this contention fails also because it seems to me that the whole of the costs were incurred for the plaintiffs' own benefit, and were not in any sense the natural and proximate result of the defendants' breach of duty." Keating, Quain and Lush, JJ., were of the same opinion, and thought the damages too remote. The case of *Mors-le-Blanch v. Wilson*, *supra*, was overruled.

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that his title was in issue, and judgment given upon it.¹ The warrantor is at liberty to show any other fact not involved in that adjudication which will be beneficial to his defense, as that the defect of title arose after he sold the property, and, therefore, that he had no interest in the determination of the question tried.²

§ 88. **Expenses incurred to prevent or lessen damages.** [148] Fifth, such losses may consist of labor done and expenses incurred to prevent or lessen damages which would otherwise result from the defendant's default or misconduct. The law imposes upon a party injured by another's breach of contract or tort the active duty of using all ordinary care and making all reasonable exertions to render the injury as light as possible. If by his negligence or wilfulness he allows the damages to be unnecessarily enhanced, the increased loss, that which was avoidable by the performance of his duty, falls upon him.³ This is a practical duty under a great variety of

damages recovered from them in the action by their sub-vendees, and the costs which had been incurred in such action." Liability for costs was denied. Held, that the defense of the previous action being, under the circumstances, reasonable, the costs incurred by the plaintiffs as defendants in such action were recoverable under the rule in *Hadley v. Baxendale* as being damages which might reasonably be supposed to have been in the contemplation of the parties, at the time when they made the contract, as the probable result of a breach of it.

¹ *Davis v. Wilbourne*, 1 Hill (S. C.), 27; *Miner v. Clark*, 15 Wend. 425; *Barney v. Dewey*, 18 Johns. 225; *Pickett v. Ford*, 4 How. (Miss.) 246; *Colburn v. Pomeroy*, 44 N. H. 19.

² *Thurston v. Spratt*, 52 Me. 202.

³ *Sherman Center Town Co. v. Leonard*, 46 Kan. 354; *Fowle v. Park*, 48 Fed. Rep. 789; *Pennsylvania R. Co. v. Washburn*, 50 id. 835; *Hamilton v. McPherson*, 28 N. Y. 72; *Gillis*

v. Space, 63 Barb. 177; *Rexter v. Starin*, 73 N. Y. 601; *Huntingdon v. Ogdensburgh, etc. R. Co.*, 33 How. Pr. 416; *Worth v. Edmonds*, 52 Barb. 40; *Costigan v. Mohawk, etc. R. Co.*, 2 Denio, 609; *Taylor v. Read*, 4 Paige, 572; *Dillon v. Anderson*, 43 N. Y. 231; *Dorwin v. Potter*, 5 Denio, 306; *Hochster v. De la Tour*, 2 E. & B. 678; *Loker v. Damon*, 17 Pick. 284; *French v. Vining*, 102 Mass. 182; *Cherry v. Thompson*, L. R. 7 Q. B. 573; *Driver v. Maxwell*, 56 Ga. 11; *Roper v. Johnson*, L. R. 8 C. P. 167; *Simpson v. Keokuk*, 34 Iowa, 568; *Beymer v. McBride*, 37 Iowa, 114; *Frost v. Knight*, L. R. 7 Exch. 111; *Hecksher v. McCrea*, 24 Wend. 304; *Davis v. Fish*, 1 G. Greene, 406; *Allender v. C., R. I. & P. R. Co.*, 37 Iowa, 264; *Dobbins v. Duquid*, 65 Ill. 464; *Chamberlain v. Morgan*, 68 Pa. St. 168; *New Orleans, etc. Co. v. Echols*, 54 Miss. 264; *Hathorn v. Richmond*, 48 Vt. 557; *Pinney v. Andrus*, 41 Vt. 631; *Bradley v. Denton*, 8 Wis. 557; *Gordon v. Brewster*, 7

circumstances, and as the damages which are suffered by a failure to perform it are not recoverable it is of great importance. Where it exists the labor or expense which its performance involves is chargeable to the party liable for the injury thus mitigated; in other words the reasonable cost of the measures which the injured party is bound to take to lessen the damages, whether adopted or not, will measure the compensation the party injured can recover for the injury or the part of it that such measures have or would have prevented.¹ This is on the principle that if the efforts made are successful the defendant will have the benefit of them; if they prove abortive it is but just that the expense attending them shall be borne by him.²

Wis. 855; Fitzpatrick v. Boston & M. R. (Me.), 24 Atl. Rep. 432.

¹ Id.; Monroe v. Lattin, 25 Kan. 351; Board of Com'rs v. Arnett, 116 Ind. 438; Texas & P. Ry. Co. v. Levi, 59 Texas, 674; Long v. Clapp, 15 Neb. 417, quoting the text.

² Watson v. Proprietors Lisbon Bridge, 14 Me. 201; Summers v. Tarney, 123 Ind. 560.

In Miller v. Mariner's Church, 7 Me. 51, is a sound exposition of this duty. Weston, J., said: "If the party injured has it in his power to take measures by which his loss may be less aggravated this will be expected of him. Thus in a contract of assurance, where the assured may be entitled to recover for a total loss, he, or the master employed by him, becomes the agent of the assurer to save and turn to the best account such of the property assured as can be preserved. The purchaser of perishable goods at auction fails to complete his contract. What shall be done? Shall the auctioneer leave the goods to perish and throw the whole loss upon the purchaser? That would be to aggravate it unreasonably and unnecessarily. It is his duty to sell them a second time, and if they bring less he may recover the difference,

with commissions, and other expenses of resale, from the first purchaser. If the party entitled to the benefit of a contract can protect himself from a loss arising from a breach at a trifling expense or with reasonable exertions, he fails in social duty if he omits to do so, regardless of the increased amount of damages for which he may intend to hold the other contracting party liable. *Qui non prohibet, cum prohibere possit, jubet.* And he who has it in his power to prevent an injury to his neighbor and does not exercise it is often in a moral, if not in a legal, point of view, accountable for it. The law will not permit him to throw a loss, resulting from a damage to himself, upon another, arising from causes for which the latter may be responsible, which the party sustaining the damage might by common prudence have prevented. For example, a party contracts for a quantity of bricks to build a house, to be delivered at a given time; and engages masons and carpenters to go on with the work. The bricks are not delivered. If other bricks of an equal quality and for the stipulated price can be at once purchased on the spot it would be unreasonable, by neglecting to

[149] When, after a contract has been entered into, notice is given by one of the parties that it is rescinded on his part, he is only liable for such damages and loss as the other has suffered by reason of such rescinding; and it is the duty of the latter, upon receiving such notice, to save the former as far as it is in his power all further damages though to do so may call for affirmative action.¹ If a person hired for service for a given term is wrongfully dismissed he is entitled to the stipulated wages for the term of his engagement if that is his loss. It is *prima facie* his loss; but the law imposes on him the duty to seek other employment; and to the extent that he obtains it and earns wages, or might have done so, his damages will be reduced.² In an action for damages resulting from alleged defects in the construction of a building so that the roof leaked and injured the interior work or property therein,³ or for breach of a contract to repair a building from which similar injuries ensued,⁴ or for injury to crops through default of the defendant in not building or repairing a fence, or his tortious opening of the same,⁵ where the party suffering

make the purchase, to claim and receive of the delinquent party damages for the workmen, and the amount of rent which might be obtained for the house if it had been built. The party who is not chargeable with a violation of his contract should do the best he can in such cases; and for any unavoidable loss occasioned by the failure of the other he is justly entitled to a liberal and complete indemnity."

In *Hogle v. New York, etc. R. Co.*, 28 Hun, 363, the trial court refused to charge that when plaintiff discovered a fire on his premises he could not recover for subsequent damages if he neglected to use reasonable practicable means to suppress it, on the ground that the fire was not attributable to his fault. This was considered as not being far from saying that he might do what he could to increase it. He was bound to use all reasonable efforts in his power to

stop the fire. *Bevier v. D. & H. C. Co.*, 13 Hun, 254; *Milton v. Hudson River S. Co.*, 87 N. Y. 214. See *O'Neill v. New York, etc. Ry. Co.*, 45 Hun, 458, as to an excuse for non-performance of duty.

¹ *Dillon v. Anderson*, 43 N. Y. 231.

² *Borden Mining Co. v. Barry*, 17 Md. 419; *Sutherland v. Wyer*, 67 Me. 64; *Gillis v. Space*, 68 Barb. 177; *Heavilon v. Kramer*, 81 Ind. 241; *Heilbroner v. Hancock*, 83 Texas, 714; *Howard v. Daly*, 61 N. Y. 362; *Williams v. Chicago Coal Co.*, 60 Ill. 149.

³ *Mather v. Butler Co.*, 28 Iowa, 253; *Haysler v. Owen*, 61 Mo. 270.

⁴ *Dorwin v. Potter*, 5 Denio, 306; *Cook v. Soule*, 56 N. Y. 420; *Thompson v. Shattuck*, 2 Met. 615.

⁵ *Andrews v. Jones*, 36 Texas, 149; *Campbell v. Miltenberger*, 26 La. Ann. 72; *Loker v. Damon*, 17 Pick. 284; *Fisher v. Goebel*, 40 Mo. 475; *Waters v. Brown*, 44 Mo. 302; *St. Louis, etc. Ry. Co. v. Ritz*, 33 Kan.

from the injury is aware of the fact and the cause and that by a little timely labor and expense the damage could be avoided, the law imposes the duty on him to stay the injury, when he is in a favorable situation to do it, and enforces the duty by confining his redress for the injury thus avoidable to compensation for the necessary and proper means of prevention.¹ The duty in such cases is not arbitrarily imposed on the injured party and exacted of him in all cases, to do or amend the work of the other party, or to finish it; but only when in view of all the circumstances of the particular case it is a reasonable duty which he ought to perform instead of passively allowing a greater damage. Where the party whose duty it is primarily to do the work necessary to fulfill the contract and to prevent damage from past failure or to stay in- [151] juries resulting from his negligence or other wrong is in possession or has equal knowledge and opportunity, he alone may be looked to to fulfill that duty, and it will not avail him to say the injured party might have lessened the damages by performing the duty for him.²

§ 89. **Same; between vendor and vendee.** If the party claiming damages is a purchaser he can recover no more than it would cost him with reasonable diligence to supply himself with the same property by resort to the market³ or other source or means of supply.⁴ So where property is sold with a warranty of fitness for a particular purpose, if it be of such a nature that its defects can be readily, and in fact are, ascertained, yet the purchaser persists in using it, whereby losses and expenses are incurred, they come of his own wrong and he cannot recover damages for them as consequences of the

404; *Same v. Sharp*, 27 id. 184; *Smith v. C. C. & D. R. Co.*, 38 Iowa, 518.

¹ *Sherman Center Town Co. v. Leonard*, 46 Kan. 354.

² *Myers v. Burns*, 35 N. Y. 269; *Hexter v. Knox*, 63 id. 561; *Schwinger v. Raymond*, 83 id. 192; *Keyes v. Western Vt. S. Co.*, 34 Vt. 81; *Haysler v. Owen*, 61 Mo. 270; *Fisher v. Goebel*, 40 Mo. 475; *Green v. Mann*, 11 Ill. 613; *Waters v. Brown*, 44 Mo. 302; *Smith v. Chicago, etc. R. Co.*, 38 Iowa, 518; *Chicago, etc. R. Co. v.*

Ward, 16 Ill. 522; *Flynn v. Trask*, 11 Allen, 550; *Priest v. Nichols*, 116 Mass. 401; *Gardner v. Smith*, 7 Mich. 410; *St. Louis, etc. Ry. Co. v. Mackie*, 71 Texas, 491.

³ *Parsons v. Sutton*, 66 N. Y. 92; *McHose v. Fulmer*, 73 Pa. St. 365; *Gainsford v. Carroll*, 2 B. & C. 624; *Barrow v. Arnaud*, 8 Q. B. 604.

⁴ *Benton v. Fay*, 64 Ill. 417; *Beymer v. McBride*, 37 Iowa, 114; *Grand Tower Co. v. Phillips*, 23 Wall. 471; *Hinde v. Liddell*, L. R. 10 Q. B. 263.

breach of warranty.¹ A. sold to B. a quantity of pork in barrels with a warranty that the barrels would not leak; B. stored it in a suitable place, but found afterwards that some of the barrels were leaking. In order to preserve the pork he filled the leaking barrels from time to time with new brine; but they continued to leak and a considerable quantity of the pork was spoiled. B. did not give notice to A. of the condition of the barrels, nor offer to return the pork. It was the established practice among persons dealing in pork, of which B. was presumed to be cognizant, where the leaking of the barrels continued after they had been filled with new brine, to take out the pork and repack it in new barrels. In a suit brought by A. for the price of the pork, B. claimed a deduction of the damages for breach of the warranty; it was held that the only deduction he was entitled to was the sum which he [152] would have been compelled to pay for new barrels in the place of the leaky ones, and for the repacking of the pork in them. If B., without knowledge that the barrels were leaky, and without care in informing himself of their condition, had suffered the pork to remain in them for a reasonable time, and it had thereby become spoiled, he could have recovered in an action on the warranty the value of the pork spoiled. But as he knew that the barrels were leaky and might have prevented the injury to the pork by procuring new ones and repacking it, the loss of the pork should be regarded as attributable to his own want of care rather than to the defect of the barrels.²

§ 90. Same subject; extent of the duty. The principle that the injured party must reasonably exert himself to prevent damage applies alike to cases of contract and tort.³ He is not required to commit a tort to prevent damages;⁴ nor to anticipate and provide against a threatened trespass.⁵ The plaintiff had a lease of a grazing farm, which he had occasion to use to its capacity in grazing his cattle intended for sale;

¹ *Draper v. Sweet*, 66 Barb. 145; See *Wing Chung v. Los Angeles*, 47 Cal. 531.
Maynard v. Maynard, 49 Vt. 297.

² *Hitchcock v. Hunt*, 28 Conn. 343.

³ *Sutherland v. Wyer*, 67 Me. 64.

⁴ *Wolf v. St. Louis W. Co.*, 15 Cal. 819; *Hubbell v. Meigs*, 50 N. Y. 480. ⁵ *Plummer v. Penobscot L. Ass'n*, 67 Me. 863; *Reynolds v. Chandler River Co.*, 43 Me. 518. See *Driver v. Western U. R. Co.*, 32 Wis. 569.

the defendant wrongfully turned other cattle of his own upon the farm and persisted against the plaintiff's remonstrance in keeping them there; in consequence the plaintiff suffered serious loss to his stock for want of sufficient pasturage. It was held not to be the duty of the plaintiff under such circumstances to provide other pasturage for his cattle to lessen damages in exoneration of the defendant.¹ The efforts made

¹ Gilbert v. Kennedy, 22 Mich. 117. In this case the duty in question is recognized, but Christiancy, J., said: "Whether it is applicable at all to the facts of the present case is only important, so far as it bears on the duty of the plaintiff, when the defendant's cattle were wrongfully turned in, to remove his own cattle from the pasture before they should be injuriously affected by the over-feeding of the defendant's cattle; or to prevent at any particular time further injury from this cause. . . . The rule in question (if based upon the supposed duty) is simply one of good faith and fair dealing. If a man tortiously injures the roof of my dwelling, and I obstinately leave it in that condition, and, having the opportunity, refuse or neglect to repair until the furniture and the bedding in the house are injured or destroyed by the rains, I cannot recover of him for this injury to my furniture and bedding, which I might have avoided by timely repairs. And if a man come to my field, where my cattle are grazing, turn them out into the street, and turn his own cattle in, thus ousting me from the possession, and claiming and holding exclusive possession against me, I cannot leave my cattle in the street to starve, and then charge him with their full value, if it be practicable by reasonable effort on my part to procure other pasture or feed for them; but I can recover only such damages as I have suffered beyond what I might have avoided

by reasonable diligence. But, if he come to the same field, and wrongfully turn his cattle in *with* mine, neither taking nor claiming any exclusive possession, and, as often I turn his cattle out, he persists in turning them in again till I find it impracticable to keep them out without coming to blows, and cease to attempt it, and my cattle from this cause are deprived of necessary feed, and I resort to a suit as my only remedy, which is substantially the present case, at *what particular point* in this series of tortious conduct does good faith to him require me to turn my own cattle from my own field and find pasture for them elsewhere to save him from liability for their further injury from his repeated or continuous wrongs? Have I not a better right to insist that he shall, and to presume that he will, relent, and cease the continuance of his tortious acts than he has to claim that I shall remove my cattle from my own field and leave it to him? Is it not rather his duty to cease the continuance of his wrongs than mine to give up my acknowledged right? The damages, in such a case, are in no proper sense increased by any act or negligence of mine, but by the continuance of his own tortious conduct. As to the question of duty, as well might it be said if he had repeatedly assaulted and beaten me and my family in my own house, and declared his intention of repeating the process as long as we should remain

to reduce the effects of the wrong must be confined to such as are reasonable and made in good faith.¹ The expense resulting from them can be recovered only to the extent that it is within the loss which would otherwise have been sustained.² If the courts can protect the rights of the injured party he must resort to them instead of using his individual efforts to counteract the wrong being done.³

[153] A surety is not bound to pay his principal's debt as a duty to prevent the costs incident to a suit for its collection.⁴ Any loss or expense occasioned by an attempt to avoid payment of an obligation cannot be contemplated by the parties as a subject of indemnity, the true meaning of the contract [154] being that if the surety pays voluntarily he shall be reimbursed; if he is compelled by suit to pay he shall also be indemnified for his costs and expenses. Flight to avoid payment of the debt is an accident wholly unforeseen, and its consequences cannot be considered as provided for. The principal had a right to calculate upon the surety's ability to pay, and did not stipulate to save him harmless from anything but the payment of money. If the surety were put in prison or if his goods were sold at a sacrifice, these would not be legal grounds of suit for indemnity because they might be avoided by payment, which he must be considered as stipulating he could make.⁵

If work is improperly done or is not done within the agreed time, but is of use to and appropriated by the employer,

there, it would be my duty to remove myself and family from the house to avoid increasing the damages which might otherwise accrue from his further continuance or repetition of the like conduct.

"There was no duty resting upon the plaintiff at any time to remove his cattle and procure pasturage for them elsewhere if this could have been done. In perfect good faith, the plaintiff had a right to keep his cattle there, and to hold the defendant liable for the continuous injury arising from his continuous wrong. But if the plaintiff chose to take any of his

cattle out to prevent further injury, it would then, as to such cattle, become his duty to make a reasonable effort to procure other food or pasturage for them, in the most prudent way he reasonably could." See *Lawson v. Price*, 45 Md. 128.

¹ *Murphy v. McGraw*, 74 Mich. 318; *Ellis v. Hilton*, 78 id. 150.

² *Ibid.*; *St. Louis, etc. Ry. Co. v. Ritz*, 38 Kan. 404.

³ *Fowle v. Park*, 48 Fed. Rep. 789.

⁴ *McKee v. Campbell*, 27 Mich. 497; *Holmes v. Weed*, 24 Barb. 546.

⁵ *Hayden v. Cabot*, 17 Mass. 169.

the *quantum meruit* claim for it is reducible by allowance of the damages for failure to perform the contract in manner and time; but in such a case if the employer can protect himself from damage by reason of the defective or dilatory work at a moderate expense, or by ordinary and reasonable efforts, he is bound to do so, and he can charge the delinquent party therefor, and with the damages which could not be thus avoided.¹

In case of wrongful injury to person or property the injured party is required to use reasonable exertion to lessen or moderate the resulting damage.² Land adjacent to a railroad was flooded by water turned on to it by the construction of the road; it got into the cellar of the house thereon and injured the walls. It was held that the owner was bound to use reasonable care, skill and diligence adapted to the occasion to prevent this consequence, notwithstanding the wrongful agency of the railroad company in turning the water upon the premises.³ Recovery cannot be had against a notary for negligent omission to give notice of protest to an indorser where the holder could but would not resort to other grounds for charging the latter.⁴ Persons whose goods are destroyed by a riotous mob in a city are not entitled to recover from the [155] city the value of the goods destroyed unless such persons, if they had knowledge of the impending peril, use reasonable diligence to notify the mayor or sheriff of the threatened riot and the apprehended danger to their property.⁵ The owner of land on which a personalty tax has been irregularly charged by a tax collector will be denied any remedy against him therefor if it is in the power of the former with very little trouble and expense to appear before the board or tribunal having authority in the premises and procure a correction.⁶ A party interested in a decree for a fund invested can claim no indemnity for depreciation of the fund during his delay to enforce the decree, it being his duty to apply seasonably to

¹ Davis v. Fish, 1 G. Greene, 406;
Mather v. Butler Co., 28 Iowa, 259.

² Chase v. New York C. R. Co., 24
Barb. 273.

³ French v. Vining, 102 Mass. 132;
Allender v. C., R. I. & P. R. Co., 37
Iowa, 264; The Baltimore, 8 Wall.

⁴ Franklin v. Smith, 21 Wend. 624.
⁵ Wing Chung v. Los Angeles, 47
Cal. 531.

377; Little v. McGuire, 43 Iowa, 447.

⁶ State v. Powell, 44 Mo. 436; Wright
v. Keith, 24 Me. 158.

the court for its enforcement.¹ A claimant of damages is bound to accept reasonable offers of the other party or a third person having direct reference to the subject of the loss which would have the effect of reducing or preventing damage.² Where damages can thus be saved by timely preventive measures by the injured party it is his *duty* to exert himself for that purpose; but he has a correlative *right* in similar cases to employ other means to attain the object of the contract broken which was within the contemplation of the parties at the time of contracting, or to extricate himself from any predicament in which the wrong complained of may have placed him.³

§ 91. Employer may finish work at contractor's expense. On failure of a contractor to finish his contract the employer may cause it to be done by others, and the reasonable sum required to be paid therefor may be recovered of the delinquent party.⁴ One who has contracted for the shipment of [156] goods, or to be carried as a passenger, may employ other reasonable means of transportation if the carrier fails to fulfill his contract, and recover the excess of cost as well as other damages.⁵ The question whether the expense of the substituted mode of conveyance, as, indeed, whether any expense for a substituted performance or to counteract the injurious

¹ *Carson's Ex'r v. Jennings*, 1 Wash. C. C. 129.

² *Dobbins v. Duquid*, 65 Ill. 464; *Parsons v. Sutton*, 66 N. Y. 92; *Beymer v. McBride*, 37 Iowa, 114; *Bisher v. Richards*, 9 Ohio St. 495.

³ *Hoffman v. Union Ferry*, 68 N. Y. 385; *Kelsey v. Remer*, 43 Conn. 129; *Williams v. Vanderbilt*, 28 N. Y. 217; *James v. Hodsden*, 47 Vt. 127.

⁴ *Clark v. Russell*, 110 Mass. 133; *Smeed v. Foord*, 1 E. & E. 602; *Paine v. Sherwood*, 21 Minn. 225; *Hinde v. Liddel*, L. R. 10 Q. B. 265.

In *Wigsell v. School for the Indigent Blind*, 8 Q. B. Div. 357, the grantee of land covenanted with his grantor that the land should be and be kept inclosed with a brick wall. In an action to recover damages for the

breach of this covenant it was shown that the value of the adjoining lands of the plaintiff was not diminished by the non-observance of the covenant to anything like the sum which it would have cost to build the wall. The measure of damages was held to be the difference between plaintiff's position with and without the wall, and the cost of building it was not the correct standard to be applied.

⁵ *Hamlin v. Great N. Ry. Co.*, 1 H. & N. 408; *Denton v. Same*, 5 E. & B. 860; *Cranston v. Marshall*, 5 Exch. 395; *Ogden v. Marshall*, 8 N. Y. 349; *Collins v. Baumgardner*, 52 Pa. St. 461; *Le Blanch v. London, etc. Ry. Co.*, 1 C. P. Div. 286; *Ward's C. & P. L. Co. v. Elkins*, 34 Mich. 489; *Williams v. Vanderbilt*, 28 N. Y. 217.

effect of the act complained of may be recovered, will depend on whether the act done for which such expense was incurred was a reasonable thing to do, considering all the circumstances. A party to a contract which has been broken by the other has a right to fulfill it for himself, as nearly as may be, but he must not do this unreasonably as regards the other party, nor extravagantly.¹ On breach of a contract to carry by vessel an ordinary article of merchandise, the shipper will not be justified in procuring shipment by rail if the railroad prices would render it unprofitable. A person has no right to put others to an expense of such a nature as he would not, as a reasonable man, incur on his own account.²

§ 92. May damages for breach of contract include other than pecuniary elements? In actions upon contract the losses sustained do not, by reason of the nature of the transactions which they involve, ordinarily embrace any other than pecuniary elements. There is, however, no reason why other natural and direct injuries may not justify and require compensation. Contracts are not often made for a purpose the defeat or impairment of which can, in a legal sense, inflict a direct and natural injury to the feelings of the wronged party. A breach of promise of marriage is an instance of such a contract, in which such considerations enter into the estimate of the damages.³ The action for such a cause is often referred to as an exceptional one. In a certain sense it [157] is so; but only in the particular under consideration. It is an action upon contract; the damages allowed are such as will adequately compensate the person injured, the nature and benefits of the thing promised being considered. Being of a personal nature the damages cannot be wholly measured by a pecuniary standard; the cause of action, for the same reason, dies with the person, as all demands for personal injuries do. The damages are recoverable by the injured party because they proceed directly and naturally from the breach. Other actions upon contract may embrace like damages.⁴ Black-

¹Le Blanch v. London, etc. Ry. Tobin v. Shaw, 45 Me. 381; Wilbur Co., 11 C. P. Div. 286. v. Johnson, 58 Mo. 600; Wadsworth

²Ward's C. & P. L. Co. v. Elkins, v. Western U. T. Co., 86 Tenn. 695, 34 Mich. 439. quoting the text.

³Wells v. Padgett, 8 Barb. 323; ⁴Hale v. Bonner, 82 Texas, 83;

burn, J.,¹ said: "Where there is a contract to supply a thing, and it is not supplied, the damages are the difference between that which ought to have been supplied and that which you have to pay for it, if it be equally good; or if the thing is not obtainable, the damages would be the difference between the thing which you ought to have had and the best substitute you can get upon the occasion for the purpose. It was urged that though, when the plaintiff was . . . (left by a carrier short of his destination), . . . if he had been able to hire a fly or obtain a carriage, and paid money for it, it was admitted he could recover that money,—yet inasmuch as he could get no carriage, and was compelled to walk under penalty of staying where he was all night, he was not entitled to get anything. . . . Now, as I have said, what the passenger is entitled to recover is the difference between what he ought to have had and what he did have; and when he is not able to get a conveyance at all, but has to make the journey on foot, I do not see how you can have a better rule than that . . . the jury were to see what was the inconvenience to the plaintiffs in having to walk, as they could not get a carriage." While it is true that if the breach causes no actual injury beyond vexation and annoyance, as all breaches of contract do more or less, they are not subjects of compensation unless to the extent that the contract was made specially to procure exemption from them, nevertheless to the extent that a contract is made to secure relief from a particular inconvenience or annoyance or to confer a special enjoyment, the breach, so [158] far as it disappoints in respect of that purpose, may give a right to damages appropriate to the objects of the contract. Inconvenience, in the case quoted from, was a prominent element of damage; that consisted in a disagreeable walk of three miles when the contract entitled the injured party to be carried in a railway car a greater portion of the distance. It was a rainy night, and he had with him his wife and small children. Sickness ensued to some of them from taking cold; damages for this were excluded by perhaps too rigid an application of the rule that they must be the natural and proximate consequence of the breach; but a verdict allowing 10%.

Western U. T. Co. v. Simpson, 73 id. 422. See vol. 8, ch. 12.

¹ In Hobbs v. London, etc. Ry. Co., L. R. 10 Q. B. 111.

damages for the *inconvenience* was sustained.¹ In an action for breach of a contract to convey the plaintiff on a steamship from London to Sheerness, where the breach consisted in putting the plaintiff off without just cause and with circumstances of aggravation, short of his destination, it was held proper to show these circumstances, and Parke, B., thus remarked upon their admissibility: "Suppose, instead of a man landed at Gravesend from a steamboat, this had been the case of a passenger in a ship bound to the West Indies, and he were put ashore on a desert island, without food, and exposed to the burning sun and danger of wild beasts, or even landed among savages, would not evidence be receivable to show the state of the island where he was left and the circumstances attending the violation of the contract?"²

§ 93. **Elements of damage for personal torts.** In actions for torts and personal injuries, damage to relative rights are frequently in question; then, every particular and phase of the injury may enter into the consideration of the jury in estimating compensation: loss of time, with reference to the injured party's condition and ability to earn money in his business or calling;³ his loss from permanent impairment [159] of faculties, mental and physical pain and suffering, disfigurement and expenses.⁴

¹ See *Ward v. Smith*, 11 Price, 19; *Williams v. Vanderbilt*, 28 N. Y. 217; *Jones v. Steamship Cortes*, 17 Cal. 487; *Wadsworth v. Western U. T. Co.*, 86 Tenn. 695, quoting the text.

If a contract is broken in a way and by such acts as constitute an offense against the law, the jury may consider the outrage to the feelings of the plaintiff, although the acts done were not directed against him in person, but against his son and employees. *Enders v. Skannal*, 35 La. Ann. 1000.

² *Goppin v. Braithwaite*, 8 Jur. 875. See *Rose v. Beattie*, 2 N. & McC. 588.

³ *Welch v. Ware*, 32 Mich. 77; *Whalen v. St. Louis R. Co.*, 60 Mo. 323; *Pennsylvania R. Co. v. Books*, 57 Pa. St. 339; *Ward v. Vanderbilt*,

4 Abb. App. Dec. 521; *Walker v. Erie Ry. Co.*, 63 Barb. 260; *McKinley v. Chicago, etc. R. Co.*, 44 Iowa, 314; *Pittsburg, etc. R. Co. v. Andrews*, 39 Md. 329; *Toledo, etc. R. Co. v. Baddeley*, 54 Ill. 19.

⁴ *Id.*; *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466; *Johnson v. Wells, etc. Co.*, 6 Nev. 224; *Muldowney v. Illinois, etc. R. Co.*, 36 Iowa, 462; *Mason v. Ellsworth*, 32 Me. 271; *Morse v. Auburn, etc. R. Co.*, 10 Barb. 621; *Lucas v. Flinn*, 35 Iowa, 9; *Stewart v. Ripon*, 38 Wis. 584; *West v. Forrest*, 22 Mo. 344; *Filer v. New York C. R. Co.*, 49 N. Y. 42; *Donnell v. Sandford*, 11 La. Ann. 645; *Lynch v. Knight*, 9 H. L. Cas. 577; *Steiner v. Moran*, 2 Mo. App. 47; *Ashcraft v. Chapman*, 38 Conn. 280; *Seger v.*

§ 94. **Character as affecting damages for personal injuries.** In an action to recover for personal injuries sustained while traveling as a passenger on a railroad the question arose as to the effect of the plaintiff's character for chastity upon the measure of damages. The trial court charged that the fact that plaintiff is an unchaste woman, or has more than one husband, has nothing to do with the damages; that she is entitled to recover the same damages for injuries received as a chaste woman, or a woman who has only one husband. The appellate court, Cole, C. J., writing the opinion, says it thinks the charge had a tendency to mislead the jury: "We do not wish to intimate that an unchaste woman who is maimed and disabled by an accident on the railroad may not suffer as much pain of body or anxiety of mind as a virtuous woman would from a like injury; but still, when it comes to a question of awarding damages, it may be that a jury would not give — perhaps ought not to give — the *same damages* for injuries to an unchaste woman that they would allow a virtuous, intelligent, and industrious woman, who could command good wages or take care of a family. The fact of chastity, as well as other personal virtues and business qualifications, would be proper matters for a jury to consider in making up their verdict as to what damages should be given as a compensation for the injury received, in view of all the facts."¹ The opposing view is expressed by Judge Deady in a case² where it might have been omitted (if the Wisconsin case announces the law under any circumstances) with more propriety than in the case stated. He charged that compensatory damages for physical pain and mental anguish are not to be diminished by the fact that the plaintiff

Barkhamsted, 22 Conn. 290; Pennsylvania & O. C. Co. v. Graham, 63 Pa. St. 290; Smith v. Overby, 30 Ga. 241; Smith v. Holcomb, 99 Mass. 552; Ford v. Jones, 62 Barb. 484; Hamilton v. Third Av. R. Co., 53 N. Y. 25; Holyoke v. Grand T. Ry. Co., 48 N. H. 541; Ripon v. Bittel, 30 Wis. 614; Moore v. Central R., 47 Iowa, 688; Ballou v. Farnum, 11 Allen, 73; Nones v. Northouse, 46 Vt. 587; John-

son v. Holyoke, 105 Mass. 80; Blackman v. Gardiner Bridge, 75 Me. 214; Bovee v. Danville, 53 Vt. 183. See ch. 26, vol. 3.

¹ Abbot v. Tolliver, 71 Wis. (1888), 64. It is to be observed of this case that it would doubtless have been decided as it was independently of this proposition.

² Boyle v. Case, 18 Fed. Rep. 880.

is an obscure man, that he is a bartender, a professional gambler or even a vagrant. In another case, brought by the next of kin to recover damages for the negligent killing of the deceased, Shiras and Brewer, JJ., held that proof of the good or bad reputation of the plaintiffs could not be received.¹ We think that a carrier cannot refuse to transport a person who presents himself as a passenger and who is properly dressed and whose conduct is not such as to enhance the risk of carrying him or endanger the comfort or safety of his fellow passengers, on the ground that he is immoral or vicious in some of the relations of life. The right to be carried existing, a necessary result of it is that the rights and obligations of passenger and carrier attach. These cannot be affected by the character of the passenger so long as his conduct as such is correct. The law does not discriminate as to the rights of persons to redress for wrongs to their physical being or their property. If bad character should be ground for reducing damages, good character would be reason for increasing them. Rights given by statute are not denied because of the character of the citizen if there is no exception made by the legislature. A homestead right is not lost because the owner uses the property for an immoral and unlawful purpose.² Another reason for disapproving the Wisconsin case is that the introduction of such a question opens up too wide a field for the consideration of courts and juries, and adds vast elements of uncertainty to verdicts. So far as we have been able to ascertain, the character of a plaintiff is not material when he seeks to recover for an injury to his person or property, unless it contributed to provoke the wrong complained of.³

§ 95. **Mental suffering.** There has been a marked development of the law concerning liability for mental anguish or pain since the publication of the first edition of this work. It was then well settled that such pain, when it resulted from

¹Hardy v. Minneapolis, etc. Ry. Co., 38 Fed. Rep. 657. In Brown v. Memphis & C. R. Co., 7 Fed. Rep. 51; S. C., 5 id. 499, Hammond, J., ruled, after a full consideration, that the presence of an alleged prostitute in a ladies' car, no misconduct being in-

dulged in there, and the immorality being confined to the private life of the passenger, was not sufficient ground for excluding her therefrom.

²Prince v. Hake, 75 Wis. 638.

³See vol. 3, ch. 36.

physical injury, was an element of damages. There was originally a little hesitancy on the part of some courts in reaching that conclusion,¹ but there is now no dissent from it.² The mental suffering which can thus be recovered for must proceed from and be caused by the act or neglect which produced the physical damage.³ The bodily injury which gives a right of recovery for the resulting mental suffering may be very small; if it is a ground of action it is enough.⁴ In actions for assault and battery the jury may consider not only the mental distress which accompanies and is a part of the bodily pain, but that other condition of the mind of the injured person which is caused by the insult of the blows he received.⁵ The same state of mind is an element of damage when an assault has been maliciously made,⁶ though no actual physical harm was done.⁷ In an action of tort for a wilful injury to the person the manner and manifest motive of the wrongful act may be given in evidence as affecting the question of damages, for when the mere physical injury is the same it may be more aggravated in its effects upon the mind if it is done in wanton disregard of the rights and feelings of the plaintiff than if it is the result of mere carelessness.⁸ Mental suffering is an element of damage in suits for malicious prosecution independently of other injury;⁹ for false imprisonment;¹⁰ and in some jurisdictions, for the illegal issuance of an attachment against property.¹¹ A husband may recover

¹ *Johnson v. Wells, etc. Co.*, 6 Nev. 224.

² *Bovee v. Danville*, 53 Vt. 183; *Ferguson v. Davis County*, 57 Iowa, 601; *Porter v. Hannibal, etc. R. Co.*, 71 Mo. 66; *Indianapolis, etc. Ry. Co. v. Stables*, 62 Ill. 813; *Salina v. Trosper*, 27 Kan. 544. See ch. 26, vol. 3.

³ If injury done to the person results in a miscarriage the physical and mental suffering connected therewith is to be considered; but injured feelings following the miscarriage and not part of the pain naturally attending it are too remote. *Western U. T. Co. v. Cooper*, 71 Texas, 507.

⁴ *Canning v. Williamstown*, 1 Cush. 452.

⁵ *Prentiss v. Shaw*, 56 Me. 427; *Wadsworth v. Treat*, 43 id. 163; *Smith v. Holcomb*, 99 Mass. 552.

⁶ *McKinley v. C. & N. W. R. Co.*, 44 Iowa, 314.

⁷ *Ford v. Jones*, 62 Barb. 484; *Goddard v. Grand Trunk Ry.*, 57 Me. 202; *Beach v. Hancock*, 27 N. H. 223; *Craker v. Chicago & N. Ry. Co.*, 36 Wis. 657.

⁸ *Hawes v. Knowles*, 114 Mass. 518.

⁹ *Parkhurst v. Mastellar*, 57 Iowa, 474; *Fisher v. Hamilton*, 49 Ind. 341.

¹⁰ *Stewart v. Maddox*, 63 Ind. 51.

¹¹ *Byrne v. Gardner*, 33 La. Ann. 6; *City Nat. Bank v. Jeffries*, 78 Ala. 183.

exemplary damages for injury to his feelings in an action brought by him against one who has had criminal conversation with his wife. His right grows out of the marital relation and is independent of her right to recover damages for the same wrong in an action brought by her.¹ A parent may recover for mental suffering resulting from the abduction,² seduction,³ or the harboring and secreting of a minor daughter.⁴ These actions are brought upon the legal principle or fiction which imports the loss of service as the ground upon which a recovery is had. The damages awarded in them, however, are largely given as compensation for wounds inflicted on the mind. Such actions are distinguishable from another class in which mental distress is an element of damage, because the facts out of which they arise affect the social and business standing of the parties plaintiff, and in many ways tend to harass and annoy and even degrade them in the eyes of the community. To some extent this is the effect of various indignities which are suffered; and because of it a passenger who is wrongfully and publicly ejected from a train may recover for the effect of the insult and indignity to his feelings, though the case does not warrant the imposition of punitive damages.⁵ In Texas mental suffering is an element of damage where it results from the breach of a carrier's contract.⁶ The authorities generally do not go so far as to allow damages for the disappointment, annoyance and vexation which results from the breach of such a contract.⁷

Injured feelings are not to be regarded in awarding damages for wrongs done to property through gross carelessness,

¹ Johnston v. Disbrow, 47 Mich. 59. Sutton, 53 Ill. 397, in the absence of

² Magee v. Holland, 27 N. J. L. 86. wilfulness or malice.

³ Lunt v. Philbrick, 59 N. H. 59; ⁴ St. Louis, etc. Ry. v. Berry, 15 S. W. Rep. 48. The extra expense incurred by the plaintiff on account

⁵ Stowe v. Heywood, 7 Allen, 118. of his delay and the failure to receive his baggage was \$90; a verdict for \$500 was sustained.

⁶ Smith v. Pittsburgh, etc. Ry. Co., 23 Ohio St. 10; Lake Erie, etc. Ry. Co. v. Fix, 88 Ind. 381; Quigley v. Central P. R. Co., 11 Nev. 350; ⁷ Walsh v. Chicago, etc. Ry. Co., 42 Wis. 23; Hamlin v. Great Northern Ry. Co., 1 H. & N. 408. See ch. Texas, 272. *Contra*, Illinois R. Co. v. 11, vol. 8.

no act or word of insult or contumely or any intentional violation of plaintiff's rights being shown.¹ Thus in an action growing out of negligence in blasting rocks and throwing them upon plaintiff's land and buildings, his mental anxiety concerning his personal safety or that of his family, no harm being done to his or their persons, is not an element of damage. The court was unable to find any case which held that mental suffering alone, caused by simple actionable negligence, can sustain an action.² But if property is injured in wilful disregard of the rights of its owner, injuries to his feelings may be compensated; as where the remains of a deceased child are removed from a burial lot in which they are rightfully interred.³ Mental pain cannot be compensated for in an action for forcible entry and detainer.⁴

§ 96. *Same subject.* In some jurisdictions mental suffering which occurs independently of physical harm, as the result of mere negligence, is too remote to be the ground of an action.⁵ Thus a father cannot recover for parental grief and anxiety on account of mere physical injuries sustained by a child;⁶ nor because of solicitude for his own and his child's personal safety.⁷ Without proof of substantial harm, incapacity to pursue his ordinary employment, or some expense incurred, a seaman thrown from a boat into the water in case of a collision can recover no damages for the resulting fright.⁸ As long ago as 1808 Lord Ellenborough charged a jury in an action brought by a husband to recover for the loss of the comfort, fellowship and assistance of his wife and the grief, vexation and anguish of mind he had undergone by rea-

¹ *White v. Dresser*, 135 Mass. 150.

² *Wyman v. Leavitt*, 71 Me. (1880), 227; *Trigg v. St. Louis, etc. Ry. Co.*, 74 Mo. 147.

³ *Meagher v. Driscoll*, 99 Mass. 281.

⁴ *Anderson v. Taylor*, 56 Cal. 131.

⁵ §§ 21-23, *ante*; *Rock v. Denis*, 4 Montreal L. R. (Superior Court), 356; *Russell v. Western U. T. Co.*, 3 Dak. 815; *Darrah v. Illinois C. R. Co.*, 65 Miss. 14; *Salina v. Trosper*, 27 Kan. 544; *West v. Western U. T. Co.*, 39 id. 93; *Canning v. Williamstown*, 1 Cush. 452; *Johnson v. Wells, etc. Co.*,

6 Nev. 224; *The Queen*, 40 Fed. Rep. 694.

⁶ *Flemington v. Smithers*, 2 C. & P. (1826), 292; *Black v. Carrollton R. Co.*, 10 La. Ann. 33; *Pennsylvania R. Co. v. Kelly*, 81 Pa. St. 372; *Cowden v. Wright*, 24 Wend. 429. *Contra*, *Trimble v. Spiller*, 7 Mon. (Ky.) 394. See *Owen v. Brockschmidt*, 54 Mo. 285.

⁷ *Wyman v. Leavitt*, 71 Me. 227; *Keyes v. Minneapolis, etc. Ry. Co.*, 36 Minn. 290; *Texas M. Ry. Co. v. Douglass*, 69 Texas, 694.

⁸ *The Queen*, 40 Fed. Rep. 694.

son of her injuries and subsequent death that they could only take into consideration the bruises which he had himself sustained, and the loss of his wife's society, and the distress of mind he had suffered on her account from the time of the accident till the moment of her dissolution.¹ In an action brought by a husband to recover for mental suffering resulting from surgical malpractice in the performance of an operation upon his wife, the difficulties in the way of the rule suggested were considered by Christiancy, J.² The chief cause of plaintiff's distress of mind must have been the death of his wife in which the injury resulted rather than the pain she suffered during the operation and prior to her death; and it would be very difficult for a jury to apportion his mental agony or to determine how much of it was attributable to one of these causes and how much to the other. If the plaintiff has a right of action on account of his wife's suffering, why may not other of her relatives who may have sustained as much mental agony on the same account as the husband? These considerations, it is said, show the propriety and good sense of the rule which restricts the right of action for mental suffering to the person who has received the physical injury. Had the wife survived, this right of action would have been hers, and neither the husband in his own right, nor any other person, could have sustained an action for it; her death does not transfer it to him. Damages for such suffering in actions for malpractice are not favored; when allowed they are to be based upon a consideration by the jury of all the facts and circumstances and not upon statements made by witnesses as to their amount.³

The rule in England and in most of the American courts is that only compensation for the pecuniary loss which has been sustained by the death of a husband, father, child or other relative can be recovered against the wrong-doer.⁴ The Scotch law allows a recovery for wounded feelings.⁵ In some states, owing to the language of the statutes, other than pecuniary loss may be recovered for, as where it is expressed that the

¹ *Baker v. Bolton*, 1 Camp. 499.

⁴ *Blake v. Midland Ry. Co.*, 18 Q. B.

² *Hyatt v. Adams*, 16 Mich. 180, 98. See ch. 27, vol. 3.
197.

⁵ *Paterson v. Wallace*, 1 Macq. 748.

³ *Stone v. Evans*, 32 Minn. 243.

jury may award such damages "as to it may seem fair and just."¹ The mental and physical pain of the deceased is not to be considered by the jury in finding the injury which results from his death to his family.² But it is otherwise where the right of action of the person who dies survives to his representatives. There must, however, be proof that mental suffering was endured by the deceased.⁴

§ 97. **Same subject.** According to the weight of authority and the tendency of late decisions, if a message delivered to a telegraph company apprises the agent who receives it, or if he is otherwise informed, that it is of immediate importance to the party to whom it is addressed and relates to the illness, death or burial of some near member of his family, the negligent failure to deliver it makes the company liable to him for such mental distress as he may sustain in consequence, or to the sender as may be endured by him if the person who is summoned by it fails to arrive by reason of neglect to deliver it to him. A husband may recover for such suffering as he bears as the result of the non-delivery of a message summoning a physician to attend his sick wife;⁵ and there may be a recovery for the increased physical and mental suffering the wife endures on account of the non-attendance of a physician,⁶ or the absence of her husband;⁷ and for the husband's disappointment and suffering in being kept away from the bedside of his sick wife;⁸ for a sister's grief at being prevented from attending a brother in his last illness and arranging for his burial.⁹ A husband who telegraphs his brother-in-law that his

¹ *Matthews v. Warner*, 29 Gratt. (Va.) 570; *Baltimore & O. R. Co. v. Noell*, 32 id. 394; *Beeson v. Grand Mountain G. M. Co.*, 57 Cal. 20 (ruled by a divided court); *McKeever v. Market Street R. Co.*, 59 id. 294; *Cleary v. City R. Co.*, 76 id. 240. See *Munroe v. Dredging, etc. Co.*, 84 Cal. 515, 525.

² *Cotton Press Co. v. Bradley*, 52 Texas, 587, 601; *Donaldson v. Mississippi & M. R. Co.*, 18 Iowa, 280.

³ *Nashville & C. R. Co. v. Prince*, 2 Heisk. 580; *Same v. Smith*, 6 id. 174; *Collins v. East Tennessee, etc. R. Co.*, 9 id. 841.

⁴ *Kennedy v. Standard Sugar Refinery*, 125 Mass. 90; *Moran v. Hollings*, id. 93.

⁵ *Western U. T. Co. v. Henderson*, 89 Ala. 510.

⁶ *Western U. T. Co. v. Cooper*, 71 Texas, 507.

⁷ *Thompson v. Western U. T. Co.*, 107 N. C. 449; 12 S. E. Rep. 427.

⁸ *Beasley v. Western U. T. Co.*, 39 Fed. Rep. 181; *Young v. Same*, 107 N. C. 370; 11 S. E. Rep. 1044.

⁹ *Wadsworth v. Western U. T. Co.*, 86 Tenn. 695.

wife is not expected to live may recover for his mental suffering arising from the fact that the person to whom the message was sent does not come.¹ Other cases in harmony with these considered are cited in the note,² as also those which are opposed.³ If anxiety or distress exists because of knowledge of the illness of a relative, its continuance as the result of the negligent failure to deliver a message which would remove or alleviate it is not an element of damage.⁴ Neither is mental distress which has its origin in alarm at and sympathy for another's sufferings.⁵ If a telegraph company undertakes to transmit money with knowledge that a failure to do so with promptness will cause mental distress it is liable for its neglect to be prompt.⁶

In order that telegraph companies shall be liable to the addressee of a message for mental suffering occasioned by negligent failure to transmit or deliver the announcement of the illness or death of the person who may be named therein, it must be shown that the message disclosed or that the operator was informed of the relation of the parties or the importance of promptness in its delivery.⁷ It is enough to establish such liability if the language of the message is reasonably suf-

¹ *Reese v. Western U. T. Co.*, 123 Ind. 294.

² *So Relle v. Western U. T. Co.*, 55 Texas, 310; *Stuart v. Same*, 66 id. 580; *Gulf, etc. R. Co. v. Levy*, 59 id. 542; *Western U. T. Co. v. Wilson*, 69 id. 739; *Same v. Adams*, 75 id. 531; *Same v. Feegles*, id. 537; *Chapman v. Western U. T. Co.*, — Ky. —; 13 S. W. Rep. 880; *Western U. T. Co. v. Broesche*, 72 Texas, 654. See ch. 22, vol. 8.

³ *West v. Western U. T. Co.*, 39 Kan. 93; *Russell v. Same*, 3 Dak. 315. See ch. 22, vol. 8.

⁴ *Rowell v. Western U. T. Co.*, 75 Texas, 26.

⁵ *Western U. T. Co. v. Cooper*, 71 Texas, 507.

⁶ *Western U. T. Co. v. Simpson*, 73 Tex. 422. A telegram was received at G., Texas, by the agent of a woman who sent it from L., California, in-

forming him that her husband had died at L., and that she would leave there the next day, and requesting him to send her \$200. When received at G. the message purported to have been sent from S. It was not repeated. The woman's agent expressed to the company's agent his belief that the message was sent from L., but after being assured that there was no mistake in this respect applied for the transfer of the money to S., which was done, without any effort on defendant's part to ascertain whether an error had been made. The money did not reach the applicant. The company was held liable for her mental suffering.

⁷ *Russell v. Western U. T. Co.*, 3 Dak. 315; *Western U. T. Co. v. Brown*, 71 Texas, 728; *Western U. T. Co. v. Kirkpatrick*, 76 id. 217.

ficient to put the company upon inquiry as to the relationship, and inform it that its object is to afford the person to whom it is addressed an opportunity to attend upon his relative in his last sickness, or to be present at the funeral in case of death.¹ A different view is taken in Indiana. The message delivered read "my wife is very ill, not expected to live." In an action by the sender to recover for mental suffering it was ruled that the language was not a hinderance thereto. The court say: It is true there was nothing in the telegram to indicate the kinship that existed between the appellant and the person to whom it was addressed; nor did it request his presence at the bedside of the sick person; but this affords no excuse to the appellee for its failure to deliver the telegram. It was bound to know that the message pertained in some way to the serious illness of the appellant's wife, and therefore that prompt communication with the person to whom the message was addressed was much desired, and was bound to know that mental anguish might and most probably would come to some person in case it failed to act promptly in transmitting and delivering the dispatch; and therefore such a result was contemplated when the message was delivered to its agent. Whether such mental suffering would be caused by the failure of a brother-in-law and his wife to go at once to the bedside of a dying sister-in-law or from the failure of a physician to reach his patient while there was still hope that something might be done to bring relief, and possibly a restoration to health, or for some other cause, is unimportant. It was not the particular cause but the effect which might be produced that was contemplated by the parties, and which is to be looked to in determining the question of liability.²

§ 98. Right to compensation not affected by motive. So far as pecuniary elements of damage and full compensation for injury are concerned, either in actions of tort or for breach of contract, the right of recovery is wholly independent of the motive which induced the act or omission which constitutes the cause of action.³ In tort the motive may increase

¹ *Western U. T. Co. v. Moore*, 76 Texas, 66; *Same v. Adams*, 75 id. 531; *Same v. Feegles*, id. 537.

² *Reese v. Western U. T. Co.*, 123 Ind. 294, 300.

³ *Krom v. Schoonmaker*, 3 Barb. 647.

the injury and give a right to greater compensation; but in actions upon contract this can seldom occur, because contracts are not often made for such objects that a breach can be committed in such manner as to involve other than pecuniary consequences.¹ In cases of tort, if the defendant's motive does not enhance the actual injury, it cannot necessitate the allowance of larger damages to compensate it; though, by possibility, it may afford cause for imposing exemplary damages.

§ 99. Distinction made for bad motive; contracts. Important distinctions, however, are made against parties who break their contracts as well as against wrong-doers, where the cause of action originates in a bad motive. On executory contracts for the sale of land the vender who wilfully breaks his contract or is unable to fulfill for causes known to him when he entered into it will be subject to damages for the loss of the bargain;² while a vendor who, in good faith [160] and without fault, finds himself unexpectedly unable to fulfill is only liable to refund the consideration with interest and expenses.³ The general rule undoubtedly is that in actions upon contracts the motives which induce breaches of them cannot be considered in awarding damages. In addition to the cases above stated and those indicated in the next paragraph of this section, as coming within the exception to this rule, actions for breach of marriage promise may be added.⁴ There is a probability that, owing to the complete obliteration of the

¹ In *Enders v. Skannal*, 85 La. Ann. 1000, it is ruled that if a breach of contract is made in a way and accompanied by acts which constitute an offense against the law, the damages are not limited to the actual pecuniary loss.

² *Pumpelly v. Phelps*, 40 N. Y. 59; *Bush v. Cole*, 28 id. 261; *Drake v. Baker*, 34 N. J. L. 258; *Plummer v. Rigdon*, 78 Ill. 222; *Stephenson v. Harrison*, 3 Litt. 170; *Hammond v. Hannin*, 21 Mich. 374; *Allen v. Atkinson*, id. 351; *Foley v. McKeegan*, 4 Iowa, 1; *Engel v. Fitch*, 9 B. & S. 85; 10 id. 738.

³ *Flureau v. Thornhill*, 2 W. Bl. 1078; *Walker v. Moore*, 10 B. & C.

416; *Sikes v. Wild*, 1 B. & S. 587; 4 id. 421.; *Bain v. Fothergill*, L. R. 6 Exch. 59; L. R. 7 H. L. 158; *McNair v. Compton*, 85 Pa. St. 23; *Conger v. Weaver*, 20 N. Y. 140.

⁴ *Duche v. Wilson*, 87 Hun, 519; *Houston, etc. R. Co. v. Shirley*, 54 Texas, 125, 142, 148.

The standard writer on the law of damages in England says: "With the single exception of actions for breach of promise of marriage I am not aware of any cases in which it has been held in England that the motives or conduct of a party breaking a contract, or any injurious circumstance not flowing from the breach itself, could be considered in

distinction formerly existing as to the forms of actions, some misunderstanding may arise on this question. The rule prevails in some states that where the injuries complained of grew out of a contract, though a tort was connected with it, if the claims for both wrongs are so related that they may be conveniently and appropriately tried together, this may be done.¹ An action so tried cannot be said, with any regard to legal accuracy, to be an action upon contract. It is an action brought upon the theory that legal rights growing out of a contract have been violated or legal duties resting thereupon neglected. As applied to a carrier, the contract it makes with a passenger gives him the right to be carried safely and put down at the place he has designated; the failure to do either is a tort. The carrier is engaged in an employment which devolves a duty upon him; an action on the case will lie for a breach of that duty, although it may consist in doing something contrary to an agreement made in the course of such employment by the party upon whom the duty is cast.² A distinction may very properly be made as to the measure of damages for the breach of a contract where the manner of the party in the wrong is offensive or such as to cause reasonable apprehension of danger to the other.³

A *quantum meruit* claim for services which were rendered in part performance of a special contract has been made in some jurisdictions to depend on the motive of the servant or contractor in his abandonment of the contract; and compensation for such performance has been allowed only to the laborer or contractor who has acted in good faith; has broken his contract through inability or mistake; and has been denied to the party who has wilfully and selfishly abandoned it.⁴ Other cases may be cited where a more liberal scope is allowed in

damages where the action is on the contract." Mayne's Dam. (Wood's ed.) § 45. 10 C. B. 73, 83, interpreting *Brown v. Boorman*, 11 Cl. & F. 1.

¹ *Houston, etc. R. Co. v. Shirley*, 54 Texas, 125, 148; *Ball v. Britton*, 58 id.

57; *G., C. & S. F. Ry. Co. v. Levy*, 59 id. 542; *New Orleans, etc. R. Co. v. Hurst*, 36 Miss. 660; *Wadsworth v. Western U. T. Co.*, 86 Tenn. 695.

² *Jarvis, C. J.*, in *Courtenay v. Earle*,

³ *Enders v. Skannal*, 35 La. Ann. 1000.

⁴ *Yeats v. Ballentine*, 56 Mo. 580; *Kelly v. Bradford*, 33 Vt. 35; *Merrow v. Huntoon*, 25 Vt. 9; *Austin v. Austin*, 47 Vt. 311; *Barker v. Troy & R. R. Co.*, 27 Vt. 766; *Britton v. Turner*, 6 N. H. 495; *Sinclair v. Tall-*

estimating damages for a fraudulent or wanton violation of contract than is ordinarily given in the absence of the element of fraud.¹

§ 100. **Motive in tort actions.** The motive with which a wrong is done in some cases affects the rule by which compensation is measured or losses estimated. Where there is [161] fraud or other intentional wrong compensatory damages are given with a more liberal hand by juries and their verdicts in such cases are less closely scanned by courts than in cases where that element is absent. There is a tendency, too, to be less strict in the exclusion of remote and uncertain damages, though for this there is no warrant.² Where the damages are certain, as for the taking or destruction of property having a well-known and provable value, the rule of compensation is generally the same, whether the loss is by tort or by breach of contract and whether the wrong was wilful or not. But there is a more liberal allowance of damages where the tort is an aggressive one, and the entire damages or some part of them are not capable of measurement by some standard of value or definite rule.³ This is justified not only on the

madge, 35 Barb. 602; Hayward v. Leonard, 7 Pick. 181; Atkins v. Barnstable, 97 Mass. 428; Snow v. Ware, 13 Met. 42; McKinney v. Springer, 8 Ind. 59; Porter v. Woods, 3 Humph. 56; McDonald v. Montague, 80 Vt. 357; Cullen v. Sears, 112 Mass. 299; Cardell v. Bridge, 9 Allen, 355; Walker v. Orange, 16 Gray, 198; Patnote v. Sanders, 41 Vt. 66; Veazie v. Bangor, 51 Me. 509; Laton v. King, 19 N. H. 280; Bertrand v. Byrd, 5 Ark. 651; Wilson v. Wagar, 26 Mich. 452; Horn v. Batchelder, 41 N. H. 86; Tait v. Sherman, 10 Iowa, 60; Baltimore & O. R. Co. v. Lafferty, 2 W. Va. 104; Gleason v. Smith, 9 Cush. 484; Thornton v. Place, 1 M. & R. 218; Newman v. McGregor, 5 Ohio, 349; Carroll v. Welch, 26 Texas, 147; Hillyard v. Crabtree, 11 Texas, 264; Dermott v. Jones, 23 How. (U. S.) 220; Norris v. School Dist., 12 Me. 293.

¹ Dewint v. Wiltse, 9 Wend. 325; Jeffrey v. Bigelow, 13 id. 518; Chitty on Contr. 684; Soudes v. Fletcher, 5 B. & Ald. 885; Rose v. Beattie, 2 Nott & McC. 538; Nurse v. Barns, T. Raym. 77; Stuart v. Wilkins, 1 Doug. 18; Williamson v. Allison, 2 East, 446; Ferrand v. Bouchell, Harp. 83; Mullett v. Mason, L. R. 1 C. P. 559; Smith v. Thompson, 8 C. B. 44.

² See § 43, *ante*.

³ A husband who properly demeans himself is entitled to the society and assistance of his wife against all the world. Whoever deprives him thereof is liable to an action. In estimating damages each case must be determined by the circumstances attending it, and the motive of the intervening person must be ever kept in view. The cases may properly be divided into two classes: One where a villain interferes for the purpose of seduction, or the sole ground of in-

ground that the wrong was wilful or malicious, but on certain considerations which emphasize the distinction between uncertain damages caused by torts and by breaches of contracts generally. Contracts are made only by the mutual consent of the respective parties; and each party for a consideration thereby consents that the other shall have certain rights as against him which he would not otherwise possess. In entering into the contract the parties are supposed to understand its legal effect, and consequently the limitations which the law for the sake of certainty has fixed for the recovery of damages for its breach. If not satisfied with the risk which these rules impose the parties may decline to contract or may fix their own rule of damages, when in their nature the amount must be uncertain. Hence when suit is brought upon such contract and it is found that the entire damages actually sustained cannot be recovered without a violation of such rules, the deficiency is a loss the risk of which the party voluntarily assumed on entering into the contract for the chance of benefit or advantage which it would have given him in case of performance. His position is one in which he has voluntarily placed himself and in which, but for his own consent, he could not have been placed by the wrongful act of the opposite party alone. Again, in a majority of cases upon contract there is little difficulty from the nature of the subject in finding a rule by which substantial compensation may be readily estimated; and it is only in those cases where this cannot be done and where, from the nature of the stipulations or the subject-matter, the actual damages resulting from a breach are [162] more or less uncertain in their nature or difficult to be

interference is malice; the other where friends, usually parents, interfere for the protection of the wife and the offspring, if any. In the first class the husband, if without fault, is always entitled to damages; in the latter, if the motive of the intervening person was pure, and the appearances seemed to indicate necessity for interference, there can be no recovery, though no occasion for interference really existed. Much will be forgiven

the parents of a wife who honestly interfere in her behalf, though the interference was wholly unnecessary and may have been detrimental to her interest and happiness as well as that of her husband; still, where the motive is not protection of the wife, but hatred and ill-will of the husband, it is no answer to his action for such interference that the offenders were his wife's parents. *Holtz v. Dic.*, 42 Ohio St. 23, per Okey, J.

shown with accuracy by the evidence under any definite rule, that there can be any great failure of justice by adhering to such rule as will most nearly approximate to the desired result. And it is precisely in these classes of cases that the parties have it in their power to protect themselves against any loss to arise from such uncertainty by estimating their own damages in the contract itself, and providing for themselves the rules by which the amount shall be measured in case of a breach; and if they neglect this they may be presumed to have assented to such damages as may be measured by the rules which the law, for the sake of certainty, has adopted. None of these considerations have any bearing in an action purely of tort. The injured party has consented to enter into no relation to the wrong-doer by which any hazard of loss should be incurred; nor has he received any consideration or chance of benefit or advantage for the assumption of such hazard; nor has the wrong-doer given any consideration or assumed any risk in consequence of any act or consent of his. The injured party has had no opportunity to protect himself by contract against any uncertainty in the estimate of damages; no act of his has contributed to the injury; he has yielded nothing by consent; and, least of all, has he consented that the wrong-doer might take or injure his property or deprive him of his right for such sum as, by the strict rules which the law has established for the measurement of damages in actions upon contract, he may be able to show with certainty he has sustained by such taking or injury. Especially would it be unjust to presume such consent and to hold him to the recovery of such damages only as may be measured with certainty by fixed and definite rules when the case is one which, from its very nature, affords no elements of certainty by which the loss he has actually suffered can be shown with accuracy by any evidence of which the case is susceptible. Nor is he to blame because the case happens to be one of this character. He has had no choice, no selection. The nature of the case is such as the wrong-doer has chosen to make it; and upon every consideration of justice he is the party who should be made to sustain all the risk of loss which may arise from the uncertainty pertaining to the nature of the case and the difficulty

[163] of accurately estimating the results of his own wrongful act.¹

§ 101. How motive affects consequences of confusion of goods. In case of a wrongful confusion of goods, that is, where one fraudulently or wrongfully intermixes his money, corn or hay with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting pot or crucible, the law, to guard against fraud, allowed no remedy in such case according to the older authorities, but gave the entire property without any account to him whose original dominion was invaded.² There is a tendency in the later adjudications, however, to confine the forfeiture to cases where otherwise the innocent owner of property so mixed cannot be adequately protected. It accords with the preceding views to charge the party whose fraudulent or tortious act caused the confusion with the duty of separating and identifying his own and with any loss resulting from his inability to do so. And greater loss cannot properly be charged to him for the purpose of compensation. A person is not damnified by mixing his property in a mass, if from it he can withdraw what will be substantially and to all intents and purposes identical with it; and where a man can obtain all that he is entitled to, in order to be in full enjoyment of his own, the law should not bestow on him the property of another.³ A reasonable rule, which has much authority

¹ Per Christiancy, J., in *Allison v. Johns*, Ch. 62; *Roth v. Wells*, 29 N. Chandler, 11 Mich. 552; *Sharon v. Mosher*, 17 Barb. 518; *Guille v. Swan*, 19 Johns. 381; *Cate v. Cate*, 50 N. H. 144.

² 2 Black. Com. 404; *Warde v. Eyre*, 2 Bulst. 323; *Ryder v. Hathaway*, 21 Pick. 298; *Willard v. Rice*, 11 Met. 493; *Hesseltine v. Stockwell*, 30 Me. 237; *Stephenson v. Little*, 10 Mich. 433; *Clafin v. Continental Jersey Works*, 85 Ga. 27; 11 S. E. Rep. 721; *First Nat. Bank v. Schween*, 127 Ill. 573; *Franklin v. Gumersell*, 9 Mo. App. 84.

³ Per Campbell, J., in *Stephenson v. Little*, *supra*; *Hart v. Ten Eyck*, 2

Johns, Ch. 62; *Roth v. Wells*, 29 N. Y. 486; *Frost v. Willard*, 9 Barb. 440; *Nowlen v. Colt*, 6 Hill, 461; *Samson v. Rose*, 65 N. Y. 411; *Brackenridge v. Holland*, 2 Blackf. 377; *Ringgold v. Ringgold*, 1 Har. & Gill, 11; *Bryant v. Ware*, 30 Me. 295; *Hesseltine v. Stockwell*, id. 237; *Dillingham v. Smith*, id. 370; *Stearns v. Raymond*, 26 Wis. 74; *Single v. Barnard*, 29 id. 463; *Morgan v. Gregg*, 46 Barb. 183; *Schulenburg v. Harriman*, 2 Dill. 398; S. C., 21 Wall. 44; *The Distilled Spirits*, 11 Wall. 856; *Robinson v. Holt*, 39 N. H. 557; *Stuart v. Phelps*, 39 Iowa, 14; *Moore v. Bowman*, 47 N. H. 494; *Seavy v. Dearborn*, 19 id.

to support it, is that one who has confused his own property with that of other persons shall lose it when there is a concurrence of these two things: first, that he has fraudulently caused the confusion; and second, that the rights of the other party after the confusion are not capable otherwise of complete protection.¹ But the principle of forfeiture, except when necessary to save the rights of the innocent owner, if there has been a fraudulent admixture, cannot be said to be eliminated from our jurisprudence.² It is a doctrine to prevent fraud.³

§ 102. Where property sued for improved by wrong-doer. In another class of cases, closely analogous to those relating to confusion of goods, where a tortious taker of property has by his labor enhanced its value, the owner's title not being divested, the latter may retake the same subject to certain limitations in its improved condition.⁴ He is precluded

851; Walcott v. Keith, 22 id. 196; Wilson v. Lane, 83 id. 466; Gilman v. Hill, 36 id. 811; Massachusetts L. Ins. Co. v. Carpenter, 2 Sweeney (N. Y.), 734; Goodenow v. Snyder, 8 G. Greene, 599; Wood v. Fales, 24 Pa. St. 246; Wooley v. Campbell, 87 N. J. L. 163; Bond v. Ward, 7 Mass. 123; Smith v. Sanborn, 6 Gray, 184; Armstrong v. McAlpin, 18 Ohio St. 184; Holbrook v. Hyde, 1 Vt. 286; Treat v. Barber, 7 Conn. 274; Tufts v. McClintock, 28 Me. 424; Colwill v. Reeves, 2 Camp. 575; Albee v. Webster, 16 N. H. 362; Weil v. Silverstone, 6 Bush, 698; Wellington v. Sedgwick, 12 Cal. 469; Sawyer v. Merrill, 6 Pick. 478; Shumway v. Rutter, 8 Pick. 448; Ames v. Mississippi Boom Co., 8 Minn. 467; Bartlett v. Hamilton, 46 Me. 435; Leonard v. Belknap, 47 Vt. 602; Wyly v. Burnett, 48 Ga. 438; Griffith v. Bogardus, 14 Cal. 410; Beach v. Forsyth, 14 Barb. 499; Frey v. Demarest, 16 N. J. Eq. 236; Elmer v. Loper, 25 id. 475; Alley v. Adams, 44 Ala. 609; Adams v. Wildes, 107 Mass. 123; Cochran v. Flint, 57 N. H. 514; Gray v. Parker, 38 Mo. 160; Fowler v. Hoffman, 31 Mich. 215;

Fellows v. Mitchel, 1 P. Wms. 81; Taylor v. Plumer, 8 M. & S. 562; 2 Kent's Com. 365.

¹ Id.

² Ryder v. Hathaway, 21 Pick. 298; The Idaho, 98 U. S. 575; Jenkins v. Steanka, 19 Wis. 126; Root v. Bonnema, 22 Wis. 539; Stephenson v. Little, 10 Mich. 433; Johnson v. Ballou, 25 Mich. 460; Willard v. Rice, 11 Met. 493; Lupton v. White, 15 Ves. 442; Wingate v. Smith, 20 Me. 287; Low v. Martin, 18 Ill. 286; Dole v. Olmstead, 86 Ill. 150; Loomis v. Greer, 7 Me. 386; McDowell v. Risell, 37 Pa. St. 164; Beach v. Schmultz, 20 Ill. 185; Jewett v. Dringer, 80 N. J. Eq. 291; Wooley v. Campbell, 87 N. J. L. 163; Claflin v. Continental Jersey Works, 85 Ga. 27; 11 S. E. Rep. 721; First Nat. Bank v. Schween, 127 Ill. 578; Franklin v. Gumersell, 9 Mo. App. 84.

³ Wooley v. Campbell, *supra*.

⁴ Final v. Backus, 18 Mich. 218; Brown v. Sax, 7 Cow. 95; Bennett v. Thompson, 18 Ired. L. 146; Rice v. Hollenbeck, 19 Barb. 664; Pierrepont v. Barnard, 5 id. 364; Smith v. Gonder, 22 Ga. 353; Curtis v. Groat, 6

[165] from exercising this right when property so taken has lost its identity. But the change which will be deemed to destroy identity where the wrong-doer took the property in good faith, supposing it to be his own, or through some other mistake or inadvertence, will not so destroy it as to determine the owner's title and put him to his action for damages, where the taking was an intentional wrong. While the authorities are in great confusion on this subject, there is a manifest discrimination against the wilful wrong-doer. By the civil law and the common law alike, the owner of the original materials is precluded from following and reclaiming the property after it has undergone a transmutation which converts it into an article substantially different,¹ as by making wine out of another's grapes, oil from his olives, or bread from his wheat; but the product belongs to the new operator who is only to make satisfaction to the former proprietor for the materials converted.² And a very large increase in the value of the property by labor has been held to have the same effect in favor of such an involuntary wrong-doer.³ The law allows him in such cases to make title by his own wrong, it not being wilful, to prevent his suffering the loss of his labor; and not because of the supposed impossibility of tracing the original materials into the more valuable property made therefrom. The authorities, however, are so much in conflict that no test can be deduced from them by which it can be determined what change will suffice to destroy the identity of property so as to prevent the owner from retaking it. It is not enough that trees are converted into saw logs or timber;⁴ into rails or [166] posts;⁵ into railroad ties, staves or fire wood;⁶ into

Johns. 168; Halleck v. Mixer, 16 Cal. 574; Moody v. Whitney, 34 Me. 563; Betts v. Lee, 5 Johns. 348; Chandler v. Edson, 9 id. 362; Riddle v. Driver, 12 Ala. 590; Hyde v. Cookson, 21 Barb. 92; Dunn v. Oneal, 1 Sneed, 106; Silsbury v. McCoon, 3 N. Y. 879.

¹ 2 Bl. Com. 404.

² Id.; Wetherbee v. Green, 22 Mich. 311; Forsyth v. Wells, 41 Pa. St. 291; Swift v. Barnum, 23 Conn. 523.

³ Wetherbee v. Green, *supra*.

⁴ Pierrepont v. Barnard, 5 Barb. 364; Symes v. Oliver, 18 Mich. 9; Grant v. Smith, 26 id. 201; Gates v. Rifle Boom Co., 70 id. 309; Arpin v. Burch, 68 Wis. 619.

⁵ Snyder v. Vaux, 2 Rawle, 423; Millar v. Humphries, 2 A. K. Marsh. 446.

⁶ Smith v. Gonder, 22 Ga. 353; Heard v. James, 49 Miss. 236; Brewer v. Fleming, 51 Pa. St. 102; Moody v. Whitney, 34 Me. 563.

shingles;¹ that saw logs are made into boards² or fire wood,³ or into coal.⁴

§ 103. **Same subject.** There is not the same difficulty [167] under the authorities in determining when the identity of the

¹ *Betts v. Lee*, 5 Johns. 348; *Chandler v. Edson*, 9 id. 362.

² *Brown v. Sax*, 7 Cow. 95; *Baker v. Wheeler*, 8 Wend. 505; *Davis v. Easley*, 13 Ill. 192.

³ *Eastman v. Harris*, 4 La. Ann. 198.

⁴ *Riddle v. Driver*, 12 Ala. 590; *Curtis v. Groat*, 6 Johns. 168.

In *Silsbury v. McCoon*, 3 N. Y. 386, *Ruggles, J.*, said: "In one case (5 Hen. 7, fol. 15) it is said that the owner may reclaim the goods so long as they may be known, or, in other words, ascertained by inspection. But this, in many cases, is by no means the best evidence of identity; and the examples put by way of illustration serve rather to disprove than to establish the rule. The court say that if grain be made into malt it cannot be reclaimed by the owner because it cannot be known. But if cloth be made into a coat, a tree into squared timber, or iron into a tool, it may. Now, as to the cases of the coat and the timber, they may or may not be capable of identification by the senses merely; and the rule is entirely uncertain in its application; and as to the iron tool, it certainly cannot be identified as made of the original material, without other evidence. This illustration, therefore, contradicts the rule. In another case (*Moore's Rep.* 20) trees were made into timber, and it was adjudged that the owner of the trees might reclaim the timber, 'because the greater part of the substance remained.' But if this were the true criterion it would embrace the cases of wheat made into bread, milk into cheese, grain into malt, and others which are put in the books as examples of a

change of identity. Other writers say that when the thing is so changed that it cannot be reduced from its new form to its former state its identity is gone. But this would include many cases in which it has been said by the courts that the identity is not gone; as the cases of leather made into a garment, logs made into lumber or boards, cloth into a coat, etc. There is therefore no definite settled rule on this question. . . . There is no satisfactory reason why the wrongful conversion of the original materials into an article of a different name or a different species should work a transfer of the title from the true owner to the trespasser, provided the real identity of the thing can be traced by evidence. The difficulty of proving the identity is not a good reason. It relates merely to the convenience of the remedy, and not at all to the right. There is no more difficulty or uncertainty in proving that the whisky in question was made of Wood's corn than there would have been in proving that the plaintiff had made a cup of his gold, or a tool of his iron; and yet, in those instances, according to the English cases, the proof would have been unobjectionable. In all cases where the new product cannot be identified by mere inspection the original materials must be traced by the testimony of witnesses from hand to hand through the process of transformation."

Cooley, J., in *Wetherbee v. Green*, 22 Mich. 811, said of making out the identity by the senses, that it is obviously a very unsatisfactory test, and in many cases would wholly de-

property is lost where the tortious taking and conversion were fraudulent. In such a case it is well settled in New York that the wrong-doer is not permitted to acquire property in the goods of another by any change wrought in them by his labor or skill however great the change may be, provided it [168] can be proven that the improved article was made from the original material.¹ The action was trover in which this

feat the purpose which the law has in view in recognizing a change of title in any of these cases. That purpose is not to establish any arbitrary distinctions, based upon mere physical reasons, but to adjust the redress afforded to the one party, and the penalty inflicted upon the other, as near as circumstances will permit, to the rules of substantial justice. It may often happen that no difficulty may be experienced in determining the identity of a piece of timber which has been taken and built into a house; but no one disputes that the right of the original owner is gone in such a case. A particular piece of wood might perhaps be traced without trouble into a church organ or other equally valuable article; but no one would defend a rule of law which, because the identity could be determined by the senses, would permit the owner of the wood to appropriate a musical instrument, a hundred or a thousand times the value of the original materials, when the party who, under like circumstances, has doubled the value of another man's corn by converting it into malt is permitted to retain it and held liable for the original value only. Such distinctions in the law would be without reason, and could not be tolerated. When the right to the improved article is the point in issue, the question, how much the property or labor of each has contributed to make it what it is, must always be one of first importance.

The owner of a beam built into the house of another loses his property in it because the beam is insignificant in value or importance as compared to that to which it has become attached, and the musical instrument belongs to the maker rather than to the man whose timber was used in making it,—not because the timber cannot be identified, but because in bringing it to its present condition the value of the labor has swallowed up and rendered insignificant the value of the original materials. The labor, in the case of the musical instrument, is just as much the principal thing as the house is in the other case instanced; the timber appropriated is in each case comparatively unimportant. No test which satisfies the reason of the law can be applied in the adjustment of the question of title to chattels by accession, unless it keeps in view the circumstance of relative values. When we bear in mind the fact that what the law aims at is the accomplishment of substantial equity, we shall readily perceive that the fact of the value of the materials having been increased a hundred fold is of more importance in the adjustment than any chemical change or mechanical transformation which, however radical, neither is expensive to the party making it nor adds materially to the value." See *Silbury v. McCoon*, 4 Denio, 832; *Herdic v. Young*, 55 Pa. St. 176; *Single v. Schneider*, 30 Wis. 570.

¹ *Silbury v. McCoon*, *supra*; *Baker*

doctrine was first held, and the value of whisky was recovered by the owner of the corn from which it was made. There is a general inclination elsewhere to find some middle ground upon which the rights of the owner may be maintained, and yet moderate and adjust the consequences of even a wilful trespass more nearly to the standard of compensation, especially where there is not an actual taking of the property and the owner by choice or otherwise seeks to recover the value in damages.¹ And if an actual retaking is impossible or [169] does not take place, and the question is one of mere compensation for the property, the law is not quite settled that the improved value may be recovered even of the party who in-

v. Hart, 52 Hun, 368; Guckenheimer v. Angevine, 81 N. Y. 394. See Silsbury v. McCoon, 6 Hill, 425; 4 Denio, 332; Hyde v. Cookson, 21 Barb. 92.

¹In *Single v. Schneider*, 24 Wis. 301, Paine, J., said: "There is proof tending to show a mistake as to a part (of the timber tortiously cut by defendants on the plaintiff's land). . . . They are not to be regarded, therefore, as wilful trespassers. Upon these facts it seems contrary to the dictates of natural justice that the plaintiff should be allowed to wait quietly until the defendants had manufactured the logs into lumber, enhancing their value four or five fold, and then recover against them that entire value. True, it is generally recognized that a wrong-doer cannot by the change of another's property change the title. The owner may pursue it and reclaim it specifically by whatever remedy the law gives him for that purpose. If he gets it, it is his. But the apparent injustice of allowing one to avail himself of the labor and money of another, in cases similar to this, has led to a modification of this stringent rule of ownership, wherever the question is resolved into one of mere compensation in money for whatever injury the party may have suffered." This

case came before the court again (30 Wis. 570), when it appeared and was found by the jury that a part of the logs sued for in the action, which was replevin, were cut wilfully, and Cole, J., said: "The counsel for the defendant contends that, so far as the measure of damages is concerned, it is quite immaterial whether the logs were cut intentionally or through mistake; that the damages given in law as compensation for an injury should be precisely commensurate with the injury, neither more nor less; and that the plaintiff is not entitled to recover the value of the property in its improved state under the circumstances of this case. He concedes that if there was anything tending to show that the trespass was wanton or malicious, committed under circumstances of insult or aggravation, then, upon the authorities, exemplary damages might be allowed in the discretion of the jury, which might exceed or fall below the value of the property enhanced by the labor of the defendants. But he claims that when a person, though intentionally, cuts pine logs upon the wild, unoccupied land of another, to say as a matter of right the owner shall recover the enhanced value of the property manufactured into lum-

tentionally converted it.¹ In such actions the question whether the property has so changed as to be no longer capable of identification is not important. The wrong-doer who has taken and converted another's property through mistake is chargeable with its value at the time of conversion; and the wilful wrong-doer by that standard, or the value at some intermediate point, or the final value of the improved article, according to the views of the particular court.² The liability of the innocent purchaser of property from a wilful trespasser whose labor has improved it is the value of the property when it

ber or into the most expensive furniture is a rule contrary to the principles of natural justice, and not in accordance with the doctrine of the common law. We are inclined to adopt this view of the matter, although we are aware that by so doing we lay down a rule in conflict with some adjudications which may be found. But it seems to us that if the owner is entirely indemnified for the injury he has sustained, it is quite immaterial whether the logs were cut by mistake or intentionally, unless in the latter case the trespass was of such a character as to make the doctrine of exemplary damages applicable. This was the view expressed by Mr. Justice Paine in *Weymouth v. Chicago & N. R. Co.*, 17 Wis. 550-555, and it seems to us that it is consonant with sound principle and natural justice. It is true that was an action of trover and this is an action of replevin. But here the defendants gave the undertaking under the statute and retained possession of the property. The judgment was in the alternative for the delivery of the property to the plaintiff, in case delivery could be had, or for its value. The plaintiff does not really expect to recover the specific property, and therefore there is no valid reason for a distinction between this case and that of trover, as regards the rule of

damages; it should be the same in both cases." He restates with approbation the views of Bronson, C. J., in *Silbury v. McCoon*, 4 Denio, 332. *Herdic v. Young*, 55 Pa. St. 176.

¹Id.; *Moody v. Whitney*, 34 Me. 563; *Reid v. Fairbanks*, 14 C. B. 729; *Cushing v. Longfellow*, 26 Me. 306.

If the owner brings trespass or trover instead of replevin he elects to take damages according to the measure awarded in such actions — a just and fair compensation for his property as it was before the trespass. *Gates v. Rifle Boom Co.*, 70 Mich. 309.

²*Martin v. Porter*, 5 M. & W. 851; *Morgan v. Powell*, 3 Q. B. 278; *Llynvi Co. v. Brogden*, L. R. 11 Eq. 188; *Maye v. Tappan*, 23 Cal. 306; *Goller v. Fett*, 30 Cal. 481; *Nesbitt v. St. Paul L. Co.*, 21 Minn. 491; *Foote v. Merrill*, 54 N. H. 490; *Adams v. Blodgett*, 47 N. H. 219; *Dresser Manuf. Co. v. Waterston*, 3 Met. 9; *Stockbridge Iron Co. v. Cone Iron Works*, 102 Mass. 80; *Winchester v. Craig*, 33 Mich. 205; *Bennett v. Thompson*, 13 Ired. 146; *Smith v. Gonder*, 22 Ga. 853; *Wood v. Morewood*, 3 Q. B. 440, note; *Hyde v. Cookson*, 21 Barb. 92; *Heard v. James*, 49 Miss. 239; *Riddle v. Driver*, 12 Ala. 590; *Greeley v. Stilson*, 27 Mich. 153. See *Isle Royale M. C. Co. v. Horton*, 37 Mich. 332.

was taken from the original owner. The defendant in such a case is not the proper subject of punishment; the plaintiff's loss is no greater than it would have been if the trespasser had been free from intentional wrong; nor is the defendant's culpability increased thereby.¹ To allow the owner of the original materials to recover the value increased by the [170] subsequent labor of the wrong-doer is to antagonize two fundamental rights: the right of property, and the right to due compensation for injury. The law gives its sanction to the former by allowing the owner to retake his property by his own act or by the legal process of replevin if it still exists and can be found. Certain changes made in it or its annexation to something else which the law regards as the principal, as to certain wrong-doers at least, have been accepted as putting an end to the owner's right to retake the property though it may in fact exist, or what was obtained from or for it is still in the hands of the wrong-doer and ascertainable by testimony. There is no more necessity for severe consequences to discourage trespass or tortious conversion of property which the wrong-doer improves than where he destroys it or retains it in the same condition. The owner is entitled to no greater measure of reparation in the one case than in the other. The wrong-doer is no more culpable when he improves the property than when he does not. Therefore, since there is a recognized though indefinite limit to the owner's right to reclaim his property with

¹ *Railroad Co. v. Hutchins*, 37 Ohio St. 282; S. C., 32 id. 571.

And if he purchases part only of the property converted his liability is limited to the value of such part. *Moody v. Whitney*, 84 Me. 563.

Where minerals are mined fraudulently the trespasser is liable for their value after they are severed from the earth, without any deduction for the expense of mining. *Martin v. Porter*, 5 M. & W. 351; *Barton Coal Co. v. Cox*, 39 Md. 1; *Coleman's Appeal*, 62 Pa. St. 252; *Ege v. Kille*, 84 id. 383; the last two cases are distinguished and limited in *Fulmer's Appeal*, 128 id. 24. If the mining is done inadvertently or under a bona

fide belief of right the damages are the fair value of the mineral as if the mine had been purchased. *Wood v. Morewood*, 3 Q. B. 440, note; *Hilton v. Woods*, L. R. 4 Eq. 433; *Forsyth v. Wells*, 41 Pa. St. 291. In an action between tenants in common, plaintiff being out of, and defendant in, possession, the damages for working an opened and developed mine are the fair marketable value of the mineral in place — the royalty due for the privilege of removing and manufacturing it in view of all the special circumstances. *Fulmer's Appeal*, 128 Pa. St. 24; *Neel's Appeal*, 3 Penny. (Pa.) 66.

any accession, and this limit is short of the ultimate point to which testimony would enable him to trace it, there is no more violation of the fundamental right of property by fixing that limit at the point of the first change than at any subsequent one. But when the redress which is given to the owner in his suit is the value or damages to compensate him for the wrong of depriving him of his property, the question is not one of allowing him to retake it, but solely of compensation for the loss of it. What is due compensation in such a case is to be ascertained on the same principles as in all other cases: the injured party is to be made good for the loss he has sustained. If his corn has been taken he is to be compensated for corn; he is no more entitled to have its value estimated by the amount of whisky which has been than by the amount of whisky that can be made from it, with no deduction for the manufacture, or than by the amount the defendant has subsequently sold it for in consequence of the general appreciation of the commodity.¹

¹ *Railroad Co. v. Hutchins*, 37 Ohio St. 282, 294. The language of Bronson, C. J., in the reversed case in New York (*Silsbury v. McCoon*, 4 Denio, 836, 837), is replete with good sense and sound judgment. He says: "The question is not, as it has been sometimes artfully put, whether the common law will allow the owner to be unjustly deprived of his property, or will give encouragement to a wilful trespasser. It will do neither. But in protecting the owner and punishing the wrong-doer, our law gives such rules as are capable of practical application, and are best calculated to render exact justice to both parties. The proper inquiry is, in what manner, and to what extent, should the trespasser be punished; and what should be the kind and measure of redress to the injured party. A trespasser who takes iron ore and converts it into watch springs should not be hanged; nor should he lose the whole of the

new product. Either punishment would be too great. Nor should the owner of the ore have the watch springs; for it would be more than a just measure of redress. Our law has, therefore, wisely provided other remedies and punishments. The owner may retake his ore, either with or without process, so long as its identity remains; and may also recover damages for the tortious taking. Or, without repossessing himself of the property, he may have an action of trespass in which the jury will not fail to give the proper damages. But the law will not allow the owner to wait until the ore has been converted into different species of property and then seize the new product, either with or without process. Nor is the value of the new product the measure of damages, if he bring an action of trespass or trover. Although there will not be many cases where the difference between the value of the rude material and the

§ 104. **Distinctions in the matter of proof.** In [172] cases of tort the principles governing the measurement of compensation are not, as a general thing, different from those which apply in actions upon contract if the tort be not wilful; there are, as we have just seen, some exceptions; and in certain cases within the influence of considerations mentioned in a preceding section,¹ where the injury is of such a nature or committed under such circumstances that the damages, or some part of them, cannot be ascertained by any definite or certain proof, the investigation is conducted by such rules in respect to the quantity, quality and burden of proof that the injured party may suffer no irreparable loss from the stealth, secrecy or complexity of the wrong. The purpose of the law is thus facilitated. Lord Brougham interrogatively expressed it:² "When did a court of justice, whether administered according to the rules of equity or law, ever listen to a wrongdoer's argument to stay the arm of justice grounded on the steps he himself had successfully taken to prevent his iniquity from being traced? Rather, let me ask, when did any wrongdoer ever yet possess the hardihood to plead in aid of his escape from justice the extreme difficulties he had contrived to throw in the way of pursuit and detection, saying, you had better not make the attempt, for you will find I have made the search very troublesome. The answer is, 'the court will try.'" The intrinsic nature of many wrongs precludes any estimate by witnesses of damages upon the items which a jury may consider, such as bodily or mental pain, disfigurement or impaired faculties; but the jury in many cases involving elements of this nature may be aided by proof of extrinsic facts showing the *status* of the injured party. Either a tort or a

new product will be so striking as in the case which has been mentioned, yet, in almost every instance where the chattel has been converted into a different species of property, the value of the new product will be more than the trespasser ought to pay or the owner of the chattel ought to receive. . . . As an original question, I think the owner should either reclaim the property before the new

possessor has greatly increased its value, either by bestowing his labor and skill upon it, or by joining it to other materials of his own; or else that he should be restricted to a remedy by action for the damages which he has sustained."

¹ *Ante*, § 100.

² In *Docker v. Somes*, 2 Myl. & K. 674.

breach of contract which destroys or injures anything of a lawful nature belonging to another is a wrong and injury for which, in some reasonable and practicable manner, the law will enable the injured party to measure and recover adequate compensation. Any such act which directly and injuriously affects an established business, as by destruction of the building in which it is conducted; obstructing the approaches necessary to it; fraudulently diverting custom where there was a duty to maintain the good will; by enticing away servants, or by slander or the breach of any agreement of which the profits of a business are the consideration or inducement, may require the estimate of a very uncertain loss; but the party whose misconduct or default has necessitated the inquiry cannot object to it on the ground of the uncertainty, though a court will, in such a case, proceed with caution and will not award damages upon mere conjecture.

§ 105. **Value of property.** The value of property constitutes the measure or an element of damages in a great variety of cases both of tort and of contract; and where there are no such aggravations as call for or justify exemplary damages, in actions in which such damages are recoverable, the value is ascertained and adopted as the measure of compensation for being deprived of the property the same in actions of tort as in those upon contract. In both cases the value is the legal and fixed measure of damages, and there is no discretion with the jury. It is so between vendor and vendee on the failure of either to fulfill a contract of sale and purchase; between employer and employee on a contract for the manufacture of specific articles; where there is a departure from instructions by an agent or a loss through his negligence or misconduct, or that of a bailee or trustee; as well as where there is a tortious taking or conversion by one standing in no contract relation to the owner. And, moreover, the value is fixed in each instance on similar considerations at the time when, by [174] the defendant's fault, the loss culminates.¹ And a party

¹ *Bank of Montgomery v. Reese*, 26 N. H. 79; *Pinkerton v. Manchester* Pa. St. 148; *Owen v. Routh*, 14 C. B. & L. R. Co., 42 N. H. 424; *Bull v.* 327; *Day v. Perkins*, 2 Sandf. Ch. Douglas, 4 Munf. 303; *Enders v.* 359; *Shaw v. Holland*, 15 M. & W. Board of Public Works, 1 Gratt. 384; 136; *Rand v. White Mts. R. Co.*, 40 Dana v. Fiedler, 12 N. Y. 48; *Clement*

who is entitled to recover and must accept its value in place of the property itself should always be allowed interest on that value from the date at which the property was lost or destroyed or converted. Whether he recovers the value for the failure of a vendor or bailee to deliver; or by reason of the destruction, asportation or conversion of the property by a wrong-doer, interest is as necessary to a complete indemnity as the value itself.¹ The injured party ought to be put in the same condition, so far as money can do it, in which he would have been if the contract had been fulfilled or the tort had not been committed, or the loss had been instantly repaired when compensation was due.²

& H. Manuf. Co. v. Meserole, 107 Mass. 362; Danforth v. Walker, 37 Vt. 239; Girard v. Taggart, 5 S. & R. 19, 539; Ganson v. Madigan, 13 Wis. 67; Hale v. Trout, 35 Cal. 229; Springer v. Berry, 47 Me. 330; Dustan v. McAndrew, 44 N. Y. 72; Marshall v. Piles, 3 Bush, 249; Camp v. Hamlin, 55 Ga. 259; Bozeman v. Rose, 40 Ala. 212; Grand Tower Co. v. Phillips, 23 Wall. 471; Underhill v. Gaff, 48 Ill. 198; Bicknall v. Waterman, 5 R. L. 43; West v. Pritchard, 19 Conn. 212; Gregg v. Fitzhugh, 36 Tex. 127; Bush v. Holmes, 53 Me. 417; Rider v. Kelley, 82 Vt. 268; Kribs v. Jones, 44 Md. 396; Moorehead v. Hyde, 38 Iowa, 382; Whitesett v. Forehand, 79 N. C. 230; Bell v. Cunningham, 3 Pet. 69; Farwell v. Price, 30 Mo. 587; Schmertz v. Dwyer, 53 Pa. St. 335; Heinnemann v. Heard, 51 N. Y. 27; Hancock v. Gomez, id. 668; Parsons v. Martin, 11 Gray, 111; Scott v. Rogers, 81 N. Y. 676; Stearine, etc. Co. v. Heintzmann, 17 C. B. (N. S.) 56; Hutchings v. Ladd, 16 Mich. 494; Suydam v. Jenkins, 3 Sandf. 641; Kennedy v. Whitwell, 4

Pick. 466; Adams v. Sullivan, 100 Ind. 8.

In Ingram v. Rankin, 47 Wis. 406, the court say: "The rule fixing the measure of damages in actions for breaches of contract for the delivery of chattels, and in all actions for the wrongful and unlawful taking of chattels, whether such as would formerly have been denominated *trespass de bonis* or *trover*, at the value of the chattels at the time when delivery ought to have been made, or at the taking or conversion, with interest, is certainly founded upon principle. It harmonizes with the rule which restricts the plaintiff to compensation for his loss, and is as just and equitable as any other general rule which the courts have been able to prescribe, and has greatly the advantage of certainty over all others."

¹ Chapman v. Chicago, etc. R. Co., 26 Wis. 295; McCormick v. Pennsylvania C. R. Co., 49 N. Y. 303; Hamer v. Hathaway, 33 Cal. 117; Arpin v. Burch, 68 Wis. 619.

²Suydam v. Jenkins, 3 Sandf. 620.

CHAPTER IV.

ENTIRETY OF CAUSES OF ACTION AND DAMAGES.

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SECTION 1.

GENERAL PRINCIPLES.

§ 106. Cause of action not divisible. A cause of ac- [175] tion and the damages recoverable therefor are an entirety. The party injured must be plaintiff, by the common law, and must demand all the damages he has suffered or which he will suffer from the injury, grievance or cause of action of which he complains. He cannot split a cause of action and bring successive suits for parts because he may not be able at first to prove all the items of the demand, or because all the damages have not been suffered. If he attempt to do so a recovery in the first suit, though for less than his whole demand, will be a bar to a second action.¹

¹Baird v. United States, 96 U. S. 430; Zirker v. Hughes, 77 Cal. 285; Colvin v. Corwin, 15 Wend. 557; Miller v. Covert, 1 Wend. 487; Wagner v. Jacoby, 26 Mo. 582; Smith v. Jones, 15 Johns. 229; Butler v. Wright, 2 Wend. 369; Cornell v. Cook, 7 Cow. 310; Brazier v. Banning, 20 Pa. St. 345; Ross v. Weber, 26 Ill. 221; Logan v. Caffrey, 30 Pa. St. 196; Mason v. Alabama Iron Co., 73 Ala. 270; Howard College v. Turner, 71 id. 429; Richardson v. Eagle M. Works, 78 Ind. 422; North Vernon v. Voegler, 103 id. 314, quoting the text; Wichita & W. R. Co. v. Beebe, 39 Kan. 465.

Various tests have been suggested for determining whether the judgment recovered in one action is a bar to a subsequent action. "The principal consideration is whether it be precisely the same cause of action in both, appearing by proper averments in a plea, or by proper facts stated in a special verdict or a special case. And one great criterion of this identity is that the same evidence will maintain both actions." Kitchen v. Campbell, 2 W. Bl. 827; Martin v. Kennedy, 2 B. & P. 69, 71; Brunsden

v. Humphrey, 14 Q. B. Div. 141. "The question is not whether the sum demanded might have been recovered in the former action, the only inquiry is whether the same cause of action has been litigated and considered in the former action." Seddon v. Tutop, 6 T. R. 607. "Though a declaration contain counts under which the plaintiff's whole claim might have been recovered, yet if no attempt was made to give evidence upon some of the claims, they might be recovered in another action." Thorpe v. Cooper, 5 Bing. 129. "It is evident, therefore, that the application of the rule depends, not upon any technical consideration of the identity of the forms of action, but upon matter of substance." Brunsden v. Humphrey, 14 Q. B. Div. 141. "It is not a test of the right of a plaintiff to maintain separate actions that all the claims might have been prosecuted in a single action." Perry v. Dickerson, 85 N. Y. 345, 350. If different allegations are required in the pleading and different evidence on the hearing, the cause of action is not split. Stark v. Starr, 94 U. S. 477, 485.

§ 107. **Present and future damages.** If one party to a contract prevents the other from performing and thereby earning wages or realizing profits, the latter in an action [176] brought at once after the breach may recover damages which will compensate him for his loss. Although by performance the benefits of the contract would accrue at a future time, yet, upon a breach by which such future advantages will be prevented, the injured party may immediately thereafter recover damages equivalent to the loss, so far as he can prove it. And to facilitate the proof the court will not oblige him to anticipate the future state of the market, but will give the plaintiff the benefit of market rates at the time of the breach. Thus, in the leading case in New York¹ it was argued that inasmuch as the furnishing of the marble would run through a period of five years, of which only about one year and a half had expired at the time of the breach, the benefits which the contractor might have realized from the execution of the contract must be speculative and conjectural; the court and jury having no certain *data* upon which to make the estimate. The court say: "Where the contract . . . is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on the day of the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose and not at the time fixed for full performance."² But the parties are entitled to the benefit of any facts transpiring subsequently to the bringing of the action which show more clearly the gains prevented by the breach of contract complained of, or the damages sustained

¹ Masterton v. Mayor, 7 Hill, 61, 71.

² Wolcott v. Mount, 36 N. J. L. 262; McAndrews v. Tippet, 39 id. 105; Burrell v. New York & C. Co., 14 Mich. 84; Roper v. Johnson, L. R. 8 C. P. 167; Frost v. Knight, L. R. 5 Exch. 325; Sutherland v. Wyer, 67 Me. 64; Dugan v. Anderson, 86 Md. 567; Schell v. Plumb, 55 N. Y. 592; Sibley v. Rider, 54 Me. 463; Fales v. Hemenway, 64 Me. 373; Richmond v. Dubuque, etc. R. Co., 40 Iowa, 264; Tiffin v. Ward, 5 Ore. 450; Howard v. Daly, 61 N. Y. 863; Gifford v. Waters, 67 N. Y. 80; Crabtree v. Hagenbaugh, 25 Ill. 233; James v. Allen County, 44 Ohio St. 226; E. T. etc. R. Co. v. Staub, 7 Lea (Tenn.), 397; Litchenstein v. Brooks, 75 Texas, 196; Kahn v. Kahn, 24 Neb. 202. See McEvoy v. Bock, 37 Minn. 402.

from such a cause of action, or any other, the injurious effects of which extend into the future. This point will receive further elucidation when we come to speak of prospective damages.

§ 108. **What is an entire demand?** The reader's attention is now directed to what constitutes an entire demand or cause of action. Whether a contract be single and entire or [177] apportionable, if there is a total abandonment or breach by one party the other has a single cause of action upon the entire contract if he think proper to act upon the breach as a total one; and the better opinion is that he is obliged to do so. A party has a right to break his contract on condition of being liable for the damages which will accrue therefrom at the time he elects to do so. And it is the duty of the other party when notified thereof to exert himself to make the damages as light as possible.¹

What default a party may treat as a total breach of a contract is not always an easy question, and its solution should be looked for in works upon contracts rather than damages, for it depends upon the interpretation of the contract. Like most other questions of construction it rests upon the intention of the parties and must be discovered in each case by considering the language and the subject-matter of the contract.² If it is single and entire, or to the extent that it is so, it can be the subject of but one action against the defaulting party and the plaintiff must have performed all precedent conditions to place the other in default.³

¹Parker v. Russell, 133 Mass. 74; 12 Cush. 366; Messick v. Dawson, 2 Dillon v. Anderson, 49 N. Y. 231; Harr. (Del.) 50; Folsom v. Clemence, 119 Mass. 473; Brannenburg v. Indianapolis, etc. R. Co., 13 Ind. 103; Hartland v. General Exchange Bank, 14 L. T. (N. S.) 863; Willoughby v. Hutchinson v. Wetmore, 2 Cal. 310; Thomas, 24 Gratt. 522; Polk v. Daly, Camp v. Morgan, 21 Ill. 255; Morgan v. McKee, 77 Pa. St. 228; Casselberry v. Forquer, 27 Ill. 170; Larkin v. 14 Abb. Pr. (N. S.) 156.

²2 Pars. on Cont. 517.

³Id. pp. 517-527; Shinn v. Bodine, 60 Pa. St. 182; Withers v. Reynolds, 2 B. & Ad. 882; Shaw v. Turnpike Co., 2 Pa. 454, Davis v. Maxwell, 12 Met. 286; Harris v. Ligget, 1 W. & S. 301; Hopf v. Meyers, 42 Barb. 270; Crips v. Talvande, 4 McCord, 20; Herriter v. Porter, 23 Cal. 385; Brown v. Smith, 12 Cush. 366; Messick v. Dawson, 2 Harr. (Del.) 50; Folsom v. Clemence, 119 Mass. 473; Brannenburg v. Indianapolis, etc. R. Co., 13 Ind. 103; Hutchinson v. Wetmore, 2 Cal. 310; Camp v. Morgan, 21 Ill. 255; Morgan v. McKee, 77 Pa. St. 228; Casselberry v. Forquer, 27 Ill. 170; Larkin v. Buck, 11 Ohio St. 561; Hall v. Claggett, 2 Md. Ch. 151; White v. Brown, 2 Jones' L. (N. C.) 403; Wagner v. Jacoby, 26 Mo. 582; Walter v. Richardson, 11 Rich. 466; Quigley v. De Haas, 82 Pa. St. 267; Sweeny v. Daugherty, 23 Iowa, 291; Stevens v.

§ 109. Entire demand may be severed. A contract originally entire may be severed afterwards by the parties so as to [178] give a right of action for a part performance.¹ This was the case where there was an entire contract for the delivery of logs, and on delivery of a part the purchaser paid therefor partly in money and gave notes for the residue delivered. It was held that the notes could be collected notwithstanding any default in the delivery of other logs to fulfill the contract, but subject to recoupment of the damages for such breach.² Under an agreement that if the creditor would forbear suing upon the whole of his demand and sue upon a part of it only, and in case of a recovery upon that part the debtor would pay the balance, it was held that such agreement was a waiver of the rule in his favor concerning the division of actions, and that the recovery upon the part sued upon was not a bar to an action upon the balance of the claim.³ So a *quantum meruit* claim may arise for a part performance on account of the benefit derived from it.⁴

§ 110. Contracts to do several things successively or one thing continuously. A contract to do several things at different times is divisible in its nature, and an action will lie upon each default.⁵ A defendant being the keeper of an office for procuring crews of vessels, in consideration of the plaintiff's agreement to furnish such supplies and advances as might be necessary in the business, promised to pay the latter a certain sum for each man shipped and to repay the advances; it was held that the defendant's undertaking was several.⁶ But when a party has distinct demands or existing causes of action growing out of the same contract or resting in matter of account, which may be joined and sued for in the same action,

Lockwood, 13 Wend. 644; Blakeney v. Ferguson, 18 Ark. 847; Pinney v. Barnes, 17 Conn. 420; Farrington v. Payne, 15 Johns. 432; Phillips v. Berick, 16 Johns. 186; Cunningham v. Jones, 20 N. Y. 486; James v. Lawrence, 7 Harr. & J. 73; Shaffer v. Lee, 8 Barb. 412; Campbell v. Hatchett, 55 Ala. 548; Parker v. Russell, 138 Mass. 74.

¹ O'Beirne v. Lloyd, 48 N. Y. 251;

Lee v. Kendall, 56 Hun, 610; Fourth Nat. Bank v. Noonan, 88 Mo. 372.

² Fessler v. Love, 43 Pa. St. 313.

³ Mills v. Garrison, 8 Keyes (N. Y.), 40; Mandeville v. Welch, 5 Wheat. 277, 288; Secor v. Sturgis, 16 N. Y. 548.

⁴ See *ante*, § 90.

⁵ Badger v. Titcomb, 15 Pick. 409; Basler v. Nichols, 8 Ind. 260.

⁶ Badger v. Titcomb, *supra*.

they must be joined; they constitute an entire cause of action or demand; and if they be split up and a suit be brought for a part only, and subsequently a second suit for the residue, the first action if determined on the merits will be a bar.¹ This is not to be carried so far as to bar an action on the contract because judgment has been obtained against the party who failed to perform for a tort resulting from the breach. Claims for a wrongful dismissal from employment and to recover wages earned prior thereto are separate and distinct causes of action. The right to wages is the result of the contract; the right to damages grows out of the wrongful termination of it. The amount due under the contract was definite or ascertainable at the time of its breach, and was then payable; the damages were incapable of exact ascertainment until the period covered by the contract expired, as they might be mitigated by the acts of the plaintiff.²

In an action on a lease which contained distinct cove- [179]nants to pay for manure and for work and labor, the defendant pleaded in abatement that a prior action brought for the breach of certain of the covenants was still pending. Plaintiff replied that the covenants upon which that suit was brought were distinct and different from those involved in the pending action. The defendant's demurrer to this replication was sustained and he obtained judgment.³ It is observed of this ruling that if it is subject to any criticism it is because of its application to the facts involved. It may be inferred from the opinion of Judge Cowen that all the covenants in the lease were for the payment of different amounts of money by the lessee to the lessor; and he seemed to regard it like the case of a contract to pay money in instalments, and in this way reached the conclusion that the different breaches constituted a single cause of action.⁴ A contract which, for an entire consideration, stipulates for the performance of several

¹ *Bendernagle v. Cocks*, 19 Wend. 207; *James v. Lawrence*, 7 Harr. & J. 73; *Atwood v. Norton*, 27 Barb. 638; *Casselberry v. Forquer*, 27 Ill. 170; *Geiser Threshing M. Co. v. Farmer*, 27 Minn. 428; *Bowe v. Minnesota M. Co.*, 44 id. 460.

² *Perry v. Dickerson*, 85 N. Y. 845.

³ *Bendernagle v. Cocks*, 19 Wend. 207. See *Badger v. Titcomb*, 15 Pick. 409; *McIntosh v. Lawn*, 47 Barb. 550.

⁴ *Perry v. Dickerson*, 85 N. Y. 845, 848.

acts for the benefit of the same person at the same time is entire.¹

[180] The principle is settled beyond dispute that a judgment concludes the rights of the parties in respect to the cause of action stated in the pleadings on which it is rendered, whether the suit embraces the whole or only a part of the demand constituting the cause of action. It results from this principle, and the rule is fully established, that an entire claim [181] arising either upon a contract or from a wrong cannot be divided and made the subject of several suits; and if several suits be brought for different parts of such a claim the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits of either will be available as a bar in the others. But it is entire claims only which [182] cannot be divided within this rule: those which are single and indivisible in their nature. The cause of action in the different suits must be the same. The rule does not prevent, nor is there any principle which precludes, the prosecution of several actions upon distinct causes of action. The holder of a number of promissory notes may maintain an ac-[183] tion on each; a party upon whose person or property successive and distinct trespasses have been committed may bring a separate suit for every trespass, and all demands of whatever nature arising out of independent transactions may be sued upon separately. It makes no difference that the causes of action might be united in a single suit; the right of the party in whose favor they exist to separate suits is not affected by that circumstance.² The true distinction between demands or rights of action which are single and entire, and those which are several and distinct, is that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts.³

¹ *Indianapolis, etc. Ry. Co. v. Koons*, 105 Ind. 507. been established and plaintiff has made improvements upon property

² *Secor v. Sturgis*, 16 N. Y. 554, abutting thereon in conformity with overruling *Colvin v. Corwin*, 15 Wend. 557, and disapproving the reasoning in *Guernsey v. Carver*, 8 N. Y. 845. such grade, and subsequently the city provides by ordinance for changing the grade, and in fact alters it from curb to curb, and afterwards adapts the sidewalk to the grade as finally

³ Where the grade of a street has established, an action for changing

Perhaps as simple and safe a test as the subject admits of by which to determine whether the case belongs to one class or the other is by inquiring whether it rests upon one or several acts or agreements. In the case of torts each trespass, conversion or fraud gives a cause of action, and but a single one;¹ in respect to contracts, express or implied, each [184] affords one and only one cause of action. The case of a con-

the sidewalk cannot be maintained after a recovery has been had for cutting down the grade from curb to curb. *Hempstead v. Des Moines*, 63 Iowa, 36; *Stickford v. St. Louis*, 7 Mo. App. 217 (injury to fee of one lot and to leasehold interest with rent of adjoining lot).

If goods are sold on credit at various times each sale is separate and distinct and an independent cause of action arises on the expiration of the agreed period of credit and as the several amounts become due. *Zimmerman v. Erhard*, 83 N. Y. 74.

Where property is purchased in several quantities at different times in the execution of a conspiracy, the damage done to the vendor is the gist of the action, and the cause of it is not single and entire; each purchase is a distinct and several fraud for which a separate action lies. *Lee v. Kendall*, 56 Hun, 610.

Where a train was in motion and a mare and colt were running on the track in front of it, and the colt was struck and killed, and the train after running on five hundred feet struck and killed the mare, the killings were separate and independent acts; causes of action based upon them were necessarily composed of different elements, because while the killing of the colt might have been prevented by the prompt exercise of ordinary care, the last killing was the result of gross negligence. *Missouri P. Ry. Co. v. Scammon*, 41 Kan. 521. See *Bricker v. Missouri P. Ry. Co.*, 83

Mo. 391; *Pucket v. St. Louis, etc. Ry. Co.*, 25 Mo. App. 650.

The seizure on the same day and under the same writ of two distinct lots of animals in different places, though they are owned by the same person, constitutes distinct trespasses. *Millikin v. Smoot*, 71 Texas, 759.

¹ *Munro v. Dredging, etc. Co.*, 84 Cal. 515; *Lee v. Kendall*; *Secor v. Sturgis*, *supra*; *Binicker v. Hannibal, etc. R. Co.*, 83 Mo. 660; *Steiglider v. Missouri P. Ry. Co.*, 38 Mo. App. 511; *Knowlton v. New York, etc. R. Co.*, 147 Mass. 606; *Brannenburg v. Indianapolis, etc. R. Co.*, 13 Ind. 103; *Hicenbotham v. Lowenbein*, 6 Robt. 557; *Marble v. Keyes*, 9 Gray, 221; *Eastman v. Cooper*, 15 Pick. 276; *Bennett v. Hood*, 1 Allen, 47; *Trask v. Hartford, etc. R. Co.*, 2 Allen, 381; *Doty v. Brown*, 4 N. Y. 71.

But one cause of action arises from the conversion of various chattels at the same time; after judgment for the plaintiff for some of those converted an action cannot be maintained for the others, although he was unable to include them in the first action because of the defendant's fraudulent conduct (*McCaffrey v. Carter*, 125 Mass. 330); nor because of the accidental failure to sue for them in the first action. *Folsom v. Clemence*, 119 Mass. 473; *Herriter v. Porter*, 23 Cal. 385; *Farrington v. Payne*, 15 Johns. 432; *Funk v. Funk*, 85 Mo. App. 246. See *Bowker v. Fertilizer Co.*, 106 N. Y. 555. This is the rule, although part of the property

tract containing several stipulations to be performed at different times is no exception; although an action may be maintained upon each stipulation as it is broken before the time for the performance of the others the ground of action is the stipulation which is in the nature of a several contract.¹ The same rule governs in torts arising from contracts and those which have their origin in official misfeasance. The cause of action arises when the breach of duty occurred, not on the discovery of the effects thereof.²

§ 111. Items of account. Where there is an account for goods sold or labor performed, where money has been lent to or paid for the use of a party at different times, or several items of claim springing in any way from contract, whether one or separate rights of action exist, will in each case depend on whether the case is covered by one or by several or sep-

taken was held by the plaintiff as trustee and part in his own right. *O'Neal v. Brown*, 21 Ala. 482. A tenant who sues for damage to his crops may recover for the whole injury done. *Texas & P. Ry. Co. v. Bayliss*, 62 Texas, 570. Injuries done to distinct pieces of property owned by the same person, by a single act, must be sued for together. *Beronio v. Southern P. R. Co.*, 86 Cal. 415.

¹ *Secor v. Sturgis*, 16 N. Y. 554; *Ryall v. Prince*, 82 Ala. 264; *Wilkinson v. Black*, 80 id. 329; *Strauss v. Meerteif*, 64 id. 299; *Wilcox v. Plummer*, 4 Pet. 172; *Moore v. Juvenal*, 92 Pa. St. 484; *Reformed, etc. Church v. Brown*, 54 Barb. 191; *Campbell v. Hatchett*, 55 Ala. 548; *O'Beirne v. Lloyd*, 43 N. Y. 248; *Pinney v. Barnes*, 17 Conn. 420; *Rudder v. Price*, 1 H. Black. 550; *Cobb v. I. C. R.*, 38 Iowa, 601; *Clayes v. White*, 83 Ill. 540; *Blakeney v. Ferguson*, 18 Ark. 347; *Kendall v. Stokes*, 3 How. (U. S.) 87.

In *McIntosh v. Lawn*, 47 Barb. 550, it was held that the lease in question contained seven distinct and independent covenants, the third of which was to keep the buildings and fences

in repair, and the seventh to build, during the continuance of the lease, one hundred and twenty-five rods of fence. It was held that a former action by the lessor upon the covenant for not building the fence was not a bar to an action subsequently brought upon the covenant to repair; that the two covenants were distinct and had no connection with each other, except that they were contained in the same instrument; that the former action must have been to recover for the same identical cause of action or for some part thereof as the plaintiff seeks to recover in the second in order to be a bar. See *Warner v. Bacon*, 8 Gray, 397; *Clark v. Baker*, 5 Met. 452.

The services of a regularly appointed or permanently employed attorney are usually rendered pursuant to some general contract, and whatever is due therefor at the termination of the service or employment must be recovered in one action. *Hughes v. Dundee Mortgage T. L. Co.*, 26 Fed. Rep. 831.

² *Owen v. Western Saving Fund*, 97 Pa. St. 47.

arate contracts. The several items may have their origin in one contract, as an agreement to sell and deliver goods, perform work, or advance money; and usually, in case of a running account, it may be fairly implied that it is in pursuance of an agreement that an account may be opened and continued either for a definite period or at the pleasure of one or both of the parties. But there must be either an express contract or the circumstances must be such as to raise an implied contract embracing all the items to make them, where they arise [185] at different times, a single or entire demand or cause of action.¹ The very fact that there is a running account imports that the parties have not been accustomed to treat every separate matter of charge as a distinct debt, but on the contrary to enter it in the account to become a part thereof and going to make up the debt which consists of the entire balance due.² The business of ship carpenters was carried on in one part of a building under the direction of two of the partners in a firm, and the business of ship chandlers in another part of the same building under the direction of the third partner. Separate books of account were kept by different clerks in the two branches of business; and the partners confined themselves respectively to the management of one of the branches without personally taking part in the other. Work was done and materials furnished from the carpentry branch in the repairing and equipping of a brig, upon the order of her captain, to the amount of \$139, and immediately thereafter goods and articles of ship chandlery to the value of \$521 were furnished to the same brig, on the order of the same captain, at different times through a period of a month. It was held that the two ac-

¹Secor v. Sturgis, 16 N. Y. 554; time, that a suit brought upon the account after some of the notes became due, in which judgment for the amount of those due was given, bars a subsequent suit upon the same account for the amount of the notes which became due after the suit was brought.

²Memmer v. Carey, 30 Minn. 458; Borngesser v. Harrison, 12 Wis. 544; Avery v. Fitch, 4 Conn. 362; Lane v. Cook, 3 Day, 255. See note to § 110.

counts did not constitute an entire claim.¹ In an action for money had and received it appeared that the defendant, as steward of the plaintiff, had between April and November, 1822, received large sums of money for timber sold, and in December, 1821, 46% for rents; in a former action a judgment had been taken by default for all that the plaintiff's agent thought the defendant could pay, but afterwards it was ascertained for the first time that the steward had received the said amount for rents. The court held that all the sums which the plaintiff knew the defendant had received at the time when he commenced the former action were to be considered as included in and constituting one entire cause of action, and the [186] recovery was confined in the last action to the 46%, though the defendant's actual receipts for timber were very much greater than the default judgment.²

Where the captain of a steamboat hired a barge and executed to the owner a contract to pay \$10 per day until returned in good order as received, but fixed no time when it should be returned or the money paid, it was held that the barge was to be returned in a reasonable time considering the circumstances of the service for which it was hired; the stipulated rent or hire would then be payable; the contract was entire and not divisible; and an action brought thereon after the expiration of such reasonable time for the amount then due for the hire of the barge at the rate specified in the contract was a bar to a subsequent action on the same contract for hire accruing after the period embraced in the judgment recovered in the former action.³ The court say: "If the barge were not returned upon demand in a reasonable time it would be a breach of the contract for the return. The right of the party in such a case is not to exact the \$10 a day perpetually, but to charge at that rate for a reasonable time, and then to collect the value of the barge, and by suing . . . (in the former action) . . . he in effect averred that the reasonable time had expired and the whole became due."⁴

§ 112. Continuing obligations. Where the defendant had covenanted in 1822 that the plaintiff should have a continual

¹ *Secor v. Sturgis*, 16 N. Y. 554.

³ *Stein v. Steamboat Prairie Rose*,

² *Bagot v. Williams*, 8 B. & C. 235; 17 Ohio St. 472.

Risley v. Squire, 53 Barb. 280.

⁴ See *Bradley v. Washington, etc. Co.*, 9 Pet. 107.

supply of water for a mill from his dam, and totally failed to perform after 1826, and in 1835 the plaintiff brought an action for the breach and recovered damages sustained by him up to that time, it was held a bar to a second action arising from a subsequent failure to perform.¹ Nelson, C. J., said: "It is true the covenant stipulated for a continued supply of water to the plaintiff's mills; and in this respect it may be appropriately styled a continuing contract. Yet, like any other entire contract, a total breach put an end to it, and gave the plaintiff the right to sue for an equivalent in damages. [187] He obtained that equivalent, or should have obtained it, in the former suit." The principle has been applied to an action to recover rent under a lease for a term of years where a suit was brought to recover the rent for one month which was due when another suit was instituted;² and to an action to recover the expense of supporting a non-resident pauper, such expense accruing after the recovery in a former suit of the amount due when the trial was had.³ An agreement by one party to support another during life is a similar continuing, entire contract,⁴ if it is unconditional.⁵ A separate action may be maintained whenever there is a new cause of action, whether it arises at the same time as another cause, or at a different time; but it must exist and be complete before the action is brought.⁶ Where the contract is indefinite as to time and negative in its character successive actions may be brought for its violation; as where one who has sold his interest in a business and agreed that he would not commence again in that place violates his obligation.⁷

§ 113. **Damages accruing subsequent to the action.** It is not essential, however, that all the injurious effects of the act

¹ *Fish v. Folley*, 6 Hill, 54. See *Miller v. Wilson*, 24 Pa. St. 114. *Amerman v. Deane*, 132 N. Y. 355. See *Ferguson v. Ferguson*, 2 N. Y. 360.

² *Burritt v. Belfy*, 47 Conn. 822.

³ *Marlborough v. Sisson*, 31 Conn. 332. See *Pinney v. Barnes*, 17 id. 420.

⁴ *Parker v. Russell*, 133 Mass. 74;

Amos v. Oakley, 131 id. 413; *Schell*

v. Plumb, 55 N. Y. 592; *Shaffer v.*

Lee, 8 Barb. 412; *Dresser v. Dresser*,

35 Barb. 573; *Sibley v. Rider*, 54 Me.

466; *Philbrook v. Burgess*, 52 Me.

271; *Fales v. Hemenway*, 64 Me. 373;

⁵ *Fay v. Guynon*, 131 Mass. 31.

⁶ *Howell v. Young*, 5 B. & C. 267;

Warner v. Bacon, 8 Gray, 397; *Prince*

v. Moulton, 1 Ld. Raym. 248; *Harbin*

v. Green, Hob. 189; *Coggeshall v.*

Coggeshall, 2 Strobb. L. 51. See *State*

Bank v. Fox, 3 Blatchf. 431.

⁷ *Just v. Greve*, 13 Ill. App. 302;

Pierce v. Woodward, 6 Pick. 206.

which constitutes the cause of action should have been developed and suffered before suit; it is immaterial to the right to recover for them when the effects manifest themselves with reference to the time of bringing the suit. But it is practically material to the plaintiff that the effects be so manifest before and at the time of the trial as to be susceptible of proof. The actual effects down to the time of the trial are provable; and whether those which may ensue later may be taken into account will depend on whether they are imminent and sufficiently certain.¹ Interest which is the accessory of the principal does not stop at the commencement of the action, but may always be computed down to the verdict.² But whether continuing damages may be computed after the commencement of the suit will depend on whether they proceed from the act complained of in that suit as the cause of action, or [188] from some later act constituting a fresh cause of action.³ A judgment creditor in lieu of her judgment agreed to accept the bond of another conditioned for her maintenance during life, or to pay her if she preferred it \$150 per annum; the bond to be secured by a mortgage on the land of the obligor. The defendant was employed to prepare the instrument and to have the mortgage entered of record; he withheld it from record until the property became otherwise incumbered by claims to an amount beyond its value and the debtor insolvent. It was held in an action on the case that the injured party could recover all that she had lost or was likely to lose by the default; all that the mortgage if duly recorded would have been worth to her.⁴ Where the defendant under-

¹ *Filer v. New York C. R. Co.*, 49 N. Y. 42; *Hayden v. Albee*, 20 Minn. 159; *Hagan v. Riley*, 13 Gray, 515; *Spear v. Stacy*, 26 Vt. 61; *Fort v. Union P. R. Co.*, 2 Dill. 259; *Mobile & M. Ry. Co. v. Gilmer*, 85 Ala. 422; *Erie & P. R. Co. v. Douthet*, 88 Pa. St. 243 (violation of contract to pass plaintiff and his family during their lives over defendant's road).

² *Robinson v. Bland*, 2 Burr. 1077; *Hovey v. Newton*, 11 Pick. 421; *Duncan v. Markley*, Harp. 276.

³ *Troy v. Cheshire R. Co.*, 23 N. H.

102; *Hicks v. Herring*, 16 Cal. 566; *Phillips v. Terry*, 8 Keyes, 313.

⁴ *Miller v. Wilson*, 24 Pa. St. 114. Black, C. J., said: "The argument is made that the plaintiff has not yet suffered any loss from the defendant's violation of duty, and that she can recover from Miller only in case Carson (the obligor in the bond) makes default, because the mortgage being but a security for the bond there is nothing due on the former until the condition of the latter is broken. But we hold it clear law

took with the plaintiff to be surety for another if the [189] plaintiff would let to him a specified house at a rent stated, and would execute an agreement to that effect, but did not, it was held that the defendant's undertaking was entire, not to

that Miller did not merely substitute his personal responsibility in place of the mortgage; that he did not become Carson's surety in the bond; but that he subjected himself to an immediate action in which the plaintiff may recover compensation for all she has lost and all she is likely to lose through his misconduct.

"On a contract to pay money at stipulated periods there may be as many suits as there are instalments; for every failure to pay is a fresh breach of the contract, and there can be no recovery except for what is due at the time of suit brought. But on a *tort*, or on a duty or promise which has already been violated as grossly as it ever can be, there is but one action, and in that the injured party must have full justice. When, in the language of Chief Justice Best (2 Bing. 229), the thing has but one neck, and that is cut off by the act of the defendant, it would be mischievous to drive the plaintiff to a second, third or fourth action as the successive consequences of the wrong may arise. It is not true, even as a general rule, that courts will not anticipate a loss *in futuro*. If a man destroys my orchard I may demand full reparation at once, and I am not compelled to sue every year for each crop of fruit I lose. In slander the damages are swelled by all the sufferings which the want of a good name may occasion subsequently. In an action for battery the plaintiff shall recover for all the injuries likely to result from the wounds inflicted by his adversary (1 *Ld. Raym.* 339). He who sues for the loss of an office or em-

ployment is entitled to a verdict at once for the whole value of it without waiting until the profits would have reached his pocket (2 Bing. 229). But we need not resort to analogies. A case directly in point is that of *Howell v. Young*, 5 B. & C. 259. There an attorney was employed to ascertain whether certain mortgages were a sufficient security for a loan of £3,000, and falsely informed his client that they were. It was held that in an action against the attorney the client might recover for all the probable loss he was likely to sustain from the invalidity of the security. The right of action in such cases accrues at the time when the contract or duty of the defendant is violated, and if suit be not brought within six years afterwards the statute of limitations is a flat bar, no matter when the consequential loss may have happened.

"The defendant has deprived the plaintiff of what she relied on for a living; and this judgment is less than it ought to be if it does not place her in as good a condition, present and prospective, as he would have left her in by doing his duty. It is vain to say she has suffered no real loss. A debt worth to her \$1,800 has been converted into a thing of no value. The defendant found her in possession of what her frugal habits taught her to think sufficient; he left her 'as poor as winter.' If he had taken the sum out of her pocket in money, she must, according to his reasoning, suffer the extremity of the consequences before she has a right of action; and therefore she can bring no suit until she

pay the rent as it became due from time to time, but to execute [190] an obligation to do so, and that only one action could be brought on his contract.¹

Where a personal injury is committed by a single tortious act, that act is a cause of action, and all the consequences for which compensation may be recovered are an entirety; recovery therefor may be had once for all in one action, and only in one, which may be brought any time after the act is committed.² So of any act done or default made which is a breach of any stipulation in a contract; it is a single and en-

starves. But human nature will not endure such logic. The law is made for practical uses. It listens to no metaphysical subtleties; and will not consent on any terms to call that right which every sound heart feels to be wrong. The value of wealth, beyond what is barely necessary for the present hour, consists in the consciousness of having it, and the comfortable security it affords the possessor against future want. A cautious providence for the time of need, which may come hereafter, is one of the attributes which distinguish the race of man from the lower animals. The fear of becoming destitute is a sentiment as universal as it is necessary to the well-being of the world. When that fear is grounded on the absence of any accumulation which may serve as a support, it is poverty,—a real, substantial, and sore evil, from which every well constituted person who feels will seek relief by the utmost exertion of mind and body. Here was a woman who consented to give up all she had in consideration that \$150 per annum for the term of her life should be secured to her beyond the reach of accidents by a mortgage. That mortgage was everything in the world that lay between her and the poor-house. By withholding it from the record the defendant left her to meet

the adversities of life unarmed, naked, defenseless, and 'steeped in poverty to the very lips.' Her counsel would send her to Carson for support—to Carson who has no means of keeping the wolf from his own door. Why did they not tell her that she might possibly be fed and clothed by public charity? She must be made whole now or never—in this action or in none. That can be done by allowing her to recover all that the security she lost was worth—what a prudent person in her circumstances would be willing to give it up for—the difference in value between her debt made absolutely safe by a mortgage, and the same debt with no security except the personal responsibility of an insolvent man. How much is that? The court fairly and carefully put this question to the jury, and their verdict is the answer."

¹ *Waterbury v. Graham*, 4 Sandf. 215.

² *Brower v. The Water Witch*, 19 How. Pr. 241; *Curtis v. Rochester, etc. R. Co.*, 18 N. Y. 584; *Drew v. Sixth Av. R. Co.*, 26 N. Y. 49; *Fetter v. Beale*, 1 Salk. 11; *Hochster v. De la Tour*, 2 E. & B. 678; *Miller v. Wilson*, 24 Pa. St. 114; *Veghte v. Hoagland*, 29 N. J. L. 125; *Thompson v. Ellsworth*, 39 Mich. 719; *Dailey v. Dismal Swamp C. Co.*, 2 Ired. L. 222. See ch. 36, vol. 8.

the cause of action, embracing all ensuing consequences for which compensation is allowed; and however multifarious may be the stipulations in it any act which amounts to a total breach constitutes but a single cause of action;¹ unless perhaps where the stipulations are so distinct and relate to subjects so disconnected as to have no relation or unity but such as results from being made at the same time or contained in one instrument.² Nor can an entire claim be severed by partial assignments so as to become the foundation of several suits instead of one.³

§ 114. Damage to real property. Actions for single and continuing nuisances and acts which are wrongful only when they result in damage may be successively brought; the damages recoverable are ordinarily confined to those which accrued prior to the time each action was begun.⁴ In an action for damages occasioned by flooding land a recovery was allowed for killing growing trees though they did not in fact die until after the action was commenced.⁵ In an equity suit to obtain damages for acts done and to restrain their continuance, if a temporary injunction is disregarded a supplemental bill will lie to recover damages accruing after the bringing of the original bill.⁶ Until recently it has been regarded as established by the English decisions that where injuries to the land of one person result from digging, mining or building upon the property of another, that all the damages, past and prospective, were recoverable in one suit brought upon the original cause of action.⁷ Late adjudications have established another rule. In 1861 the house of lords passed upon a question

¹ *Jacobs v. Davis*, 34 Md. 204; *Waterbury v. Graham*, 4 Sandf. 215; *Bancroft v. Winspear*, 44 Barb. 209; *Spear v. Stacy*, 26 Vt. 61.

² *McIntosh v. Lown*, 49 Barb. 550.

³ *Chicago, etc. R. Co. v. Nichols*, 57 Ill. 464; *Fourth Nat. Bank v. Noonan*, 88 Mo. 372; *Loomis v. Robinson*, 76 id. 488; *Chicago & A. R. Co. v. Maher*, 91 Ill. 312.

⁴ *Blunt v. McCormick*, 3 Denio, 288; *Cumberland C. Co. v. Hitchings*, 65 Me. 140; *Thayer v. Brooks*, 17 Ohio, 489; *Loweth v. Smith*, 12 M. & W.

582; *Beach v. Crain*, 2 N. Y. 86; *Cobb v. Smith*, 38 Wis. 21; *Hazeltine v. Case*, 46 id. 391; *Burnett v. Nicholson*, 86 N. C. 99; *McConnel v. Kibbe*, 29 Ill. 482; S. C., 33 id. 175; *Holmes v. Wilson*, 10 A. & E. 503; *Kinnaird v. Standard Oil Co.*, 89 Ky. 468.

⁵ *Hayden v. Albee*, 20 Minn. 159; *Clark v. Nevada L. & M. Co.*, 6 Nev. 202. See *Crabtree v. Hagenbaugh*, 25 Ill. 214.

⁶ *Waterman v. Buck*, 63 Vt. 544.

⁷ *Mayne's Dam.* 183.

based upon the following facts: A. B. was the owner of a house; C. D. was the owner of a mine under the house and under the surrounding land; C. D. worked the mine, and in so doing left insufficient support to the house, which was not damaged nor the enjoyment of it prejudiced until sometime after the workings had ceased. The question submitted by the lord chancellor to the lords was: "Can A. B. bring an action at any time within six years after the mischief happened, or must he bring it within six years after the workings rendered the support insufficient?" The opinion was that the action was not barred if brought within six years from the time the mischief was done.¹ In an earlier case² an excavation had been made and a subsidence had resulted, the injury from which had been satisfied. Subsequently another subsidence from the same excavation caused additional injury. In an action to recover for the latter the defense was that the cause of action in respect to the subsidence had been satisfied. Plaintiff pleaded that he was not suing for that cause of action, but for a new and different cause, the subsequent subsidence. The defendant contended that the pleading was bad because it was only a new assignment of a damage which was the result of the former cause of action; with this contention the court agreed. In another case³ the trustees of a turnpike road made a covered drain by the side of the highway; it was so made that it collected water in it, and the water was caused to flow into the plaintiff's mines, and could not go elsewhere. It was answered that the action was barred; but it appeared that plaintiff had been injured within the time constituting the limitation. The court said the *causa causans* of the injury to the property was a continuing cause; but that cause alone gave to the mine-owner no right of action: it was a cause which if thereby any damage was occasioned to the mine-owner's property would immediately give him a cause of action; it had given him a cause of action sometime ago, but since that the trustees continued it; they might have stopped it; the continuing *causa causans* remained

¹ Backhouse v. Bonomi, 9 H. of L. Cas. 508; Bonomi v. Backhouse, Ellis, B. & E. 622, 654.

² Nicklin v. Williams, 10 Exch. (1854), 259.

³ Whitehouse v. Fellows, 10 C. B. (N. S.) (1861), 765.

and remained in the power of the trustees, and that caused a new injury to the mine-owner's property, that was a new right of action because it was an injury to his property in each case. In a case¹ later than any of those referred to it was held by a majority of the court, Cockburn, C. J., dissenting, that where land and buildings are injured by the removal of lateral support through mining operations carried on by the defendant on his own land that future damages are recoverable. Up to this point it seems clear that these cases are in conflict; *Whitehouse v. Fellowes* not being harmonizable with *Nicklin v. Williams*, and the latter being in antagonism with *Backhouse v. Bonomi*. This is the view of the court of appeal in a case decided in 1884,² and in which the conclusion of the dissenting member of the court in *Lamb v. Walker* was adopted as a correct exposition of the law, and as being in harmony with the decision of the house of lords in *Backhouse v. Bonomi*. As stated by the master of the rolls in *Mitchell v. Darley Main Colliery Co.* the views of the chief justice in *Lamb v. Walker* were that where an excavation had been made, and a subsidence has taken place, it may be true that for all the effects, both existing and prospective, of that subsidence, the person injured ought to sue at once. But what is to be done as to a new subsidence? The mine-owner has excavated in his own property; he knows that he has caused a subsidence to his neighbor's property, and he knows that that neighbor is entitled to damages for it; will he run the risk of allowing that excavation to continue, the effects of which he may obviate by immediately putting in a wall or propping up his own property? There is nothing to prevent him; will he allow that to continue or will he not? If he does nothing, he is not counteracting the effects on his neighbor's property of something which he has done on his own; he is not counteracting that mischief to his neighbor by doing something on his own property; and if there is a new subsidence that will give his neighbor a new cause of action. It is difficult to conceive that the jury which is to give damages for the first subsidence that is existing ought to give damages for a prospective new subsidence which the defendant has the

¹ *Lamb v. Walker*, 3 Q. B. Div. (1878), 389.

² *Mitchell v. Darley Main Colliery Co.*, 14 Q. B. Div. 125.

option and the right to prevent; so that, although before the verdict of the first jury is given, or although at the time that that verdict is given the mine-owner is doing that which will prevent any future damage, nevertheless the jury in the first action ought to take into consideration the prospective injury which might be thought likely to occur at the time when the action was brought. Expressing his own views, the master of the rolls continued: "That seems to me a proposition which, when it is well sifted out and examined, cannot stand, and therefore the chief justice's reasoning, of itself, and without reference to *Backhouse v. Bonomi*, is conclusive to show that each subsidence is a fresh cause of action. Besides that, it seems to me to be in accordance with what was decided in *Backhouse v. Bonomi*, and to be the logical result of *Backhouse v. Bonomi*. . . . Therefore, I agree with the lord chief justice's view that each subsidence is a new cause of action, although the *causa causans* of each subsidence may be the same. It may be argued that the *causa causans* is not the same. The *causa causans* of the first is the excavation, the *causa causans* of the second is, as a matter of fact, the excavation unremedied, or the combining of the excavation and of its remaining unremedied." A similar rule has been applied where the acts complained of were not continuous, as where temporary flash-boards were erected on a dam from time to time or the gates thereof were opened at intervals;¹ and where the water in a stream has been diverted by placing obstructions therein.²

§ 115. Same subject. Where injuries result from a temporary trespass upon land all the damage done must be recovered for in a single action. If there has been a recovery for the injury inflicted upon a special part of a tract a subsequent action cannot be maintained to recover for that done to another portion of it at the same time and by the same act.³

¹ *Noyes v. Stillman*, 24 Conn. 15.

² *Beckwith v. Griswold*, 29 Barb. 294. See *Williams v. Missouri Furnace Co.*, 13 Mo. App. 70.

³ *Pierro v. St. Paul, etc. Ry. Co.*, 39 Minn. 451; *Child v. Boston & F. I. Works*, 19 Fed. Rep. 258; *Williams v. Pomeroy Coal Co.*, 37 Ohio St. 588;

Dick v. Webster, 6 Wis. 481; *Marshall v. Ulleswater Steam Nav. Co.*, L. R. 7 Q. B. 166; *Lord Oakley v. Kensington Canal Co.*, 5 B. & Ald. 138; *Clegg v. Dearden*, 12 Q. B. 575; *Vedder v. Vedder*, 1 Denio, 257; *Beronio v. Southern P. R. Co.*, 86 Cal. 415. In *Kansas P. Ry. Co. v. Muhlman*,

Where the trespass is continuing or is repeated each repetition or the continuation after suit brought is a fresh wrong and affords ground for a new action. So where plaintiff was seized of an ancient house with lights therein, and defendant

17 Kan. 224, Brewer, J., discussed this question in an interesting way. It was there ruled that where A. enters upon the land of B. and digs a ditch thereon, there is a direct invasion of the rights of B., a completed trespass, and the cause of action for all injuries resulting therefrom commences to run at the time of the trespass; the fact that A. does not re-enter B.'s land and fill up the ditch does not make him a continuous wrong-doer and liable to repeated actions as long as the ditch remains unfilled; no one can be charged as a continuing wrong-doer who has not the right, and who is not under the duty, of terminating that which causes the injury; a party who has dug a ditch upon the land of another has no right to re-enter and fill it up; though unforeseen injury results from a completed act there does not arise a new cause of action for which a recovery may be had after the original wrong has been satisfied.

The case of *Clegg v. Dearden*, 12 Q. B. 576, is interesting upon the same distinction. There the owner of a coal mine excavated as far as the boundary (which he was by custom entitled to do), and continued the excavation wrongfully into the neighboring mine, leaving an aperture in the coal of that mine, through which water passed into it and did damage. It was held that the party so excavating was liable in trespass for breaking into the neighboring mine, but not in an action on the case for omitting to close up the aperture on his neighbor's soil, though a continuing damage resulted from its being unclosed. It was also held

that a new action could not be maintained for damages occasioned by the flow of water in consequence of the aperture remaining unclosed after an action on the case had already been brought for making the aperture and letting in the water, which action was referred to arbitration, and the plaintiff being made a party to the reference in respect of any injury to him by any of the matters alleged in the declaration in such action, had had damages awarded and paid for such injury, although the damage last complained of was subsequent to the award and payment. Lord Denman, C. J., said: "The gist of the action as stated in the declaration is the keeping open and unfilled of an aperture and excavation made by the defendant into the plaintiff's mine. By the custom the defendant was entitled to excavate up to the boundary of his mine without leaving any barrier; and the cause of action, therefore, is the not filling up the excavation made by him on the plaintiff's side of the boundary and within his mine. It is not, as in the case of *Holmes v. Wilson*, 10 A. & E. 508, a continuing of something wrongfully placed by the defendant upon the premises of the plaintiff; nor is it a continuing of something placed upon the land of a third person to the nuisance of the plaintiff, as in the case of *Thompson v. Gibson*, 7 M. & W. 456. There is a legal obligation to discontinue a trespass or remove a nuisance; but no such obligation upon a trespasser to replace what he has pulled down or destroyed upon the land of another, though he is liable in an action

erected a building whereby the former's lights were estopped, a recovery for the erection did not bar an action for its continuance.¹ In another case there had been an action of trespass for placing stumps and stakes on plaintiff's land, which action had been satisfied; a subsequent action for leaving them there was sustained on the ground that a new trespass was thereby committed.² In *Holmes v. Wilson*³ trespass was brought against a turnpike company for continuing buttresses on plaintiff's land to support its road. He had recovered compensation in a former action. After refusing to remove the buttresses on request another action of trespass was brought. It was argued for the defendant that the damages given in the first action were to be regarded as full compensation for all injuries and were to be taken as the full estimated value of the land occupied by the buttresses; that the judgment operated as a purchase of the land. In reply Patterson, J., said: "How can you convert a recovery and payment of damages for the trespass into a purchase? A recovery of damages for a nuisance to land will not prevent another action for continuing it. As to the supposed effect of the judgment in changing the property of the land, the consequence of that doctrine would be that a person who wants his neighbor's land might always buy it against his will, paying only such purchase-money as a jury might assess for damages up to the time of the action. If the property was changed when did it pass? Suppose the plaintiff had brought ejectment for the part occupied by defendant's buttresses, would the recovery of damages in trespass be a defense? There is no case to show that when land is vested in a party and fresh injuries are done upon it fresh actions will not lie." These cases may be distinguishable from the Kansas decision⁴ on the ground that

of trespass to compensate in damages for the loss sustained. The defendant having made an excavation and aperture in the plaintiff's land was liable to an action of trespass; but no cause of action arises from his omitting to re-enter the plaintiff's land and fill up the excavation; such an omission is neither a continuation of a trespass nor of a nui-

sance; nor is it the breach of any legal duty." *Cumberland C. Co. v. Hitchings*, 65 Me. 140.

¹ *Rosewell v. Prior*, 2 Salk. 459.

² *Bowyer v. Cook*, 4 M. G. & S. 286. Compare *Kansas P. Ry. Co. v. Muhlman*, *supra*.

³ 10 A. & E. 503.

⁴ *Kansas P. Ry. Co. v. Muhlman*, in note to last paragraph.

the request to remove the things complained of may be considered as a license to enter for that purpose; but otherwise it is difficult to harmonize them with it. It may be that the true ground of distinction is stated in a Maine case:¹ "When something has been unlawfully placed upon the land of another which can and ought to be removed, then, inasmuch as successive actions may be maintained until the wrong-doer is compelled to remove it, the damages in such suit must be limited to the past and cannot embrace the future."

§ 116. **Same subject.** The authorities are not agreed as to the right to bring successive actions where the result of a tort to real property is to create a permanent appropriation of it to the public use, as for railroads, streets, sewers and the like; or to change its condition so as to adapt it to the grade of streets. Where property is taken for public use under the statutes which provide therefor prospective damages as well as others are assessed; they are an entirety, and all such as proceed from the appropriation of it to the use for which it is taken are presumed to have been anticipated.² If land is damaged by a permanent structure lawfully erected, which, without any further act except to keep it in repair, must continue to cause the result which is complained of, the owner may recover in one action for damages sustained and those which will fall upon him. The judgment in the action first brought will bar another like action for subsequent injuries

¹Cumberland C. Co. v. Hitchings, 65 Me. 140.

²White v. Chicago, etc. R. Co., 122 Ind. 317; Perley v. B. C. & M. R. Co., 57 N. H. 212; Sawyer v. Keene, 47 id. 173; Aldrich v. Cheshire R. Co., 21 id. 359; Fowle v. New Haven & N. Co., 107 Mass. 352; S. C., 112 id. 334; Van Schoick v. Delaware Canal, 20 N. J. L. 249; Water Co. v. Chambers, 13 N. J. Eq. 199; Waterman v. Connecticut R. Co., 30 Vt. 610; Chesapeake Canal v. Grove, 11 Gill & J. 396; Furniss v. Hudson River R. Co., 5 Sandf. 551; Baltimore R. Co. v. Magruder, 34 Md. 79; Missouri R. Co. v. Haines, 10 Kan. 439; La Fayette R. Co. v. New Albany, 13 Ind. 90; Mont-

morency R. Co. v. Stockton, 43 id. 828; Evans v. Haefner, 29 Mo. 141; Baker v. Johnson, 2 Hill, 342; Call v. Middlesex, 2 Gray, 232; Veghte v. Hoagland, 29 N. J. L. 125. But see Lancashire R. Co. v. Evans, 15 Beav. 322.

It is said in North Vernon v. Voegler, 103 Ind. 314, that the construction of works of a public character by municipal officers is clearly analogous to the seizure of land under the right of eminent domain, and that all the damages occasioned thereby must be assessed in one action. But this position is controverted by a case considered in the text of this section.

from the same cause.¹ A recovery of prospective damages in such a case will bar an action for subsequent damages though caused by an unusual event.² In some cases this principle has been extended to the unlawful entry upon land by railroads and the building of tracks thereon,³ and in others to the rightful improvement of a street, though the work was negligently done, and the negligence was the cause of the action.⁴ These decisions are rested on the principle that the parties have elected to consider the trespass as permanent, and they apply the rule applicable in condemnation proceedings which requires a final adjustment of the liability of the party condemning. As will appear there are strong objections and weighty authorities in opposition. Some of the courts which entertain this view hold that if the gist of the complaint is not the unlawful entry and occupation, but the improper use, that the wrong may be redressed in successive actions.⁵

For damages resulting from the negligent erection or construction of a building or culvert which is erected or constructed pursuant to law, successive actions may be brought.⁶ Damage to crops by the annual overflow of water is susceptible of apportionment, and compensation therefor may be recovered in successive actions.⁷ In a New York case which

¹ *Fowle v. New Haven & N. Co.*, 107 Mass. 352; *Troy v. Cheshire R. Co.*, 3 Fost. (N. H.) 83; *Chicago & A. R. Co. v. Maher*, 91 Ill. 312; *Same v. Schaffer*, 26 Ill. App. 280; *Same v. Loeb*, 118 Ill. 208; *Swantz v. Muller*, 27 Ill. App. 320; *Elizabethtown, etc. R. Co. v. Combs*, 10 Bush, 382; *Jeffersonville, etc. R. Co. v. Esterle*, 13 id. 667; *North Vernon v. Voegler*, 103 Ind. 314; *Central Branch U. P. R. Co. v. Andrews*, 26 Kan. 702; *Ohio & M. Ry. Co. v. Wachter*, 123 Ill. 440; *Bizer v. Ottumwa Hydraulic Co.*, 70 Iowa, 145; *Powers v. Council Bluffs*, 45 id. 652; *Indiana, etc. Ry. Co. v. Eberle*, 110 Ind. 542; *Lafayette v. Nagle*, 113 id. 425; *Frankle v. Jackson*, 33 Fed. Rep. 371.

² *Fowle v. New Haven & N. Co.*, 112 Mass. 334.

³ *Frankle v. Jackson*, 33 Fed. Rep. 371; *Central Branch U. P. R. Co. v. Andrews*, 26 Kan. 702; *Indiana, etc. Ry. Co. v. Eberle*, 110 Ind. 542; *Baldwin v. Chicago, etc. Ry. Co.*, 35 Minn. 354.

⁴ *North Vernon v. Voegler*, 103 Ind. 314; *Powers v. Council Bluffs*, 45 Iowa, 652.

⁵ *Lindquest v. Union P. Ry. Co.*, 33 Fed. Rep. 372.

⁶ *Ohio & M. Ry. Co. v. Wachter*, 123 Ill. 440; *Chicago, etc. R. Co. v. Schaffer*, 26 Ill. App. 280; *S. C.*, 124 Ill. 112.

⁷ *Oldfield v. Wabash, etc. Ry. Co.*, 22 Mo. App. 607; *Van Hoozier v. Hannibal, etc. R. Co.*, 70 Mo. 145; *Dickson v. Chicago, etc. R. Co.*, 71 id. 575.

was fully considered¹ it is held that if a railroad is constructed upon or over a highway in which or in the soil of which individuals have private rights, that unless the public right is obtained and private rights are lawfully acquired the builders thereof are trespassers; and an adjacent owner may recover only the damages he has sustained up to the commencement of the action; for damages thereafter resulting successive actions may be brought.² There is no presumption that the trespass will be continued, and title to land cannot be acquired otherwise than by purchase or condemnation proceedings.³ Criticising the rule held by some courts to the effect that where the character of the injury is permanent, and the complaint recognizes the defendant's right to continue in the use of the property, and to acquire as the result of the suit the owner's right thereto, in pursuance of which the damages are assessed on the basis of the permanent depreciation of the property, and with especial reference to a case which holds that damages may be so assessed for negligence in making a lawful improvement in a street,⁴ Earl, J., says that in his opinion that decision is clearly unsound as to the precise question adjudged. "What right was there to assume that the street would be left permanently in a negligent condition, and then hold that the plaintiff could recover damages upon the theory that the carelessness would forever continue?" The municipality "may cease to be careless, or remedy the effects of its carelessness, and it may apply the requisite skill to its embankment, and this it may do after its carelessness and unskilfulness and the consequent damages have been established by a recovery in an action. The moment an action has been commenced, shall the defendant in such a case be precluded from remedying its wrong? Shall it be so precluded after a recovery against it? Does it establish the right to continue

¹ *Uline v. New York, etc. R. Co.*, 101 N. Y. 98.

² This rule is well established in New York. *New York Nat. Bank v. Metropolitan E. Ry. Co.*, 108 N. Y. 600; *Pond v. Same*, 112 id. 186. See *Lahr v. Same*, 104 id. 270; *Henderson v. New York Central R. Co.*, 78 N. Y. 423; *Schell v. Plumb*, 55 id. 592.

³ *Carl v. Sheboygan, etc. R. Co.*, 46 Wis. 625; *Blesch v. Chicago, etc. R. Co.*, 48 id. 188; *Russell v. Brown*, 68 Me. 203; *Cumberland & O. C. Co. v. Hitchings*, 65 id. 140.

⁴ *North Vernon v. Voegler*, 103 Ind. 814.

to be a wrong-doer forever by the payment of the recovery against it? Shall it have no benefit by discontinuing the wrong, and shall it not be left the option to discontinue it? And shall the plaintiff be obliged to anticipate his damages with prophetic ken and foresee them long before, it may be many years before they actually occur, and recover them all in his first action? I think it is quite absurd and illogical to assume that a wrong of any kind will forever be continued and that the wrong-doer will not discontinue or remedy it, and that the convenient and just rule, sanctioned by all the authorities in this state, and by the great weight of authority elsewhere, is to permit recoveries in such cases by successive actions until the wrong or nuisance shall be terminated or abated.”¹

§ 117. Contracts of indemnity. Upon contracts of indemnity if there has been a breach before suit brought, any actual damage subsequently resulting therefrom, or payments made by the indemnified party covered by the agreement after as well as before the commencement of suit, and down to the [191] time of the trial, may be included in the recovery.² So if the defendant's breach of any contract or his wrongful act has involved the injured party in a legal liability to pay money, or he has incurred indebtedness to a third person, or expenses to relieve against the effects of the act which constitutes the cause of action, such liability, indebtedness or expenses, paid or not, constitutes an element of damage without regard to the time when it was actually incurred or discharged.³

¹The writer of the opinion cited *Ind. 814; Harrington v. St. Paul, etc. Rosewell v. Prior, 2 Salk. 460; R. Co., 17 Minn. 215; Adams v. Hastings & D. R. Co., 18 id. 260; Ford v. Bowyer v. Cook, 4 M. & G. & S. 236; Chicago & N. R. Co., 14 Wis. 609; Holmes v. Wilson, 10 A. & E. 503; Carl v. Sheboygan, etc. R. Co., 46 id. Thompson v. Gibson, 8 M. & W. 281; 625; Blesch v. Chicago & N. R. Co., Mitchell v. Darley Main Colliery Co., 43 id. 188; Greene v. New York, etc. 14 Q. B. Div. 125; Whitehouse v. R. Co., 65 How. Pr. 154; Taylor v. Fellowes, 10 C. B. (N. S.) 765; Esty v. Baker, 48 Me. 495; Russell v. Metropolitan E. Ry. Co., 50 N. Y. Brown, 63 id. 208; Cumberland C. Super. Ct. 311; Duryea v. Mayor, etc., Co. v. Hitchings, 65 id. 140; Bare v. 26 Hun, 120, and other cases in New Hoffman, 79 Pa. St. 71; Thompson v. York.*

²*Spear v. Stacy, 26 Vt. 61.*

³*Id.; Dixon v. Bell, 1 Stark. 287; Hagan v. Riley, 18 Gray, 515; Smith*

§ 118. **Damage to property and injury to person by same act.** The question has arisen in England whether damage inflicted upon property and injury resulting to the person from one act of negligence will give cause for independent actions. Through the negligence of defendant's servant plaintiff's cab was damaged and his person injured. An action to recover for the damage done to the cab was successful. Subsequently an action to recover for the personal injuries was instituted. It was held that inasmuch as the damages therefor might have been claimed in the other action, the judgment recovered in it barred the second suit.¹ It was considered that there was but one wrong though there were two consequences. The court of appeal reversed this judgment, Coleridge, C. J., dissenting. The majority of the court were of opinion that "two separate kinds of injury were in fact inflicted, and two wrongs done. The mere negligent driving in itself," says Bowen, L. J., "if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damage which it caused. One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person. Both causes of action in *one* sense may be said to be founded upon one act of the defendant's servant, but they are not on that account identical causes of action."² This distinction impresses the writer as being too metaphysical for practical purposes, and as out of harmony with the analogies of the law. Our assent is compelled to the opposite view by the force of the reason given by the chief justice in his dissenting opinion: "It appears to me that whether the negligence of the servant or the impact of the vehicle which the servant drove be the technical cause of action, equally the cause is one and the same: that the injury done to the plaintiff is injury done to him at one and the same moment by one and the same act in respect of different *rights*, i. e., his person and his goods, I do not in the least deny; but it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions if

v. Howell, 6 Exch. 780; Kenyon v. Div. 712 (1883), per Pollock, B., and Woodruff, 33 Mich. 310. Lopes, J.

¹ Brunaden v. Humphrey, 11 Q. B. ² *Ib.*; 14 Q. B. Div. 141 (1884).

he is injured in his arm and in his leg, but can bring two if besides his arm and leg being injured his trousers which contain his leg and his coat sleeve which contains his arm have been torn." American adjudications on the identical question are not numerous, and those which exist very meagerly discuss it. They concur in holding what has long been supposed to be the rule, that statements of injuries to the person and damage to property, both resulting from the same wrongful or negligent act, are properly included in the same count of a complaint.¹

§ 119. What is not a double remedy. In an attachment in equity against B. and A. the property of A. was taken as the property of B., and being perishable it was sold under an order of the court, and afterwards the court decreed that the sheriff pay the proceeds of sale to A. The sheriff failing to pay, A. moved against him and his sureties, and judgment was entered for the penalty of his bond, to be discharged by the payment of the proceeds, which they paid. Previous to the decision of the court in favor of A. he brought an action on the bond of the sheriff against him and his sureties for the [192] trespass in taking his goods; the former judgment and its payment were set up in defense; but it was held that the action was not thereby barred; but A. might recover the difference between the value of the goods at the time they were taken under the attachment, and the amount of the proceeds [193] of sale paid him.² If the master of a whaling vessel abandons the voyage and wrongfully sells the property of the owner on board, the subsequent collection of a part of the proceeds of such sale is no bar to an action against him for breaking up the voyage and disposing of the property, but it reduces the damage.³

§ 120. Prospective damages. In the application of the rule that all the damages which pertain to a cause of action, without reference to the time when they actually accrue, are entire, and that they cannot be recovered piecemeal by successive actions, it is frequently necessary to take into consid-

¹ Von Fragstein v. Windler, 2 Mo. App. 598; Lamb v. St. Louis, C. & W. Ry. Co., 33 id. 489. See Stickford v. St. Louis, 7 id. 217. ²Sangster v. Commonwealth, 17 Gratt. 124. ³Brown v. Smith, 12 Cush. 366.

eration damages which have not been actually suffered either at the commencement of the suit or its trial; for otherwise there would be a very inconvenient postponement of that [194] class of actions or a renunciation of a large part of the compensation due to the injured party. When a cause of action accrues there is a right, as of that date, to all the consequent damages which will ever ensue.¹ They are recoverable in one action if they can be proved and only one can be maintained; it may be brought at any time after the accrual of the right. The question is a practical and legal one in each case whether the cause of action is of such a nature that the injurious consequences of the wrong complained of can reach into the future or whether any subsequent damages will be owing to a continuous fault which may be the foundation of a new action. So is the question whether any offered evidence tends to prove future damages which are the legal result of the wrong which constitutes the cause of action, and whether the sum of the evidence in the particular case is sufficient for the consideration of the jury.

If a growing crop is destroyed it can, of course, never be shown with absolute certainty that but for its destruction it would have matured; nor that one party who is stopped by the other in the performance of a special contract would otherwise have proceeded to a complete execution of it so as to entitle himself to its full benefits. Nor is it matter of law that the jury shall assume that the crop would have matured, or that the contract would have been fulfilled. The jury may estimate, with the aid of testimony, the value of the crop at the time of its destruction, in view of all the circumstances existing at any time before the trial, favoring or rendering doubtful the conclusion that it would attain to a more valuable condition, and all the hazards and expenses incident to the process of supposed growth or appreciation.² The same uncertainties and a greater surface of them are encountered in

¹ *Ennis v. Buckeye Pub. Co.*, 44 44 Mich. 229; *Smith v. Chicago, etc. Minn.* 105; *Bowe v. Minnesota M. Co.*, R. Co., 38 Iowa, 518; *Richardson v. id.* 460; *Erie & P. R. Co. v. Douthet*, Northrup, 66 Barb. 85; *Folsom v. 88 Pa. St.* 248; *Amerman v. Deane*, Apple River L. D. Co., 41 Wis. 602; 133 N. Y. 355. *Texas P. Ry. Co. v. Bayliss*, 62 Texas,

² *Taylor v. Bradley*, 39 N. Y. 129; 570; *Chicago, etc. R. Co. v. Schaffer*, 26 Ill. App. 280.

actions upon warranties that seeds sold for planting are of particular varieties.¹

[195] In actions upon contracts which contemplate a series of acts and a considerable period of time for performance, a party complaining of a total breach by the other sufficiently maintains his right to recover if he has performed without default up to the time of the breach and is ready to proceed, though his right to the value of the contract depends on his ability and inclination to prosecute the performance on his part to completion. He is entitled to recover the profits which he would have made,—the contract price less what he would have to do or expend to earn or otherwise entitle himself to it. This deduction may be the price of labor or the value of property at a future day. The action for damages recoverable for such a breach may be brought and tried before that day arrives. If so, the prices prevailing at the time of the breach may be acted upon as the test of values at the times mentioned in the contract;² but if the trial be delayed until the date fixed for performance the parties may show the prices actually prevailing then or any other conditions, favorable or otherwise, affecting the cost of fulfilling the contract.³

§ 121. **Certainty of proof of future damages.** The conservatism pervading the law is opposed to allowing compensation for probable loss. It manifests itself more particularly in respect to those damages which might be proved with certainty if they were real; and, if not fanciful and imaginary, are past damages: not such as are contemplated to arise in the future from such causes as according to general experience produce them. The decided cases which relate to prospective damages warrant the statement that the injured party is entitled to recover compensation for such elements of damage as are likely to occur; the jury may proceed upon reasonable

¹ *Randall v. Raper*, E. B. & E. 84; *Steamer Excelsior*, 44 Mich. 229; *Chicago v. Greer*, 9 Wall. 726; *Hochster v. De la Tour*, 2 E. & B. 678; *Frost v. White v. Miller*, 7 Hun, 427; 71 N. Y. 118; *Van Wyck v. Allen*, 69 N. Y. 61; *Knight*, L. R. 5 Exch. 822; 7 id. 111; *Wolcott v. Mount*, 36 N. J. L. 262; *Taylor v. Bradley*, 39 N. Y. 129; *Ferris v. Comstock*, 33 Conn. 513; *Howard v. Daly*, 61 id. 362; *Richmond v. Dubuque, etc. R. Co.*, 40

² *Masterton v. Mayor*, 7 Hill, 61.

³ *Burrell v. New York, etc. Salt Co.*, Iowa, 264; *Jacobs v. Davis*, 34 Md. 14 Mich. 84; *People's Ice Co. v.* 204; *Grover v. Buck*, 34 Mich. 519.

probabilities; and accept as sufficiently proved those results which under like circumstances generally come to pass.¹ It is not, however, to be hence inferred that prospective dam- [196] ages may be recovered on every plausible anticipation; nor that no allowance is to be made for the uncertainties which affect all conclusions depending on future events; it is only intended that such uncertainties, where the damages are shown by evidence reasonably certain, do not exclude them wholly from consideration. The price of an average colt cannot be fixed by deducting the cost of its keep from the value of an average horse, for there is not a certainty of exemption from accidents and disease.

All the damages from a single tortious act are an entirety, and must be assessed and recovered once for all.² Successive actions cannot be maintained for their recovery as they may accrue from time to time. The injured party is entitled to recover in one action compensation for all the damages resulting from the injury, whether present or prospective. And in respect to the latter, the rule is that he can recover for such as it is shown with reasonable certainty will result from the wrongful act complained of.³

§ 122. **Action for enticing away apprentice, servant or son.** In an action for enticing away an apprentice damages cannot include the loss of his services for the residue of his term, for he may return.⁴ Where an action on the case was

¹Treat v. Hiles, 81 Wis. 278; Lewis v. Atlas M. L. Ins. Co., 61 Mo. 534; Howell v. Young, 5 B. & C. 259; Macrae v. Clarke, L. R. 1 C. P. 403; Frye v. Maine C. R. Co., 67 Me. 414; Richmond v. Dubuque, etc. R. Co., 40 Iowa, 264; Schell v. Plumb, 55 N. Y. 592; Missouri, etc. R. Co. v. Fort Scott, 15 Kan. 435; Roper v. Johnson, L. R. 8 C. P. 167; Peltz v. Eichle, 62 Mo. 171; Sutherland v. Wyer, 67 Me. 65; Gifford v. Waters, 67 N. Y. 80; Richardson v. Mellish, 2 Bing. 229. See ch. 36, vol. 8.

²See last section.

³Filer v. New York C. R. Co., 49 N. Y. 42; Miller v. Wilson, 24 Pa. St.

114; Fetter v. Beale, 1 Salk. 11; Hod-soll v. Stallebrass, 11 A. & E. 301; Short v. McCarthy, 8 B. & Ald. 626; Howell v. Young, 5 B. & C. 259; Ingram v. Lawson, 8 Scott, 471; Clegg v. Dearden, 12 Q. B. 576; Stroyan v. Knowles, 6 H. & N. 454.

⁴Fay v. Guynon, 131 Mass. 81; Hambleton v. Veere, 2 Saund. 170; Moore v. Love, 8 Jones' L. 215; Hod-soll v. Stallebrass, 11 A. & E. 301; Trigg v. Northcut, Litt. Sel. Cas. 414; Lewis v. Peachey, 1 H. & C. 518; Drew v. Sixth Av. R. Co., 26 N. Y. 49. See McKay v. Bryson, 5 Ired. L. 216.

brought to recover for the defendant's enticement of the plaintiff's minor son from his service and inducing him to enlist in the army for three years, it was held that the plaintiff [197] could only recover damages for the loss of service up to the time of the commencement of the action, or at most up to the time of trial.¹

¹ *Covert v. Gray*, 84 How. Pr. 450. In this case there were numerous contingencies with elements of probability in each: the enlisted man might be discharged by reason of sickness or wounds; his enlistment being illegal, it was the duty of the war department to discharge him; there was no presumption that the war would continue for three years.

In *Moore v. Love*, 3 Jones' L. (N. C.) 215, Battle, J., thus discusses the distinction between cases where the cause of action is an entirety and those which admit of a succession of suits: "It is clearly stated by Lord Mansfield, in the case of *Robinson v. Bland*, 2 Burr. 1077, 'When a new action may be brought and satisfaction obtained thereupon for any duties or demands which may have arisen since the commencement of the depending suit, that duty or demand shall not be included in the judgment upon the former action. As in covenant for the non-payment of rent, or of an annuity payable at different times, you may bring a new action *toties quoties* as often as the respective sums become due and payable. So in trespass and in tort, new actions may be brought as often as new injuries and wrongs are repeated; and therefore damages shall be assessed only up to the time of the wrong complained of. But where a man brings an action of *assumpsit* for principal and interest upon a contract obliging the defendant to pay such principal money, with interest from such a time, he complains of

the non-payment of both; the interest is an accessory to the principal, and he cannot bring a new action for any interest grown due between the commencement of his action and the judgment in it.' What is here so well said about the interest being the accessory to the principal money, and therefore recoverable down to the time of the trial, applies with equal force to the case of trespass and tort where the wrong done is not repeated or continued, though the damage resulting from it may not cease being developed until after the time when the writ was issued. In the latter case the plaintiff is not limited solely to the consequential damage which has actually occurred up to the trial of the cause, but he may go on to claim relief for the prospective damages which can then be estimated as reasonably certain to occur.

"This brings us to the consideration of the case of *McKay v. Bryson*, 5 Ired. 216, which may seem at first view to militate against the distinction by which we have endeavored to reconcile the decisions which have been made upon the subject of prospective damages. It was an action on the case brought to recover damages for enticing the plaintiff's apprentice from his service *and conveying him out of the state*. The testimony showed that the boy was bound apprentice to learn the business of a tailor, and that he continued in the service of his master until he was carried away by the defendant, and

§ 123. Future damages for personal injuries. In ascertaining the amount of damages resulting from a personal injury the jury may consider the bodily pain and mental suffering which have occurred and are likely to occur in the future [198]

when last heard from he was in Tennessee. The suit was brought some time before the expiration of the term of service, and the jury were instructed that they might give damages as for a total loss of service during the whole period of apprenticeship subject to a deduction on account of the plaintiff's chance of regaining the boy. The charge given to the jury in the court below was approved in this court upon the authority of the case of *Hodsoll v. Stallebrass*, 11 A. & E. 301. No other case appears to have been cited and the court do not advert to the fact that in *Hodsoll v. Stallebrass* the injury from which the loss accrued to the plaintiff was a single act of wrong; but they do advert to and state the fact that the loss caused by the tort of the defendant was in effect a total loss of the plaintiff's apprentice. The only wrong alleged in the declaration or proved on the trial was that of carrying the apprentice beyond the limits of the state, which caused a total loss of his services to his master. In this view the case may well be sustained upon the principle applicable to the second class of cases to which we have referred. That the removal of the apprentice out of the state may be regarded in the same light as if a permanent injury had been inflicted upon him. We have the strong analogy of the case of trover by one tenant in common against another for the destruction of the article held in common. If the article be sent off by the defendant to a place unknown to the plaintiff, so that, as to him, it is totally lost, it is equivalent to its destruction. *Lucas*

v. Wasson, 3 Dev. 398. The circumstances of the present case are very different from those in *McKay v. Bryson*. The apprentices were carried by the defendant to his residence in an adjoining county, only twenty-five miles distant from the plaintiff. They were not concealed from him; and it appears from the proof that he knew where they were. The continued detention of them by the defendant was a succession of torts for which he might bring new actions from time to time; and hence his case falls into the class with *Hambleton v. Veere*, and all those on which damages can be given for the loss of service up to the commencement of the suit only."

The true distinction is undoubtedly pointed out in the foregoing opinion, that the damages in an action cannot include those arising after suit is brought if a new action could be brought for them; but it may admit of a doubt if the case was properly disposed of upon that test. A trespasser who takes personal property and retains it may be said to commit a succession of torts while he retains the property; but in an action for such a taking the injured party would undoubtedly be obliged to make his full claim of damages. He would not be entitled to a succession of actions. In cases where apprentices have been enticed away, and the enticer has not, by the injury or otherwise, made it reasonably certain that the apprentice will not return, prospective damages are not denied because a new action may be brought for them but because they are not susceptible of proof; they are not certain. But if the defend-

in consequence thereof as well as the loss of time, expense of medical and other attendance and the diminution of ability to earn money.¹

§ 124. **Only present worth of future damages given.** In a Vermont case the court say that what the jury give the injured party for prospective damages is like payment in advance, and in fixing the same that fact may be taken into consideration and the amount may properly be reduced to its present worth.²

§ 125. **Continuous breach of contracts or infraction of rights not an entirety.** A continuous breach of contract or infraction of a right is not an entirety. It is at any time severable for the purpose of redress in damages for the injury already suffered. This is the case whenever a continuous duty imposed by law or by contract is uninterruptedly neglected, whether such departure from the line of duty be by positive acts or by culpable inaction.³ There is a legal obligation to discontinue a trespass or to remove a nuisance.⁴ So a covenant to keep certain premises in repair for a specified period imposes a continuous duty, and when neglected gives a continuous cause of action.⁵ When an action is brought the injury

ant has control, and will have it in the future, he may be charged with depriving the master of the services of an apprentice for the whole term for the same reason that he might be charged with the full value of a horse tortiously taken. See *Herriter v. Porter*, 23 Cal. 385.

¹ *Bay Shore R. Co. v. Harris*, 67 Ala. 6; *Curtiss v. Rochester, etc. R. Co.*, 20 Barb. 282; *Atchison v. King*, 9 Kan. 550; *Welch v. Ware*, 32 Mich. 77; *Birchard v. Booth*, 4 Wis. 67; *Morely v. Dunbar*, 24 Wis. 183; *Wilson v. Young*, 31 Wis. 574; *Goodno v. Oshkosh*, 28 Wis. 300; *Spicer v. Chicago, etc. R. Co.*, 29 Wis. 580; *Karasich v. Hasbrouck*, 28 Wis. 569; *Pennsylvania R. Co. v. Dale*, 76 Pa. St. 47; *Tomlinson v. Derby*, 43 Conn. 562; *Fulsome v. Concord*, 46 Vt. 135; *Nones v. Northouse*, id. 587; *Metcalf v. Baker*, 57 N. Y. 662; *New*

Jersey Exp. Co. v. Nichols, 33 N. J. L. 434; *Walker v. Erie R. Co.*, 63 Barb. 260; *Bradshaw v. Lancashire Ry. Co.*, L. R. 10 C. P. 189; *Collins v. Council Bluffs*, 32 Iowa, 324; *Russ v. Steamboat War Eagle*, 14 Iowa, 363; *Dixon v. Bell*, 1 Stark. 287. See ch. 36, vol. 3.

² *Fulsome v. Concord*, 46 Vt. 135.

³ *Powers v. Ware*, 4 Pick. 106; *Pierce v. Woodward*, 6 Pick. 206; *McConnel v. Kibbe*, 33 Ill. 175.

⁴ Per Lord Denman in *Clegg v. Dearden*, 12 Q. B. 601; *Savannah, etc. Ry. Co. v. Davis*, 25 Fla. 917; *Adams v. Hastings & D. R. Co.*, 18 Minn. 260.

⁵ *Cooke v. England*, 27 Md. 14; *Beach v. Crain*, 2 N. Y. 86; *Bleecker v. Smith*, 13 Wend. 530; *Phelps v. New Haven, etc. Co.*, 43 Conn. 453; *Keith v. Hinkston*, 9 Bush, 283.

to that time is segregated and recovery is confined to such damages as result from the breach or wrong continued to the commencement of the action.¹

§ 126. Continuance of wrong not presumed. [199-201] The law will not presume a continuance of a wrong, nor allow a license to continue it or a transfer of title to result from the recovery of damages for prospective misconduct.² But in equity the owner of real property upon which a trespass has been committed may restrain the continuance of the wrong and thus prevent a multiplicity of actions at law to recover damages. In such an action the court may determine the amount of damages the owner would sustain if the trespass were permanently continued, and it may decree that upon their payment the plaintiff shall give a deed or convey the right to the defendant.³

§ 127. Necessity of successive actions. The neces- [202] sity and advantage of successive actions to recover damages which proceed from a continuous and still operating cause are very obvious; for besides the considerations which have already been mentioned the injurious effects so blend together that in most instances it would be wholly impracticable to accurately apportion them. Therefore the right to recover for all damages which have been suffered to the time of bringing the first action, in the next, all damages which have been suffered from that time to that of commencing such second action, and so on while the cause continues, is the most conven-

¹ Id.; *Sackrider v. Beers*, 10 Johns. 241; *Crain v. Beach*, 2 Barb. 120; *Beach v. Crain*, 2 N. Y. 86; *Shaw v. Etheridge*, 3 Jones' L. 801; *Brasfield v. Lee*, 1 Ld. Raym. 829; *Whitehouse v. Fellowes*, 10 C. B. (N. S.) 765; *Mahon v. New York C. R. Co.*, 24 N. Y. 658; *Phillips v. Terry*, 3 Keyes, 313; *Hayden v. Albee*, 20 Minn. 159; *Thompson v. Gibson*, 7 M. & W. 456; *Beckwith v. Griswold*, 29 Barb. 291; *Bradley v. Amis*, 2 Hayw. 890; *Caruthers v. Tillman*, 1 id. 501; *Duncan v. Markley*, Harp. 276; *Moore v. Love*, 3 Jones' L. 215; *Cole v. Sprowl*, 85 Me. 161; *Hudson v. Nicholson*, 5 M. & W. 487.

² *Adams v. Hastings & D. R. Co.*, 18 Minn. 260; *Ford v. Chicago, etc. R. Co.*, 14 Wis. 609; *Uline v. New York, etc. R. Co.*, 101 N. Y. 98; *Savannah & O. C. Co. v. Bourquin*, 51 Ga. 378; *Hanover W. Co. v. Ashland I. Co.*, 84 Pa. St. 279; *Whitmore v. Bischoff*, 5 Hun, 176; *Sherman v. Milwaukee, etc. R. Co.*, 40 Wis. 645; *Russell v. Brown*, 63 Me. 203; *Bowyer v. Cook*, 4 C. B. 236; *Holmes v. Wilson*, 10 A. & E. 503; *Battishill v. Reed*, 18 C. B. 696; *Cumberland C. Co. v. Hitchings*, 65 Me. 140.

³ *Pappenheim v. Metropolitan E. Ry. Co.*, 128 N. Y. 436; *Amerman v. Deane*, 132 id. 355. See vol. 3, ch. 16

ient course of practice for practical redress that can be devised.¹

In cases of contracts imposing a continuous duty, or a duty the continued neglect of which is an uninterrupted breach, from which results a steady accretion of damage, the injured party may bring a succession of actions or treat defaults having that significance as a total breach,² and recover damages accordingly. Of this nature was the contract in *Crain v. Beach*,³ where the plaintiff had granted to the defendants a perpetual right of way over his land and covenanted to erect a gate of a specified description at the terminus, to which the defendants covenanted in the same instrument to make all necessary repairs. The plaintiff erected the gate, which was subsequently removed by some unknown person. It was held that the defendants were bound to replace it; the covenant was continuing; an action brought thereon after the removal of the gate for damages occasioned by cattle coming on the plaintiff's land in consequence of there being no gate, and a recovery therein, were no bar to another action on the same covenant for damages accruing after the commencement of the first suit. The defendants' default was not a total breach, nor declared and recovered on as such, and hence they were not thereby relieved of the continuing obligation of the covenant. If it were an entire contract, however, any breach would be or might be treated as a total breach.⁴ Covenants for support and maintenance during life are entire, and any breach entitles the injured party to recover entire damages as for a total breach,⁵ but as they impose a continuous duty the injured party may have a succession of actions treating any acts of breach as partial only.⁶

¹ *Uline v. New York C. R. Co.*, 101 N. Y. 88; *Mitchell v. Darley Main Colliery Co.*, 14 Q. B. Div. 125.

² *Grand Rapids, etc. R. Co. v. Van Dusen*, 29 Mich. 431; *Royalton v. Royalton & W. T. Co.*, 14 Vt. 311; *Withers v. Reynolds*, 2 B. & Ad. 882; *Fish v. Folley*, 6 Hill, 54; explained in *Crain v. Beach*, 2 Barb. 124; *Keck v. Bieber* (Penn.), 24 Atl. Rep. 170.

³ 2 N. Y. 86; 2 Barb. 120.

⁴ *Fish v. Folley*, 6 Hill, 54.

⁵ *Schell v. Plumb*, 55 N. Y. 592; *Dresser v. Dresser*, 35 Barb. 573; *Shaffer v. Lee*, 8 id. 412; *Trustees of Howard College v. Turner*, 71 Ala. 429. See *Wright v. Wright*, 49 Mich. 624.

⁶ *Id.*; *Fiske v. Fiske*, 20 Pick. 499; *Berry v. Harria*, 43 N. H. 376; *Ferguson v. Ferguson*, 2 N. Y. 360; *Turner v. Hadden*, 62 Barb. 480.

SECTION 2.

PARTIES TO SUE AND BE SUED.

§ 128. **Damages to parties jointly injured entire.** Before leaving the subject of the entirety of causes of action and damages it is proper to notice some points relative to parties. At common law all the parties who are jointly injured by a tort or breach of contract may sue jointly for damages; in actions *ex contractu* the rule is imperative. All the parties [204] with whom the violated contract was made must join as plaintiffs unless their interests are severed in the contract, so that upon a breach a distinct cause of action accrues to each or less than all.¹ Actions for personal injuries to a married woman must be in the names of the husband and wife;² except where statutes have so enlarged the property rights of married women as to enable them to maintain such actions in their own names.³

§ 129. **Actions under statutes.** In actions brought under statutes which create a liability where none existed at common law the parties who sue thereunder must bring themselves clearly within the language used by the legislature. Such statutes will not be extended or enlarged by construc-

¹ *Bigelow v. Reynolds*, 68 Mich. 344; *Hall v. Leigh*, 8 Cranch, 50; *Fugure v. Mutual Society of St. Joseph*, 46 Vt. 362; *Cleaves v. Lord*, 8 Gray, 66; *Jewett v. Cunard*, 8 Woodb. & M. 277; *Little v. Hobbs*, 8 Jones' L. 179; *Gridley v. Starr*, 1 Root, 281; *Farmer v. Stewart*, 2 N. H. 97; *Eastman v. Ramsey*, 3 Ind. 419; *Millard v. Baldwin*, 3 Gray, 484; *Dow v. Clark*, 7 Gray, 198; *Weathers v. Ray*, 4 Dana, 474; *Frankem v. Trimble*, 5 Pa. St. 520; *Ross v. Milne*, 12 Leigh, 204; *Thompson v. Page*, 1 Met. 566; *The Ship Potomac*, 2 Black, 581; *Archer v. Bogue*, 4 Ill. 526; *Robertson v. Reed*, 47 Pa. St. 115; *Sawyer v. Steele*, 4 Wash. 227; *Newcomb v. Clark*, 1 Denio, 226; *Law v. Cross*, 1 Black, 583.

² *Gallagher v. Bowie*, 67 Texas, 265; *Ezell v. Dodson*, 60 id. 331; *Tell v. Gibson*, 66 Cal. 247; *King v. Thompson*, 87 Pa. St. 365; *Northern C. R. Co. v. Mills*, 61 Md. 355; *Blair v. Chicago & A. R. Co.*, 89 Mo. 384. Compare *Bennett v. Bennett*, 116 N. Y. 584.

³ *Chicago, etc. R. Co. v. Dunn*, 52 Ill. 260; *Musselman v. Galligher*, 32 Iowa, 388.

A wife may maintain an action in her own name against a woman who has alienated from her the affection and deprived her of the society of her husband, although they live together as husband and wife. *Foot v. Card*, 58 Conn. 1; *Bennett v. Bennett*, 116 N. Y. 584.

tion.¹ The relief or remedy is not available to any person who is not included therein.² If the right to sue for an injury which has resulted in death is given to a "child," an illegitimate child cannot recover for its mother's death in England,³ nor in Canada;⁴ but it is otherwise in Ohio under a statute which uses the words "next of kin."⁵ Where an action is given for the benefit of the widow and next of kin it may be brought though there be no widow if there are next of kin, and *vice versa*.⁶ Nor are the "next of kin" required to be so nearly related to the person whose death is sued for as to require any duty of sustenance, support or education.⁷

§ 130. **Must be recovered by person in whom legal interest vested.** The suit must be brought in the name of the party in whom is vested the legal interest though the equitable interest be in another person.⁸ The funds of a voluntary association were put under the control and management of trustees who took a note payable to themselves on lending the funds to some other members. It was held that the trustees in their individual names were entitled to maintain an action on the note, as it was payable to them, though the defendants as well as themselves were members of the association beneficially interested in the collection.⁹ One who pays the con-

¹ Sutherland, Const. of States, § 871.

² Ibid.; *McNamara v. Slavens*, 76 Mo. 380; *Gibbs v. Hannibal*, 82 id. 143; *Warren v. Englehart*, 13 Neb. 283; *Woodward v. Chicago & N. Ry. Co.*, 23 Wis. 400; *Dickins v. New York C. R. Co.*, 28 N. Y. 153.

³ *Dickinson v. Northeastern Ry. Co.*, 2 H. & C. 735.

⁴ *Gibson v. Midland Ry. Co.*, 2 Ont. 658; 15 Am. & Eng. R. R. Cas. 507.

⁵ *Muhl v. Michigan Southern R. Co.*, 10 Ohio St. 272.

⁶ Sutherland, Const. States, § 871, citing *McMahon v. Mayor*, 33 N. Y. 612, 647.

⁷ *Tilley v. Hudson River R. Co.*, 24 N. Y. 474; *Galveston, etc. R. Co. v. Kn-tac*, 72 Texas, 643; 37 Am. & Eng. R. R. Cas. 470; *Petrie v. Columbia, etc. R. Co.*, 29 S. C. 303; *Railroad Co. v.*

Barron, 5 Wall. 90; *Baltimore, etc. R. Co. v. Hauer*, 60 Md. 449; 13 Am. & Eng. R. R. Cas. 149, 155.

⁸ 1 Chitty Pl. 2-6; *Treat v. Stanton*, 14 Conn. 445; *Denton v. Denton*, 17 Md. 408; *Sunapee v. Eastman*, 82 N. H. 470; *Pike v. Pike*, 24 N. H. 384; *Phillips v. Pennywit*, 1 Ark. 59; *Lapham v. Green*, 9 Vt. 407; *Governor v. Ball*, Hempst. 541; *Lord v. Carnes*, 96 Mass. 808; *Hart v. Stone*, 80 Conn. 94; *Pierce v. Robie*, 89 Me. 205; *Yeager v. Wallace*, 44 Pa. St. 94; *Morton v. Webb*, 7 Vt. 123; *Boardman v. Keeler*, 2 Vt. 65; *Clarkson v. Carter*, 8 Cow. 84; *Mitchell v. Dall*, 2 H. & Gill, 159; *Lord v. Baldwin*, 6 Pick. 352; *Wilson v. Wallace*, 8 S. & R. 55; *Warner v. Griswold*, 8 Wend. 666; *Clark v. Miller*, 4 Wend. 628.

⁹ *Pierce v. Robie*, 89 Me. 205.

sideration for a privilege or benefit which he may confer upon another may sue for the denial of it.¹ A trustee who has sold trust property without assigning a claim for damages resulting from a wrong done thereto prior to the sale may bring suit to recover therefor.² In an action by a firm the name of a dormant partner need not and ought not to be used³ unless he is one of the parties disclosed in the contract.⁴ The parties to a contract are the persons in whom the legal interest in the subject of it is deemed to be vested, and who therefore must be the parties to the action which is instituted for the purpose of enforcing it or recovering damages for its violation.⁵ An agent who has sold property on credit pursuant to authority from and for his principal may sue the purchaser in his own name if he is bound to account to the owner or if he has accounted to him for it.⁶ An undisclosed principal may sue on a contract made for his benefit by an agent.⁷ An agreement to relinquish a business and not to carry it on thereafter in a designated place, no limit being specified as to time, and a bond conditioned for the observance thereof, are not so personal to the obligee that he cannot sue thereon for a breach of the agreement after he has transferred the property and business for the benefit of his vendee. There seems no doubt, upon the authorities, that the agreement could be transferred with and as an incident of the property, the purchase being made with the knowledge of the condition of the bond.⁸ The contrary doctrine is held in Oregon.⁹ The English cases referred to in the note are not considered in that case; and the California case cited is distinguished because the word "heirs" was used in the contract there passed upon while

¹ Trustees of Howard College v. Turner, 71 Ala. 429.

² Lancaster v. Connecticut Mut. L. Ins. Co., 92 Mo. 460.

³ Clark v. Miller, 4 Wend. 628.

⁴ Clark v. Carter, 2 Cow. 84; Lord v. Baldwin, 6 Pick. 852.

⁵ Treat v. Stanton, 14 Conn. 445; Daugherty v. American U. T. Co., 75 Ala. 168.

⁶ Fuller v. Curtis, 100 Ind. 287; Jackson v. Mott, 76 Iowa, 263.

⁷ Bell v. Lee, 78 Ala. 511.

⁸ Webster v. Buss, 61 N. H. 40; Guerand v. Dandeleit, 32 Md. 562; California Steam Nav. Co. v. Wright, 6 Cal. 258; S. C., 8 id. 585; Pemberton v. Vaughan, 10 Q. B. 87; Hastings v. Whitley, 2 Exch. 611. It was held in the last case that a suit might be brought by the executors of the obligee for a breach arising after his death.

⁹ Hillman v. Shannahan, 4 Ore. 163.

it was not employed in the one before the court. The breach of a covenant which runs with land gives the widow who occupies it as a homestead a right of action though she was not a party to it.¹

[205] § 131. Not joint when contract apportions the legal interests. Where the contract separates and apportions the legal interests, the injury in case of a breach is correspondingly separate and distinct. Thus a promise to pay the respective owners of land taken for a road such sums as a referee named shall award gives each a separate action for the amount awarded him.²

§ 132. Implied assumpsit follows the consideration. Where the *assumpsit* is implied it will follow the consideration.³ A committee appointed by a school district to repair a school-house took the job among themselves, each performing work and furnishing a separate portion of materials. It was held that each had a distinct cause of action.⁴ By the failure of I. to fulfill a promise made to G. and S. to enter satisfaction of a judgment against them the judgment was collected entirely out of the property of G.; it was held that he could recover in an action by himself alone for money paid.⁵ If money is deposited with a stakeholder on the event of a wager by one who acts as an agent for several others, each of the latter may bring a separate action to recover the money deposited for him, though the stakeholder was ignorant of the principals on whose account the deposit was made.⁶ Several plaintiffs claiming distinct rights cannot join in the same action.⁷

§ 133. Effect of release by or death of one of several entitled to entire damages. Where a cause of action *ex contractu* accrues to several jointly it is an entirety as to them; they must all join in an action upon it; no others can, except where assignments are sanctioned by statute as a transfer of the legal right of action, or unless that right devolves upon others

¹ St. L., I. M. & S. Ry. v. O'Baugh, 49 Ark. 418.

² Farmer v. Stewart, 2 N. H. 97; Jewett v. Cunard, 8 Woodb. & M. 277.

³ Lee v. Gibbons, 14 S. & R. 110.

⁴ Geer v. School District, 6 Vt. 76.

⁵ Taylor v. Gould, 57 Pa. St. 152.

⁶ Yates v. Foot, 12 Johns. 1.

⁷ Barry v. Rogers, 2 Bibb, 314; Hinchman v. Paterson R. Co., 17 N. J. Eq. 75; Chambers v. Hunt, 18 N. J. L. 339.

by operation of law as in case of death or marriage. It cannot be severed by partial assignments,¹ nor by the giving of a release by one of several jointly entitled to sue. Such a [206] release would operate to extinguish the right of action at law; for if, for such a reason, all to whom the right of action accrued cannot join in a suit upon it, no action at all can be maintained.² But one of several joint creditors between whom no partnership exists cannot release the common debtor so as wholly to conclude his co-creditors who do not assent. He may defeat an action at law, but they will be entitled to assert their rights in equity. It is a general rule that joint creditors cannot by a division of their claim between themselves acquire a separate right of action against their debtor, either at law or in equity; but when a debtor procures a release from a part of them, he cannot object to the others proceeding against him in equity.³ On the death of one of two persons who have a joint right of action upon contract, it survives, and the survivor alone is entitled to sue. The personal representatives of the deceased party cannot be joined with him.⁴ By consent a joint demand may be severed so that several suits may be brought.⁵ So an assignee of the whole or a part may sue in his own name if the debtor promise to pay him,⁶ but not otherwise.⁷

§ 134. **Misjoinder of plaintiffs, when a fatal objection.** In such action it is a fatal objection available on the trial that there is a misjoinder of plaintiffs.⁸ It is equally so in actions *ex delicto*.⁹ And in actions *ex contractu* the non-joinder of all

¹ Chicago, etc. R. Co. v. Nichols, 57 Ill. 464.

² Hall v. Gray, 54 Me. 230; Kimball v. Wilson, 3 N. H. 96; Myrick v. Dame, 9 Cush. 248; Tuckerman v. Newhall, 17 Mass. 581; Eaton v. Lincoln, 13 Mass. 424. See Eisenhart v. Slaymaker, 14 S. & R. 154.

³ Upjohn v. Ewing, 2 Ohio St. 13; Hosack v. Rogers, 8 Paige. 229; Carlington v. Crocker, 37 N. Y. 836.

⁴ Jackson v. People, 6 Mich. 154; Smith v. Franklin, 1 Mass. 480; Walker v. Maxwell, id. 118; Morrison v. Winn, Hardin (Ky.), 480; Beebe v.

Miller, Minor (Ala.), 364; Brown v. King, 1 Bibb, 462; Clark v. Parish, id. 547; Chandler v. Hill, 2 Hen. & Mun. 124.

⁵ Parker v. Bryant, 40 Vt. 291; Carlington v. Crocker, 37 N. Y. 386.

⁶ Page v. Danforth, 53 Me. 174.

⁷ Hay v. Green, 12 Cush. 282.

⁸ Brent v. Tivebaugh, 12 B. Mon. 87; Blakey v. Blakey, 2 Dana, 460; Doremus v. Selden, 19 Johns. 218; Waldsmith v. Waldsmith, 2 Ohio, 333; Robinson v. Scull, 3 N. J. L. 817.

⁹ Glover v. Hunnewell, 6 Pick. 222;

the parties in whom the right of action is vested is fatal, and [207] the objection may be taken on the trial.¹ But in actions of tort the non-joinder of a party who ought to join as co-plaintiff can only be taken advantage of by plea in abatement or upon the trial by an apportionment of damages.²

§ 135. Joinder of defendants; effect of non-joinder and misjoinder. By the common law all joint promisors should be joined as defendants. And all should be sued, or only one, on a joint and several contract.³ On a joint and several promissory note made by a firm in the firm name and by another person in his individual character, a suit may be maintained against the members of the firm without joining the other maker, they for this purpose being considered but one person; and the non-joinder of the other is no ground of objection.⁴ Where some weeks after the execution of a lease of real estate a third person, by writing obligatory, became surety for the lessee, it was held that they were not jointly liable and could not be joined as defendants.⁵ Two or more persons cannot be sued jointly unless a joint liability is proved.⁶ On the death of one joint promisor the liability survives at law against the remaining or surviving promisor; and the personal representative of the deceased cannot be joined as co-defendant.⁷ Many persons may join in one instrument without making themselves jointly bound. Whether they have done so or not [208] is a question of intention to be determined by the con-

Ainsworth v. Allen, Kirby (Conn.), 145.

¹ *Dob v. Halsey*, 16 Johns. 84; *Ehle v. Purdy*, 6 Wend. 629; *Hansel v. Morris*, 1 Blackf. 807; *McIntosh v. Long*, 2 N. J. L. 274; *Hilliker v. Loop*, 5 Vt. 116; *Ellis v. McLemoor*, 1 Bailey, 13; *Coffee v. Eastland, Cooke* (Tenn.), 159; *Sweigart v. Berk*, 8 S. & R. 308; *Morse v. Chase*, 4 Watts, 456; *Connolly v. Cottle, Breeze* (Ill.), 864; *Beach v. Hotchkiss*, 2 Conn. 697; *Baker v. Jewell*, 6 Mass. 460; *Halliday v. Doggett*, 6 Pick. 359; *Gordon v. Goodwin*, 2 N. & McC. 70.

² *Wright v. Bennett*, 8 Barb. 451; *White v. Webb*, 15 Conn. 302.

³ *Damron v. Sweetser*, 16 Ill. App.

889; *Deloach v. Dixon, Hempst.* 428; *Merrick v. Trustees of Bank*, 8 Gill, 59; *Minor v. Mechanics' Bank*, 1 Pet. 78; *Bangor Bank v. Treat*, 6 Me. 207; *Fielden v. Lahens*, 9 Bosw. 486; *Claremont Bank v. Wood*, 12 Vt. 252; *Keller v. Blasdel*, 1 Nev. 491.

⁴ *Van Tine v. Crane*, 1 Wend. 524.

⁵ *Tourtelott v. Junkin*, 4 Blackf. 483.

⁶ *Rowan v. Rowan*, 29 Pa. St. 181.

⁷ *Sigler v. Interest*, 3 N. J. L. 724; *Hedden v. Van Ness*, 2 Id. 84; *Gillin v. Pence*, 4 T. B. Mon. 804; *Murphy v. Branch Bank*, 5 Ala. 421; *Poole v. McLeod*, 1 Sm. & M. 891; *Union Bank v. Mott*, 27 N. Y. 633; *Voorhis v. Childs' Ex'r*, 17 Id. 354.

struction of the entire contract. The undertaking of each party may be several, as is usual in subscriptions for some common purpose, and sometimes in other promises to pay.¹ Joining too many persons as defendants in an action upon contract is a fatal objection and may be taken advantage of on the trial;² but if less than all those jointly liable are sued the objection of the non-joinder of others can only be taken advantage of by plea in abatement unless it appears on the face of the declaration.³

§ 136. **How joint liability extinguished or severed.** If one jointly or jointly and severally liable is released all are discharged.⁴ So a specialty taken from one merges any simple contract liability, not only of the person giving the specialty, but of others who were jointly liable with him.⁵ Thus where a mercantile business was carried on in a single name and the merchant in whose name it was conducted bought goods and executed a specialty for the price, the vendor, though ignorant at the time that such purchaser had a dormant partner, but who discovered that fact after the death of the purchaser who executed the specialty, was held not entitled to maintain *assumpsit* on the simple contract against the dormant partner because that contract was extinguished.⁶ The code has materially relaxed the strictness of the common law as to parties

¹Larkin v. Butterfield, 29 Mich. 254.

²Tuttle v. Cooper, 10 Pick. 281; Walcott v. Canfield, 3 Conn. 194; Livingston v. Tremper, 11 Johns. 101; Erwin v. Devine, 2 T. B. Mon. 124; Jenkins v. Hart, 2 Rand. 448.

³Bragg v. Wetzell, 5 Blackf. 95; Burgess v. Abbott, 6 Hill, 185; Nash v. Skinner, 12 Vt. 219; Ives v. Hulet, id. 314; Hicks v. Cram, 17 id. 449; Means v. Milliken, 33 Pa. St. 517; Douglas v. Chapin, 26 Conn. 76.

⁴State v. Watson, 44 Mo. 805; Heckman v. Manning, 4 Colo. 548; Gunther v. Lee, 45 Md. 60; Line v. Nelson, 38 N. J. L. 358; Bonney v. Bonney, 29 Iowa. 448; Prince v. Lynch, 38 Cal. 528.

Where judgment was rendered against two defendants upon a verdict which apportioned their liability, a motion to vacate it and dismiss the action as to one defendant was denied on the ground that it might operate as a discharge of both defendants.

McCool v. Mahoney, 54 Cal. 491. See Minor v. Mechanics' Bank, 1 Pet. 46, 87.

A similar verdict was considered as being against one defendant and a finding in favor of the other against whom the smaller sum was charged. Clissold v. Machell, 25 Up. Can. Q. B. 80; S. C. on appeal, 26 id. 422.

⁵Ward v. Motter, 2 Rob. (Va.) 536.

⁶Id.

by requiring, with few exceptions, actions to be brought in the name of the real party in interest.

§ 137. Principles on which joint right or liability for tort determined. Whether actions in tort are joint as to the [209] parties injured or as to those liable depends on very plain principles. The injury is joint where it at once affects property or interests jointly owned; in other words, there must be a community of interest between the parties injured in that which the injury affects. And to render wrong-doers jointly liable there must be concert or a common purpose between them. Persons who are jointly interested in the damages recoverable for an injury to property may unite in a suit for their recovery although they are not joint owners of the property itself. Thus two persons in possession of land carrying on business in a mill which belongs to one of them only may unite in an action for damages for a negligent burning of it.¹ If injury is done both to the possession and the freehold, and the interests of both owners are affected, though in different degrees, the life tenant and the remainder-man may join in case for the recovery of the damages.² All joint owners of personal property are rightly joined in actions for tortious injuries thereto.³ At common law the rule was that "when two or more persons are jointly entitled, or have a joint legal interest in the property affected, they must, in general, join in the action or the defendant may plead in abatement."⁴ As to tenants in common who bring actions against third parties a distinction existed between real and personal actions. "When the action is in the realty they must sue

¹ *Cleveland v. Grand T. R. Co.*, 42 Vt. 449; *Rhoads v. Booth*, 14 Iowa, 575.

² *McIntire v. Westmoreland Coal Co.*, 118 Pa. St. 108.

³ *Glover v. Austin*, 6 Pick. 209; *Pickering v. Pickering*, 11 N. H. 141.

But in California one joint owner can recover but one-half the damages for the injury done to the joint property. *Loveland v. Gardner*, 79 Cal. 817.

If two machines are bought on joint account and paid for out of

joint funds the fact that the purchasers entered into a separate contract for each machine and that each contract was signed by one of them only in his individual name does not preclude parol proof that the purchase of each machine was made by one of them as agent for the other and on their joint account; such evidence will sustain a joint action for breach of warranty of the machines. *Fox v. Harvester, etc. Works*, 83 Cal. 338.

⁴ 1 Chitty Plead. 64.

separately;¹ when in the personalty they must join.”² This rule must give way if the effect of enforcing it will be to deny a remedy. The reason for it — to protect defendants from a multiplicity of suits — is good; but if adherence to it will cause a failure of justice the reason for departing from the rule is stronger than that for applying it because there is a possibility that no other suit will be brought on the cause of action; while there is a certainty that adherence to it will work the loss of a remedy. These considerations induced the Minnesota court to permit one tenant in common of personalty to maintain an action against a stranger for a wrong done to it, the co-tenants refusing to join as plaintiffs; and being non-residents they could not be made defendants.³

§ 138. **Tortious act not an entirety as to parties injured.** A tortious act is not an entirety as to the persons affected by it; it may affect many persons and do a several injury to each. A single trespass upon real estate injurious to the possession and to the inheritance will be an entire cause of action if one person has the whole title and is in possession. But if one person has the possession and another a reversionary title a distinct wrong is done to each, for which each may bring a separate and independent action.⁴ One having a special interest in real estate injured by the tortious act of another may recover damages therefor whether the wrong-doer is a stranger or has another interest in the same premises.⁵ The purchaser of a crop of growing grass is entitled to the exclusive enjoyment of the crop standing on the land during the proper period of its full growth and removal, and he may maintain trespass *quare clausum fregit* against a stranger who during that time wrongfully enters and cuts and carries away the grass.⁶

¹ Carley v. Parton, 75 Texas, 98.

² Hill v. Gibbs, 5 Hill, 56; Rowland v. Murphy, 66 Texas, 534.

³ Peck v. McLean, 36 Minn. 228.

⁴ Wood v. Williamsburgh, 46 Barb. 401; Gilbert v. Kennedy, 22 Mich. 5;

Files v. Magoon, 41 Me. 104; Stevens v. Adams, 1 Thomp. & C. 587; Stoner

v. Hunsicker, 47 Pa. St. 514; Adams v. Emerson, 6 Pick. 57; Robbins v.

Borman, 1 Pick. 122.

In Pennsylvania a joint action may be maintained. McIntire v. Westmoreland Coal Co., 118 Pa. St. 108.

⁵ Hasbrouck v. Winkler, 48 N. J. L. 481; Luse v. Jones, 39 id. 707; Turnpike Co. v. Fry, 88 Tenn. 296.

⁶ Dolloff v. Danforth, 48 N. H. 219; Howard v. Lincoln, 18 Me. 122; Austin v. Hudson River R. Co., 25 N. Y. 334.

[210] He could maintain a like action against the general owner of the land for such a trespass.¹

§ 139. **General and special owners.** In such case the damages will be according to the tenure by which the plaintiff holds and such as result from the injury he has suffered. He must show that his title gives him an interest in the damages he claims; and can recover none except such as affect his right.² In actions against a stranger for taking or converting personal property, a bailee, mortgagee or other special property man is entitled to recover its full value, but must account to the general owner for the surplus recovered beyond the value of his own interest; but against the general owner, or one in privity with him, only the value of the special property.³ Where goods assigned to a creditor in trust to pay himself and other creditors were attached at the suit of some of the creditors as property of the assignor before the assignment was assented to by any creditor but the assignee, and the value of the goods exceeded the amount of the latter's demand, it was held, in an action of trespass brought by the assignee against the attaching officer, that the measure of damages was the amount of the plaintiff's demand against the assignor and not the value of the goods.⁴ An officer, with an execution against one of two partners, who makes himself a trespasser *ab initio* by levying on the entire property of the concern, still represents the interest of the execution debtor, and the owner of the other interest can recover against him only the value thereof.⁵

Several persons having separate and distinct interests in a chattel cannot unite in replevin for it;⁶ two persons cannot

¹ Clap v. Draper, 4 Mass. 266; Caldwell v. Julian, 2 Mills (S. C.), 294.

² Gilbert v. Kennedy, 22 Mich. 5.

One who has borrowed property cannot maintain an action for its loss. Lockhart v. Western & A. R. Co., 73 Ga. 472.

³ Denver, etc. R. Co. v. Frame, 6 Colo. 332; White v. Webb, 15 Conn. 302; Seaman v. Luce, 23 Barb. 240; Chadwick v. Lamb, 29 Barb. 518; Rhoads v. Woods, 41 Barb. 471; Sherman v. Fall River Iron Co., 5 Allen, 213; Bartlett v. Kidder, 14 Gray, 449;

Russell v. Butterfield, 21 Wend. 300; Fallon v. Manning, 35 Mo. 271; Chaffee v. Sherman, 26 Vt. 237; Soule v. White, 14 Me. 436; Mead v. Thompson, 78 Ill. 62.

A very recent English case holds that a bailee who is under no liability to his bailor cannot recover for an injury to the property held by him. Claridge v. South Staffordshire Tramway Co. [1892], 1 Q. B. 422.

⁴ Boyden v. Moore, 11 Pick. 362.

⁵ Berry v. Kelly, 4 Robert. 106.

⁶ Chambers v. Hunt, 18 N. J. L. 339.

join in suing for an injury done to one of them.¹ Where [211] two constables levy on the same goods by virtue of separate executions they cannot join in an action against one who takes away the goods.² One of several joint debtors whose separate goods are taken on execution and wasted must sue alone for redress; and so if the officer extorsively demand and receive of the debtors illegal fees.³ Actions for torts connected with the matter of a contract, where the tort consists in the mere omission of a contract duty, must be brought by the party injured.⁴

In one suit the court will not take cognizance of distinct and separate claims of different persons. Where the damage as well as the interest is several each party must sue separately.⁵ Whether the plaintiffs in a joint action are copartners or not is immaterial so long as their cause of action is shown to be joint.⁶

§ 140. Joint and several liability for torts. If injuries or damage are sustained through the affirmative acts or negligence of several persons an action may be brought against all or any of them.⁷ They may participate so as to be thus liable by preconcert to do the wrong complained of, or to procure it to be done, as well as by jointly taking part in it, or by subsequently adopting the act done or neglect suffered as principals.⁸ The extent of individual participation in, or of

¹ *Winans v. Denman*, 3 N. J. L. 124. *Schaeffer v. Marienthal*, 17 Ohio St.

² *Warne v. Rose*, 5 N. J. L. 809. 183.

³ *Ulmer v. Cunningham*, 2 Me. 117. ⁶ *Wood v. Fithian*, 24 N. J. L. 33.

⁴ *Fairmount R. Co. v. Stutler*, 54 Pa. St. 375. ⁷ *Williams v. Sheldon*, 10 Wend.

654; *Merryweather v. Nixan*, 8 T. R. 186; *Wheeler v. Worcester*, 10 Allen, 591; *Murphy v. Wilson*, 44 Mo. 813; *Moore v. Appleton*, 26 Ala. 633.

⁸ *Lewis v. Read*, 13 M. & W. 334; *Davis v. Newkirk*, 5 Denio, 92; *Cook v. Hopper*, 23 Mich. 511; *Bonnel v. Dunn*, 28 N. J. L. 153; *Ford v. Williams*, 13 N. Y. 584; *Ball v. Loomis*, 29 N. Y. 412; *Hyde v. Cooper*, 26 Vt. 552; *Lewis v. Johns*, 34 Cal. 629; *Adams v. Freeman*, 9 Johns. 118; *Guille v. Swan*, 19 Johns. 381; *Hume v. Oldacre*, 1 Stark. 351; *Stewart v. Wells*, 6 Barb. 81; *Brown v. Perkins*,

Keith v. Ham, 89 Ala. 590.

⁵ *Hufnagel v. Mt. Vernon*, 49 Hun,

280; *Governor v. Hicks*, 12 Ga. 189;

Rhoads v. Booth, 14 Iowa, 575;

expected benefit from, a joint tort is immaterial; each and all of the tort-feasors are liable for the entire damage.¹ The law [212] is thus accurately and comprehensively laid down in a New York case: "To entitle the plaintiff to a verdict against all the defendants as joint trespassers it must appear that they acted in concert in committing the trespass complained of; if some aided and assisted the others to commit the trespass or assented to the trespass committed by others, having an interest therein, they are all jointly guilty; . . . it would not be material if they had unequal interests in the avails of the trespass; for those who confederate to do an unlawful act are deemed guilty of the whole although their share in the profits may be small. But if any of the defendants are not guilty at all, or if any of them, though guilty, were acting separately and for themselves alone without any concert with the others, they ought to be acquitted and those only found guilty who were acting jointly."² The fact that one who orders an act done which results in injury to a third person gave such order as the officer of a municipal or private corporation does not absolve him from liability for the consequences.³ The rule is that two or more persons cannot be held jointly liable for verbal slander. While admitting this it is said in a recent case in which slander of title was the ground of the action, that under circumstances where all the defendants are jointly concerned and interested and participate in the general purpose, the concert and co-operation may be shown although the false and malicious statements may have been made by one alone.⁴ Where a master is liable for the tort of his servant, a principal for that of his agent or deputy, they are

¹ Allen, 89; Wheeler v. Worcester, 10 Allen, 591.

² McCool v. Mahoney, 54 Cal. 491; Learned v. Castle, 78 id. 454; McCalla v. Shaw, 72 Ga. 458; Everroad v. Gabbert, 83 Ind. 489; Westbrook v. Mize, 35 Kan. 299; Sharpe v. Williams, 41 id. 56; Boaz v. Tate, 43 Ind. 60; Breedlove v. Bundy, 96 id. 319; Page v. Freeman, 19 Mo. 421; Wright v. Lathrop, 2 Ohio, 275; Knickerbacker v. Colver, 8 Cow. 111; Turner v. Hitchcock, 20 Iowa, 810; Nelson

v. Cook, 17 Ill. 448; McMannus v. Lee, 43 Mo. 208; Brown v. Perkins,

1 Allen, 89; Barden v. Felch, 109 Mass. 154; Williams v. Sheldon, 10 Wend. 654; Currier v. Swan, 68 Me. 328.

³ Williams v. Sheldon, 10 Wend. 654.

⁴ Jenne v. Sutton, 43 N. J. L. 257; Myers v. Daubenbiss, 84 Cal. 1.

⁵ Chesebro v. Powers, 78 Mich. 472. See Thomas v. Rumsey, 6 Johns. 26.

jointly liable.¹ If an officer take property of a wrong person on process he as well as the party or attorney who directs it and even the sureties who execute a bond of indemnity to the officer covering that tort may be held jointly liable.² An action for deceit in the nature of a conspiracy cannot be sustained against a principal for the unauthorized fraudulent acts and representations of the agent alone.³ A joint action against two may be maintained when the injury complained of resulted from their concurrent negligence.⁴

§ 141. **Same subject.** In an action for diverting water from a natural water-course so as to flood the plaintiff's land it appeared that the defendant did it by walling the banks on his own land to preserve them. A third person [213, 214] by certain acts wholly independent of defendant's and without concert with him increased the volume of water that flowed upon such land. It was held that the defendant was only liable for the flooding caused by him; and not for that part of the plaintiff's damages resulting from the increased volume of water caused by such third person.⁵ But where nine different creditors acting without concert and without knowing that they were employing a common agent wrongfully caused their debtor to be arrested by the same officer on their several writs, service being made simultaneously, and by virtue thereof committed the debtor to jail where he was confined upon all of the writs at the same time, they were deemed joint trespassers and full satisfaction recovered by the debtor from one of them was held a bar to an action against the others.⁶ It is not possible to harmonize the cases on the extent of the co-operation which makes parties jointly

¹ *Balme v. Hutton*, 9 Bing. 471; 15 N. Y. 409; *Root v. Chandler*, 10 Waterbury, v. Westervelt, 9 N. Y. Wend. 110.

² *Morgan v. Chester*, 4 Conn. 387;

³ *Page v. Parker*, 40 N. H. 47.

⁴ *Barker v. Braham*, 3 Wils. 368; *Bates*

⁵ *Klauber v. McGrath*, 85 Pa. St.

v. Pilling, 6 B. & C. 38; *Newberry v.*

128; *Colegrove v. New York, etc. R.*

Lee, 3 Hill, 523; *Crook v. Wright*,

Co., 20 N. Y. 492; *Peckham v. Bur-*

Ry. & M. 278; *Armstrong v. Dubois*,

lington. Brayton (Vt.), 134.

⁶ *Keyes*, 291.

⁷ *Wallace v. Drew*, 59 Barb. 413.

⁸ *Murray v. Lovejoy*, 2 Cliff. 191;

⁹ *Stone v. Dickinson*, 5 Allen, 29.

Lovejoy v. Murray, 3 Wall. 1; *Lewis*

Bigelow, J., said: "As a matter of

v. Johns, 34 Cal. 629; *Knight v. Nel-*

first impression, it might seem that

son, 117 Mass. 458; *Ball v. Loomis*,

the legal inference from . . . (the

20 N. Y. 412; *Herring v. Hoppock*,

fact that the defendants acted sep-

liable. It seems perfectly proper that an unlawful act done by one person, though it be in furtherance of a lawful purpose in the accomplishment of which others are engaged, should not make the latter liable if it is done without their

arately and independently of each other without any apparent concert among themselves) . . . is that the plaintiff might hold each of them liable for his tortious act, but that they could not be regarded as co-trespassers, in the absence of proof of any intention to act together, or of knowledge that they were engaged in a common enterprise or undertaking. But a careful consideration of the nature of the action, and of the injury done to the plaintiff, for which he seeks redress in damages, will disclose the fallacy of this view of the case. The plaintiff alleges in his declaration that he was unlawfully arrested and imprisoned. This is the wrong which constitutes the gist of the action, and for which he is entitled to indemnity. But it is only one wrong, for which in law he can receive but one compensation. He has not in fact suffered nine separate arrests, or undergone nine separate terms of imprisonment. The writs against him were all served simultaneously, by the same officer, acting for all the creditors, and the confinement was enforced by the jailor on all the processes, contemporaneously, during the entire period of his imprisonment. The alleged trespasses on the person of the plaintiff were, therefore, simultaneous and contemporaneous acts, committed on him by the same person, acting at the same time for each and all of the plaintiffs in the nine writs upon which he was arrested and imprisoned. It is, then, the common case of a wrongful or unlawful act, committed by a common agent acting for several and distinct principals.

"It does not in any way change or affect the injury done to the plaintiff, or enhance in any degree the damages which he has suffered, that the immediate trespassers, by whom the tortious act was done, were the agents of several different plaintiffs, who without preconcert had sued out separate writs against him. The measure of his indemnity cannot be made to depend on the number of principals who employed the officers to arrest and imprison him. We know of no rule of law by which a single act of trespass committed by an agent can be multiplied by the number of principals who procured it to be done, so as to entitle the party injured to a compensation graduated, not according to the damages actually sustained, but by the number of persons through whose instrumentality the injury was inflicted. The error of the plaintiff consists in supposing that the several parties who sued out writs against him, and caused him to be arrested and imprisoned, cannot be regarded as co-trespassers, because it does not appear that they acted in concert, or knowingly employed a common agent. Such preconcert or knowledge is not essential to the commission of a joint trespass. It is the fact that they all united in the wrongful act, or set on foot or put in motion the agency by which it was committed, that renders them jointly liable to the party injured. Whether the act was done by the procurement of one person or of many, and, if by many, whether they acted from a common purpose and design in which they all shared, or from separate and distinct motives,

concurrence, and no benefit is received by them from it.¹ Where the effects of the independent acts of two persons on opposite sides of a street united in causing injury, there being no concert of action they were held not jointly liable.² So where a dam was filled with deposits of coal dirt from different mines on the stream above the dam, worked by persons having no connection with each other, it was held that they were not jointly liable for the combined results of throwing coal dirt into the river by all the workers of the mines; that the ground of action was not the deposit of dirt in the dam by the stream but the negligent act above. Throwing the dirt into the stream was the tort; the deposit in the dam only the consequence. The tort of each was several when committed and did not become joint because its consequences united with other consequences.³ Agnew, J., referring to the in- [216] structions of the trial court asserting a joint liability or the liability of each for the combined results, said: "The doctrine of the learned judge is somewhat novel, though the case itself is new; but if correct is well calculated to alarm all riparian owners who may find themselves by slight negligence overwhelmed by others in gigantic ruin. It is immaterial what may be the nature of their several acts or how small their share in the ultimate injury. If instead of coal dirt others were felling trees and suffering their tops and branches to float down the stream finally finding a lodgment in the dam with the coal dirt, he who threw in the coal dirt and he who felled the trees would each be responsible for the acts of the other. In the same manner separate trespassers who should haul their rubbish upon a city lot and throw it upon the same

and without any knowledge of the intentions of each other, the nature of the injury is not in any degree changed, or the damages increased which the party injured has a right to recover. He may, it is true, have a good cause of action against several persons for the same wrongful act, and a right to recover damages against each and all therefor, with the privilege of electing to take his satisfaction *de melioribus damnia*.

But there is no rule of law by which he can claim to convert a joint into a several trespass, or to recover more than one satisfaction for his damages, when it appears that he has suffered the consequences of a single tortious act only." See *Wehle v. Butler*, 12 Abb. Pr. (N. S.) 189.

¹ *Wert v. Potts*, 76 Iowa, 612.

² *Bard v. Yohn*, 26 Pa. St. 482.

³ *Little Schuylkill, etc. Co. v. Richards*, 57 Pa. St. 142.

pile would each be liable for the whole if the final result be the only criterion of liability." The court rejected this view and held as above. The learned judge further said: "True, it may be difficult to determine how much dirt came from each colliery, but the relative proportions thrown in by each may form some guide, and a jury in a case of such difficulty caused by the party himself would measure the injury of each with a liberal hand. But the difficulty of separating the injury of each from the others would be no reason that one man should be held to be liable for the torts of others without concert. It would be simply to say because the plaintiff fails to prove the injury one man does him he may therefore recover from that one all the injury that others do. This is bad logic and hard law. Without concert of action no joint suit could be brought against the owners of all the collieries, and clearly this must be the test."¹

Separate owners are not jointly liable for injuries jointly committed by their respective animals though the latter hap-

¹In *Hillman v. Newington*, 56 Cal. 57, the plaintiff was entitled to four hundred inches of the water in a creek; defendants severally and without concert of action diverted water to such an extent that he did not receive that quantity. In passing upon the question of misjoinder of parties defendant the court said: "It is not at all improbable that no one of the defendants deprives the plaintiff of the amount to which he is entitled. If not, upon what ground could he maintain an action against any one of them? If he were entitled to all the water of the creek, then every person who diverted any of it would be liable to him in an action. But he is only entitled to a certain specific amount of it, and if it is only by the joint action of the defendants that he is deprived of that amount, it seems to us that the wrong is committed by them jointly because no one of them alone is guilty of any wrong. Each of them diverts some of the water;

and the aggregate reduces the volume below the amount to which the plaintiff is entitled, although the amount diverted by any one would not. It is quite evident, therefore, that without unity or concert of action no wrong could be committed, and we think that in such a case all who act must be held to act jointly. If there be a surplus [of water] the defendants can settle the priority of right to it among themselves. That can in no way affect the plaintiff's right to the amount to which he is entitled. It does not seem to us that the defendant's answer that each one of them is acting independently of every other one shows that the wrong complained of is not the result of their joint action; and if it does not the answer in that respect is insufficient to constitute a defense. The case so far as we are advised is *sui generis*. No parallel case is cited by either side." See § 142.

pen to unite in a single transaction. Each owner is liable only for the injury committed by his own animal; and his liability is based on his duty to restrain it and his neglect in allowing it to go at large where in pursuing its known natural inclination it may do damage.¹ If, however, separate owners keep animals in common and by a concurring negligence or design suffer them to run at large as one herd, they are jointly liable for all damages by the united trespasses of all or any of them.² Two railroad companies used the same track by joint arrangement, governed by common rules; their trains collided owing to mutual and concurring negligence and caused a single injury. They were held jointly liable.³ The same rule applies to adjoining land-owners by whose concurring negligence an insecure party-wall is maintained.⁴

§ 142. *Same subject.* A statute giving a joint action to any person who shall be injured in his means of support by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication in whole or in part of such person or persons, gives a right of action against all such persons who participate in causing a particular or several particular intoxications of a person; if damages result therefrom the person injured may sue such persons jointly or severally; and also all persons who only by the sale of liquor to any person materially contribute to make him an habitual drunkard, may be sued jointly by the person injured in consequence. But the two classes cannot be sued jointly, and those who alone contributed to cause habitual intoxication made responsible jointly with those who only contributed to the particular intoxication and the reverse.⁵ Under the Iowa statute concerning liability for the results of the sale of liquors, whoever contributes to a single

¹Dyer v. Hutchins, 87 Tenn. 198; Wend. 562; Buddington v. Shearer, Auchmuty v. Ham, 1 Denio, 495; 20 Pick. 477.

Wilbur v. Hubbard, 85 Barb. 308; ²Jack v. Hudnall, 25 Ohio St. 255.

Partenheimer v. Van Order, 20 id. ³Colegrove v. New York, etc. R. 479; Russell v. Tomlinson, 2 Conn. Co., 20 N. Y. 492.

206; Adams v. Hall, 2 Vt. 9 (the rule ⁴Klauder v. McGrath, 85 Pa. St. in Vermont has been changed by 128.

statute, Remele v. Donohue, 54 Vt. ⁵Tetzner v. Naughton, 12 Ill. App. 553); Van Steinburgh v. Tobias, 17 148.

act of intoxication, whereby distinct damages are caused, is a joint wrong-doer.¹ But there is no joint liability unless the persons made defendants contributed to a specific act or acts of intoxication.² In an earlier case the court say: "A joint

¹ *Kearney v. Fitzgerald*, 43 Iowa, 580.

² *Richmond v. Shickler*, 57 Iowa, 486. *Boyd v. Watt*, 27 Ohio St. 259, is a novel and interesting case. The widow of Dr. Watt brought an action; the complaint alleged that he was a physician with an extensive practice, from the profits of which he was able to furnish her comfortable means of support; that about April, 1865, he became and was in the habit of getting intoxicated, and so continued until his death in 1869, of which the defendant had notice; that during that period and at sundry and divers times the defendant sold him in quantities of from one pint to a quart intoxicating liquors, causing said Watt to become intoxicated and an habitual drunkard; and by reason thereof during said period, and resulting therefrom, he became incapable of attending to his usual business, and squandered his estate, and so deprived her of her means of support. Johnson, J., speaking for a majority of the court, said: "The statute gives the action against 'any person who shall . . . have caused the intoxication.' This intoxication may be 'habitual or otherwise.' A right of action is given for damages resulting from single cases of intoxication or from habitual intoxication. Under the code several distinct causes of action may be joined in one action for damages growing out of distinct cases of intoxication, where each cause of action is separate and distinct, and is between the same parties; but if on trial it appears that some of the acts of intoxication were caused by others, no re-

covery as to them could be had. In such case the causes of action are separate, and the damages resulting from each are distinct and disconnected; and the causes of action should be separately stated and numbered.

"In such a case the question would be as to each case of intoxication, who caused it, and what damages resulted from it. What would constitute a causing of a single act under the statute to render one liable would then arise. That question is not made in this case. The charge is of causing *habitual* intoxication for a series of years. The damages alleged are not the proximate results from distinct cases, but the ultimate result of habitual intoxication. This continued habit of drinking is alleged to have rendered the husband incapable of attending to his business, and caused him to squander his estate. This final result deprived the plaintiff of her means of support. It is a charge of repeated illegal acts, producing by their united effects an ultimate *state* or *condition* of Dr. Watt, out of which the damages arise. The plaintiff asks to recover the damages resulting from this *state* or *condition* of her husband, caused by repeated illegal sales for a series of years, and not the damages from a single case of intoxication, nor of a series of distinct cases at different times, caused by separate and distinct illegal sales. The means used were sales in quantity by the pint and quart. To a person of Dr. Watt's habits, frequent sales in such quantity were calculated to produce the result complained of. Every

liability arises where an immediate act is done by the co-operation or joint act of two or more persons. Mere successive wrongs, being the independent acts of the persons doing them, will not create a joint liability although the wrongs may

person is presumed to have intended the natural and probable consequences of his acts. The defendant was, in violation of law, using means calculated to produce the alleged injury. If the jury found that this was so, and that the means so employed were so continued as to produce the condition of the husband alleged, then they had the right to presume he intended the result which followed, though others, with or without preconcent, contributed to cause it. The intent with which the act or acts are done is always an important element in the case. In this case it is peculiarly so. The means used, the force or agency employed, are to be considered in ascertaining that intent. If, as seems to be claimed, a defendant can only be liable, except in cases of conspiracy or agreement, when he is the sole cause of the habitual intoxication, and no recovery can be had unless the damages can be separated (an impossibility in most cases of this class), then this part of the statute is virtually a dead letter.

"Why should the defendant be exonerated from the injury he has caused by his habitual wrongs for a series of years by showing that others, without his knowledge, have also contributed by like means to this result? He was using adequate means to produce the result, and may, therefore, fairly be presumed to have intended it. True, he may not have enjoyed a monopoly in the profits accruing, by reason of the competition of others in a common business; but that certainly is no reason why he should not be liable

for the injuries he was intentionally engaged in causing. If such is the law, then he could take advantage of his own wrong by showing that during this four years another or others had also contributed. Such is not the law in criminal cases at common law, as will be shown hereafter; and we know no reason for greater strictness under this statute than in cases of the highest crimes known to the law. This section of the statute, we take it, is to be construed by ordinary canons of construction."

The foregoing views of the court presuppose that the defendant insisted on complete exemption from responsibility because other persons made sales to Dr. Watt. But the case as reported does not disclose that any such position was taken. The defendant asked the court to charge the jury "that the defendant was only liable for damages to the plaintiff occasioned by intoxication produced by the intoxicating liquor which the defendant himself had sold to said Dr. Watt, and that the defendant was not liable for any damages produced by the intoxication of said Dr. Watt, occasioned by intoxicating liquors sold to him during said period by other persons;" which charge the court refused to give except with the following qualifications: "Should you find that the defendant sold intoxicating liquor to Joseph Watt in violation of law within the time charged in the petition, and that the plaintiff sustained damages by reason of the intoxication of said Watt, caused thereby to her person, property or means of

be committed against the same person. There must be concurrent action, co-operation or a consent or approval in the accomplishment by the wrong-doers of the particular wrong

support, the fact that other persons also sold liquor to said Watt, in violation of law, within that period, and which liquor may have contributed to increase the intoxication, and consequently to enhance the injury resulting to the plaintiff therefrom; such facts, if they be shown to have existed, will not exonerate the defendant from the consequence of his wrongful acts; but, on the contrary, he will still be responsible for all the injury resulting to the plaintiff from the intoxication of Joseph Watt, caused by his illegal sale of liquor to him. *If you can separate the damages resulting from the intoxication caused by illegal sales to Watt by defendant from the damages resulting from sales by others, you must do so; but if such separation cannot be made you will render your verdict against the defendant for all the actual pecuniary damages resulting to the plaintiff in person, property or means of support by reason of the intoxication of the said Joseph Watt, to which intoxication the illegal sales of intoxicating liquor by the defendant contributed."*

The judgment for the plaintiff was affirmed. And upon the state of facts supposed by the defendant's request, the appellate court treat the defendant and all other persons who sold liquor to Dr. Watt as jointly and severally liable—as joint tort-feasors. On that point the learned judge who delivered the majority opinion states the defendant's position and the answer as follows: "Counsel properly admit that where two or more act by concert in an unlawful design each is liable for *all damages*, but claim: if each acts independently, or without

the knowledge of the other, then he is only liable for his own acts. In the former case the acts of others co-operating are his acts, because they are only in furtherance of a common unlawful design. If there is no common intent there can be no joint liability, but each is responsible for his own act. If there is a common intent, or if one without such intent aids one with it in doing an unlawful act, the latter is nevertheless guilty, though not the sole cause. They claim this principle is limited to cases of conspiracy or concerted action. In this we think they mistake the authorities. We hold that this common intent, which is sufficient to create mutual liability, may exist without previous agreement or a common understanding to do the unlawful act, and that it may be presumed to exist when the means employed create that presumption as well as by proving an express agreement.

This "common intent which is sufficient to create mutual liability" is, further on in the opinion, thus elucidated: "If the defendant was using the means calculated to produce the injury, the law presumes that he intended to produce it. If others, with or without concert, were concurrently co-operating with him, using like means, they were acting with the same common design, and if the injury resulted each is liable, though each was acting without the knowledge of what the other was doing. So if the defendant alone was using such means as created this presumption of intent to do the act, and another, without concert, free from such intent, was contributing to the injury,

in order to make them jointly liable."¹ But where it is provided that the person who furnishes the liquor which causes the intoxication "in whole or in part," habitual or otherwise, shall be liable, the damages cannot be apportioned; full recovery may be had against any one who contributed to the result complained of.²

Each partner is an agent of the firm of which he is a member for the purpose of carrying on its business in the way it is usually prosecuted; hence an ordinary partnership is liable for the results of the negligence of any one of its members in conducting its affairs in the usual way.³ Such liability extends to the fraudulent or malicious conduct of one partner though the others had no knowledge of it, if the act was done for the benefit of the firm and was within the scope of the partnership.⁴ But it does not embrace acts done beyond such

the former is liable for all damages, notwithstanding the other also contributed."

The majority of the court came to the conclusion that vendors of intoxicating liquors who separately sell to a man, who, by thus imbibing, in a period of several years, becomes an habitual drunkard, are in law jointly and severally liable for that result; though they have no concert in the sense of communicating with each other on the subject; though they do not act together, that is, no two of them join in any one sale, and each may be unacquainted with the others, and perhaps may not even know that there are others; though the only circumstance that is supposed to join and unify them is that they are engaged in the same kind of business and each is doing such a business as has a tendency to make drunkards; and in a particular case they have thus made one.

¹ *La France v. Krayner*, 42 Iowa, 143.

² *Neuerberg v. Gaultier*, 4 Ill. App. 448; *Bryant v. Tidgewill*, 188 Mass.

86; *Werner v. Edmiston*, 24 Kan. 147; *Rantz v. Barnes*, 40 Ohio St. 48; *Aldrich v. Parnell*, 147 Mass. 409.

This is the rule applied in Michigan, although the statute does not contain the words "in whole or in part." *Steele v. Thompson*, 42 Mich. 598. See *Sutherland's Stat. Const.*, § 377.

³ *Lindley's Part* (2d Am. ed.) *149; *Linton v. Hurley*, 14 Gray, 191; *Buckie v. Cone*, 25 Fla. 1; *Mode v. Penland*, 93 N. C. 292; *Gerhardt v. Swaty*, 57 Wis. 24; *Robinson v. Goings*, 68 Miss. 500; *Wiley v. Stewart*, 123 Ill. 545; *Hall v. Younts*, 87 N. C. 285; *Hyrne v. Erwin*, 28 S. C. 226; *Stroher v. Elting*, 97 N. Y. 102.

⁴ *Lothrop v. Adams*, 183 Mass. 471; *Locke v. Stearns*, 1 Met. 580; *Gray v. Cropper*, 1 Allen, 837; *White v. Sawyer*, 16 Gray, 586; *Durant v. Rogers*, 87 Ill. 508; *Wolf v. Willis*, 56 id. 860; *Chester v. Dickerson*, 54 N. Y. 1; *Guillou v. Peterson*, 89 Pa. St. 163; *Robinson v. Goings*, 68 Miss. 500. But see *Gilbert v. Emmons*, 42 Ill. 148; *Grund v. Van Vleck*, 69 id. 478; *Rosenkrans v. Barker*, 115 id. 331.

scope,¹ unless they are authorized or adopted by the firm.² A partnership is also responsible for the negligence of its servants subject to the same limitations.³

¹ *Gwynn v. Duffield*, 66 Iowa, 709; *man v. Black*, 14 Ill. App. 331; *Wood-
ing v. Knickerbocker*, 31 Minn. 268.
Schwabacker v. Riddle, 84 Ill. 517.

² *Graham v. Meyer*, 4 Blatch. 129; ³ *Roberts v. Johnson*, 53 N. Y. 618;
Heirn v. McCaughan, 83 Miss. 17; *Stables v. Eley*, 1 C. & P. 614; *Brent
Taylor v. Jones*, 42 N. H. 25; *Ernst-
v. Davis*, 9 Md. 217; *Linton v. Hur-
ley*, 14 Gray, 191.

CHAPTER V.

LEGAL LIQUIDATIONS AND REDUCTIONS.

SECTION 1.

CIRCUIITY OF ACTION.

§ 143. Defense of.

- 144. Agreements not to sue.
- 145. Principle operates in favor of plaintiff.
- 146. Damages must be equal.
- 147. Reciprocal obligations.

SECTION 2.

MUTUAL CREDIT.

- 148. Compensation by mutual demands.

SECTION 3.

MITIGATION OF DAMAGES.

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SECTION 1.

CIRCUIITY OF ACTION.

[220] § 143. Defense of. The defense of circuity of action is available where the parties stand in such legal relation to each other that if the plaintiff recovers against the defendant the latter thereupon and by reason thereof has a cause of action against the former for the very sum so recovered. The plaintiff's demand is then neutralized by his liability, consequent upon recovery, to pay back such sum; by a legal equation the plaintiff has no cause of action. This defense ac-

compleishes the same result as would the circuity of action. Thus in an action against the surviving partner upon the promissory note of a partnership it was held that an indenture by which the plaintiff and others had covenanted to indemnify the defendant against all debts due from the partnership and against all actions brought against him by reason of such debts was a bar to the action.¹ Under a statute which imposes a personal liability upon stockholders for the debts of a corporation a creditor who is himself a stockholder cannot maintain an action to enforce such liability against a co-stockholder.² One who is a surety upon an official bond cannot recover from his fellow-sureties the full amount of damages he has sustained by its breach.³

§ 144. **Agreements not to sue.** On this principle if a creditor makes a valid agreement never to sue his debtor upon a specified demand it operates to extinguish the debt like a release.⁴ But when the covenant is that a demand shall not be put in suit within a limited time a breach thereof cannot be pleaded in bar of that demand. The reason is that the [221] damages for the breach of the latter covenant being uncertain and not determinable by the amount of the demand, the principle of circuity of action is not applicable.

§ 145. **Principle operates in favor of plaintiff.** The same principle of avoiding circuity of action will sometimes operate

¹Whitaker v. Salisbury, 15 Pick. 534; Austin v. Cummings, 10 Vt. 26.

²Gray v. Coffin, 9 Cush. 192, 206; Bailey v. Bancker, 8 Hill, 188.

³Alderson v. Mendes, 16 Nev. 298.

Plaintiff declared on a note made by C. and payable to plaintiff or his order, and afterwards indorsed by him to the defendant, who re-indorsed it to plaintiff. After verdict for the latter the judgment was arrested. Bishop v. Hayward, 4 T. R. 470. But if it appears that plaintiff's name was originally used for form only, and that it was understood by all the parties to the instrument that the note, though nominally made payable to the plaintiff, was substantially to be paid to the defend-

ant, and the declaration so alleges, the defense of circuity of action is not good. Ibid.; Wilders v. Stevens, 15 M. & W. 208.

⁴Robinson v. Godfrey, 2 Mich. 408; Cuyler v. Cuyler, 2 Johns. 186; Rowley v. Stoddard, 7 id. 207, and note a; Phelps v. Johnson, 8 id. 54; Lane v. Owings, 3 Bibb, 247; Millett v. Hayford, 1 Wis. 401; Reed v. Shaw, 1 Blackf. 245; McNeal v. Blackburn, 7 Dana, 170; Jackson v. Stackhouse, 1 Cow. 122; Sewall v. Sparrow, 16 Mass. 24; Gibson v. Gibson, 15 id. 106; White v. Dingley, 4 id. 483; Whitaker v. Salisbury, 15 Pick. 534; Jones v. Quinpiack Bank, 29 Conn. 25; Clark v. Bush, 3 Cow. 151; Dearborn v. Cross, 7 id. 48.

in favor of a plaintiff. A town was compelled to pay damages for an injury resulting from a defect in a highway occasioned by the want of repair of a cellar way constructed in a sidewalk and leading to an adjoining building occupied by a tenant; it was held that the occupant and not the owner was liable to the town for such damages, and was *prima facie* liable to third persons suffering injury from any such defect; but if there be an express agreement between the landlord and tenant that the former shall keep the premises in repair, so that in case of a recovery against the tenant he would have his remedy over, then the party injured, to avoid circuity of action, may bring his suit in the first instance against the landlord.¹

§ 146. Damages must be equal. If a deed contains reciprocal covenants which are governed by the same rule of damages one covenant may be pleaded in bar to another to avoid circuity of action. But where the covenants are distinct and independent they cannot be so pleaded, for the damages may not be commensurate and each party must recover against the other separate damages according to the justice of the case.² This defense has been termed a setting off of one right of action against another.³ It is available though the damages be unliquidated, but the damages on the two causes of action must be the same in amount as matter of law, and must so appear by the pleadings.⁴ In other words, a good plea in avoidance of circuity of action must show that the sum which the defendant is entitled to recover from the plaintiff is necessarily [222] the same as that in respect of which the plaintiff is suing. The rigid severity and precision of this test are illustrated in the following case. By a charter-party it was agreed between the master and the charterers that one-third of the stipulated freight should be paid before the sailing of the vessel, the same to be returned if the cargo was not delivered at the

¹ Lowell v. Spaulding, 4 Cush. 277; ³ Mayne on Dam. 115.

Payne v. Rogers, 2 H. Bl. 349.

⁴ Id.; Turner v. Thomas, L. R. 6 C.

² Gibson v. Gibson, 15 Mass. 106, P. 610; De Mattos v. Saunders, 7 id. 112; Guard v. Whiteside, 13 Ill. 7; 570; Walmsley v. Cooper, 11 A. & Millett v. Hayford, 1 Wis. 401; Thurston v. James, 6 R. I. 103; Howland 759; Connop v. Levy, 11 Q. B. 769. v. Marvin, 5 Cal. 501; Bac. Abr. Cov. L.

port of destination, the charterers to insure the amount at the owner's expense, and deduct the cost of doing so from the first payment of freight. The charterers paid the one-third freight, deducting the premium for insurance. The vessel and cargo did not reach their destination. In an action by the charterers to recover the freight so paid, the owner pleaded that the loss of the part of the freight to be returned was such a loss as was by the charter-party to be insured against by the charterers at the owner's expense, and such insurance, if effected, would have indemnified the defendant against the loss of the freight stipulated to be returned; that although the plaintiffs might, with the use of reasonable care and diligence, have effected an insurance whereby the defendant and the owner of the ship would have been fully indemnified against the loss of the one-third freight so to be returned, yet the plaintiffs effected the insurance so negligently and in disregard of the usual course of business that the same became of no use or value, and the defendant by reason of such improper conduct had sustained damages to the amount of the said third freight so insured, and the plaintiffs thereby became liable to the defendant for the same, and liable to make good to him such amount as he should have to return to the plaintiffs under the charter-party, and any sum paid or returned by the defendant to the plaintiffs in respect of the freight would be the damage sustained by the defendant by reason of such improper conduct and deviation, and he would be damnified to that extent. The court held that the plea was bad inasmuch as the conclusion it drew was not warranted by the facts stated, for the liability of the plaintiffs in respect of their negligence in effecting the insurance was a liability for damages which were not necessarily identical in amount with the claim set up by them in their action. Jervis, C. J.: "It is not denied that the rule in question is plain and well ascertained, viz.: that to justify a defendant in setting up a demand in avoidance of circuity of action he must show that the sum which he claims to be [223] entitled to recover back is of necessity the identical sum which the plaintiff is suing for. The only difficulty arises from the application of the rule. I was somewhat struck by a difficulty arising from the allegation in the plea that, by and through the negligent and improper conduct of the plaintiffs

in effecting the insurance, the insurance became of no use or value and the defendant thereby sustained damage to the amount of one-third of the freight so insured; and that the plaintiffs thereby became liable to the defendant for the same, . . . and liable to make good to the defendant such amount as he should have to return to the plaintiffs under the charter-party; and that the sum paid by the defendant to the plaintiffs, or received by them, . . . would be the damages sustained by the defendant by reason of such improper conduct. But I think my brother Channell has relieved me from that difficulty by suggesting that it is a mere conclusion drawn from the previous allegations,—not a conclusion of law necessarily resulting from such previous allegations, one which a jury might or might not arrive at. I think that unless the judge would be bound to tell the jury that the amount which the defendant claims by his plea is necessarily the same amount as the plaintiffs claim by their declaration the plea does not bring the case within the rule as to circuity of action. The case differs materially from those which were cited, . . . in which the defendant was bound to a liquidated and ascertained sum on the failure of the plaintiff to perform a duty. This is a matter which sounds in damages. The plaintiffs had undertaken to effect an insurance for the defendant with third persons; and it *may be* that in the result the defendant will be entitled to recover from the plaintiffs precisely the same amount of damages that the plaintiffs will recover in this action; but there are various circumstances which might by possibility arise to reduce the damages in that action to a lesser or even to a nominal amount; and unless the defendant could negative all these possible circumstances, he could not make this a good plea.”¹

¹Charles v. Altin, 15 C. B. 46. Crowder, J., doubted in this case. He said: “I have entertained considerable doubts during the argument, and I must confess that these doubts are not altogether removed; and although my lord and my two learned brothers think otherwise, it is with considerable reluctance that I should come to the conclusion that the plea

is no answer to the declaration. The rule as to the avoidance of circuity of action is in my opinion a just and valuable one, and it is important that a case should be brought within it if possible. In point of fact and common sense nobody can doubt that, if these plaintiffs recover back the one-third freight to-day and the defendant were to bring a cross-action

§ 147. **Reciprocal obligations.** The reciprocal obligations of the parties may be such that the action of one may be barred by a counter covenant which is not only a good defense on the ground of avoiding circuitry of action, but also as a release. Of this nature is a covenant never to sue.¹ To sustain a bar in that form, however, the contract must be technically such as to amount to a release. But the defense of circuitry of action does not depend on the principle of a release, but on the policy of the law against unnecessary litigation and the convenience of admitting a party to his ultimate right by the shortest and most direct process.

SECTION 2.

MUTUAL CREDIT.

§ 148. **Compensation by mutual demand.** Mutual debts or credits do not compensate each other except when pleaded under statutes of set-off, unless they are so connected [225] that the parties have reciprocally the right to retain out of the moneys they owe the amount they are creditors for. Then the accounts are reciprocal payments and no demand exists upon either side except for the net balance. This is the case where the demands of both parties are with their mutual consent brought into one account as debit and credit;² and also

against them, and to allege and prove what is stated in this plea, the jury would be directed to give damages to precisely the same amount." After quoting the language of Mr. Justice Washington in *Morris v. Summerl*, 2 Wash. C. C. 203, he continued: "It is not said that, as a positive matter of law, he is responsible to that extent. It probably amounts to this, that the loss would be the reasonable measure of damages. The learned judge is referring to a course of dealing. The case before us arises upon a contract to insure the amount,— the precise amount,— which the plaintiffs are claiming under the charter-party to have returned to them; and the question is whether the breach of the engagement to insure does not so clearly entitle the

defendant to recover from the plaintiffs the precise sum which they by their action are seeking to recover from him, as to warrant the plea. If this had been a contract of indemnity, there could have been no doubt." *Alston v. Herring*, 11 Exch. 822.

¹*Smith v. Mapleback*, 1 T. R. 441; *Johnson v. Carre*, 1 Lev. 152; *Harvey v. Harvey*, 3 Ind. 473; *Reed v. Shaw*, 1 Blackf. 245; *Jackson v. Stackhouse*, 1 Cow. 122; *Phelps v. Johnson*, 8 Johns. 54; *Jones v. Quinpiack Bank*, 29 Conn. 25; *Walker v. McCulloch*, 4 Me. 421; *Lane v. Owings*, 8 Bibb, 247; *Hastings v. Dickinson*, 7 Mass. 153; *Upham v. Smith*, id. 265; *Shed v. Pierce*, 17 id. 623; *Sewall v. Sparrow*, 16 id. 24.

²*Bond v. Clark*, 47 Vt. 565; *McNeil v. Garland*, 27 Ark. 343; *Sanford v.*

wherever a party has a lien on moneys in his hands or which he holds for the satisfaction of a cross-demand in favor of himself, as in the case of factors, brokers and others. In an early case a ship broker recovered for his principal a sum of money for damages done to his ship by collision; the broker paid over all but his charges for services, and it was held in a suit by the principal for the reasonable sum so retained, that the defendant had a right to it. The action was for money had and received, and it was said the plaintiff should not receive more than he was in conscience and equity entitled to, and this could not be more than what remained after deducting all just allowances which the defendant was entitled to out of the very sum demanded; it was not in the nature of a cross-demand or mutual debt but a charge which makes the sum received for the plaintiff's use so much less.¹

In conformity to a natural equity that one debt shall compensate another, and for the convenience of commerce, the courts favor liens; and recognize them, first, where there is an express contract; second, where one may be implied from the usage of trade; third, where it may be implied from the manner of dealing between the parties in the particular case; fourth, where the defendant has acted in the capacity of a factor.² Where it was part of the contract between a servant and his master that the former should pay out of his wages [226] the value of his master's goods lost by his negligence it was held to be an agreement that the wages were to be paid only after deducting the value of the things lost, and that their loss was provable under the general issue.³ So where by the custom of the hat trade the amount of injury done to hats in dyeing was to be deducted from the dyer's wages, evidence of injury from this cause was admitted in reduction of damages.⁴

Clark, 29 Conn. 457; Myers v. Davis,

26 Barb. 367; Ang. on Lim., § 138.

¹ Dale v. Sollet, 4 Burr. 2133; 1 Chitty's Pl. 563; Rawson v. Samuel, Cr. & Ph. 161; Green v. Farmer, 4 Burr. 2214; Patrick v. Hazen, 10 Vt.

183; Saltus v. Everett, 20 Wend. 267; Muller v. Pondir, 55 N. Y. 325; Dres-

ser Manuf. Co. v. Waterson, 3 Met. 9; Turpin v. Reynolds, 14 La. 473;

Holbrook v. Receivers, 6 Paige, 220.

See Taft v. Aylwin, 14 Pick. 336; also

Schermerhorn v. Anderson, 2 Barb. 584; Citizens' Bank v. Carson, 32 Mo. 191.

²Id.

³Le Loir v. Bristow, 4 Camp. 134; Cleworth v. Pickford, 7 M. & W. 814.

⁴Bamford v. Harris, 1 Stark. 843. See Alder v. Keighley, 15 M. & W.

SECTION 3.

MITIGATION OF DAMAGES.

§ 149. **Equitable doctrine of.** Mitigation of damages is what the expression imports, a reduction of their amount; not by proof of facts which are a bar to a part of the plaintiff's cause of action, or a justification, nor of facts which constitute a cause of action in favor of the defendant; but rather of facts which show that the plaintiff's conceded cause of action does not entitle him to so large an amount as the showing on his side would otherwise justify the jury in allowing him. Facts for mitigation are addressed to the equity of the law, [227] and are admitted to assist in the application of the paramount rule that damages should not exceed just compensation unless the case, when fully disclosed, calls for severity in the form of exemplary damages. But if a wrong is wilfully done courts are not inclined to allow the resulting damages to be mitigated by taking into account lawful acts of the wrong-doer which have benefited the other party.¹ There are, however, few, if any, exceptions to the rule that any circumstance competent as evidence to reduce the damages may be proven on the trial for that purpose although it may not have been effective until after the suit was begun.²

119. In this case the bankrupt had given the defendant a bill drawn by himself for \$600, which the defendant agreed to discount, retaining 100% and the discount. He never paid the bankrupt anything. The action was brought by the assignees for breach of the agreement. The jury gave a verdict for \$495, being the amount of the bill minus the 100% and discount. This was held correct, though the bill had become worthless on account of the bankruptcy. Pollock, C. B., said: "If this had been an action of trover for the bill, no doubt it would have been altogether a question for the jury as

to the amount of damages. So, also, if it had been an accommodation bill, or the bankrupt's own bill. But this is not an action of trover, but of breach of contract. The defendant promised to deliver to the bankrupt the amount of the bill minus 100% and discount. The bankrupt would have to receive that sum, and his assignees are entitled to recover the same amount which he would be entitled to receive, had he continued solvent, by reason of the breach of contract."

¹ Whorton v. Webster, 56 Wis. 356.

² Marsh v. McPherson, 105 U. S. 709, 716.

§ 150. **Absence of malice.** Matters may be proved in mitigation which tend to excuse or justify the defendant's act complained of, though they are not a full excuse or justification. Thus where the plaintiff was taken into custody for an offense not justifying an arrest, evidence of the offense was allowed to be given, for it was in the nature of an apology for the defendant's conduct.¹ In trespass for false imprisonment the void warrant of arrest and proceedings had under it are admissible in evidence to disprove malice and prevent the recovery of exemplary damages,² but not to mitigate those which are compensatory.³

§ 151. **Words as provocation for assault; agreements to fight.** Although it is well settled that no words of provocation whatever will justify the offended party in inflicting a blow upon the offender, they will constitute an excuse which will mitigate the damages, and may be proved for that purpose.⁴ But such provocation must be so recent as to induce the presumption that the violence was committed under the immediate influence of the passion thus excited.⁵ The language of the parties is often so intimately associated and identified with the transaction that it is impracticable to suppress it in giving evidence of their conduct; and, indeed, the suppression of it, if practicable, would only tend to exhibit

¹ *Linford v. Lake*, 8 H. & N. 276; *Warwick v. Foulkes*, 12 M. & W. 507; *Wells v. Jackson*, 3 Munf. 458; *Paine v. Farr*, 118 Mass. 74.

² *Woodall v. McMillan*, 38 Ala. 622; *Wells v. Jackson*, 3 Munf. 458.

³ *Lewis v. Lewis*, 9 Ind. 105.

⁴ *Cushman v. Ryan*, 1 Story, 91; *Avery v. Ray*, 1 Mass. 12; *Lee v. Woolsey*, 19 Johns. 819; *Maynard v. Beardsley*, 7 Wend. 560; *Rochester v. Anderson*, 1 Bibb, 428; *McAlexander v. Harris*, 6 Munf. 465; *McBride v. McLaughlin*, 5 Watts, 375; *Waters v. Brown*, 3 A. K. Marsh. 557; *Corning v. Corning*, 6 N. Y. 97; *Currier v. Swan*, 68 Me. 323; *Matthews v. Terry*, 10 Conn. 455; *Delevan v. Bates*, 1 Mich. 97; *Saltus v. Kipp*, 12 How. Pr. 342.

⁵ *Corning v. Corning*, *Rochester v. Anderson*, *supra*; *Ellsworth v. Thompson*, 13 Wend. 658.

A provocation in the morning does not mitigate an assault made in the afternoon of the same day. *Keiser v. Smith*, 71 Ala. 481. And so with an assault made one day after the alleged cause. *Gronen v. Kuckkuck*, 59 Iowa. 18.

In *Brooks v. Carter*, 84 Fed. Rep. 505, the defendant gave the plaintiff thirty minutes in which to retract statements made by him, and on his declining to do so made an assault. There was too much deliberation to allow the facts to mitigate the damages.

the transaction in false and deceitful colors.¹ The law mercifully makes this concession to the weakness and infirmities of human nature, which subject it to uncontrollable influences when under great and maddening excitement, superinduced by insult and threats. But it wholly discountenances that cruel disposition which for a long time broods over hastily and unguardedly spoken words, and seeks, when opportunity offers, to make them an excuse for brutal behavior. With such a temper it has no sympathy.² The mitigating effect of a provocation in words is spent when there has been time for reflection, and for the passion excited by it to cool. Other antecedent facts, however, may be proved in mitigation, where they are connected with the acts complained of, and afford an explanation of the motives and conduct of the defendant, and show him less culpable than he would otherwise appear. Thus where the injury is inflicted in an attempt to prevent the execution of previous threats, the defendant may prove such threats in mitigation of damages, as conducing to show that an excusable motive governed him, as well as the motives with which the other acted in the rencounter.³ In a case in Maine⁴ there was an affray between the plaintiff and one of the defendants in the afternoon. In the evening of the same day the defendant assaulted the plaintiff at his own house. It was held that the defendants might show the fact of the affray in the afternoon, but not its details, in mitigation of damages for the last assault. Peters, J., said: "It was to show the object and purpose of the second assault, or the state of mind with which it was done. Otherwise, there would have been nothing to indicate to the jury but that the house was entered for the purpose of robbery and plunder, or something of the kind. The fact of the previous affray might have some weight on the question of the amount of damages recoverable, and might legitimately be regarded as part of the transaction to be investigated in this suit." And in a case in

¹ Id.

² In *Keiser v. Smith*, *supra*, the text is quoted, and the rules stated are said to be sustained by the uniform current of decisions in this country for

the past three quarters of a century. *Gaither v. Blowers*, 11 Md. 536.

³ *Waters v. Brown*, 3 A. K. Marsh. 557; *Rhodes v. Bunch*, 3 McCord, 66; *McKenzie v. Allen*, 8 Strobh. 546.

⁴ *Currier v. Swan*, 68 Me. 333.

Wisconsin¹ it was held in an action for an injury to the person, committed in an affray, that evidence offered should have been received that the plaintiff for several years had frequently tried to provoke a quarrel with the defendant, and on [229] various occasions threatened his life, some of these being made to the defendant, and all of them brought to his knowledge before the occasion in question.

The defendant may show that the parties fought by agreement.² Where a battery proceeds from a dispute in which the parties impugn each other's veracity courts have differed as to whether the defendant may prove in mitigation that his statement in the altercation was true. Such proof has been excluded in Indiana,³ but in Maryland where the parties disputed and blows ensued from questioning each other's veracity the defendant was allowed to show that he told the truth.⁴ Proof by the plaintiff in aggravation of damages that the defendant threatened to beat him because he had circulated slanderous words concerning the defendant does not entitle the latter to give evidence that the plaintiff had in fact circulated the slander.⁵ Some question has been raised as to the extent to which damages may be mitigated by proof of provocation in words. Judge Story said they might be reduced to nominal when the words were "very gross and reprehensible and calculated from the circumstances to draw forth strong resentment."⁶ This has been doubted,⁷ but it seems to be supported by good sense and authority. When the wrong is done under circumstances arising without the plaintiff's fault, and these furnish a reasonable excuse for the violation of public order, considering the infirmities of human temper, there is no foundation for exemplary damages, but the plaintiff is entitled to compensation. But where there is a reasonable excuse for the violation of public order arising from the provocation or fault of the

¹ Fairbanks v. Witter, 18 Wis. 287.

Where there has been a persistent continuation and repetition of insults for the sole purpose of exciting and irritating another, and these have been repeated from day to day, the case is not to be controlled or limited by a few hours or a single day. Dolan v. Fagan, 68 Barb. 73.

² Adams v. Waggoner, 33 Ind. 531;

Logan v. Austin, 1 Stew. 476; Barholt v. Wright, 45 Ohio St. 177.

³ Butt v. Gould, 34 Ind. 552.

⁴ Marker v. Miller, 9 Md. 338.

⁵ Rochester v. Anderson, 1 Bibb, 428.

⁶ Cushman v. Ryan, 1 Story, 100.

⁷ Birchard v. Booth, 4 Wis. 67.

plaintiff, but not sufficient to entirely justify the wrong done, there can be no exemplary damages and the circumstances of mitigation must be applied to the actual damages.¹ Dixon, C. J.,² said: "This seems to follow as the necessary and logical result of the rule which permits exemplary damages to [230] be recovered. Where motive constitutes a basis for increasing the damages of the plaintiff above those actually sustained, there it should, under proper circumstances, constitute the basis for reducing them below the same standard. If the malice of the defendant is to be punished by the imposition of additional damages or smart money, then malice on the part of the plaintiff, by which he provoked the injury complained of, should be subject to like punishment, which, in his case, can only be inflicted by withholding the damages to which he would otherwise be entitled. The law is not so one-sided as to scrutinize the motives and punish one party to the transaction for his malicious conduct and not punish the other for the same thing; nor so unwise as not to make an allowance for the infirmities of men when smarting under the sting of gross and immediate provocation. If it were, then, as has been well said, it would frequently happen that the plaintiff would get full compensation for damages occasioned by himself,—a result which would be contrary to every principle of reason and justice. And so I find the uninterrupted course of decisions both in England and this country."³ The fact

¹Robison v. Rupert, 23 Pa. St. 523; Reed v. Bias, 8 W. & S. 189; Ellsworth v. Thompson, 13 Wend. 663.

²Morely v. Dunbar, 24 Wis. 183.

³Citing Robison v. Rupert, 23 Pa. St. 523; Fraser v. Berkeley, 7 C. & P. 621; Millard v. Brown, 35 N. Y. 297; Finnerty v. Tipper, 2 Camp. 72; Avery v. Ray, 1 Mass. 11; Cushman v. Ryan, 1 Story, 100; Gaither v. Blowers, 11 Md. 551, 552; Child v. Homer, 13 Pick. 503; Keyes v. Devlin, 3 E. D. Smith, 518; Rochester v. Anderson, 1 Bibb, 428; Lee v. Woolsey, 19 Johns. 319; Ireland v. Elliott, 5 Iowa, 478; Maynard v. Beardsley, 7 Wend. 560; Waters v. Brown, 3 A.

K. Marsh. 557; Prentiss v. Shaw, 56 Me. 427; Rhodes v. Bunch, 8 McCord, 65; McKenzie v. Allen, 8 Strobb. 546; Matthews v. Terry, 10 Conn. 459; Coxe v. Whitney, 9 Mo. 531; Collins v. Todd, 17 Mo. 539; Corning v. Corning, 6 N. Y. 103; Willis v. Forest, 2 Duer, 310; Tyson v. Booth, 100 Mass. 258; Marker v. Miller, 9 Md. 338; Bingham v. Garnault, Buller's N. P. 17.

In Wilson v. Young, 31 Wis. 574, the subject was again under discussion, and a majority of the court held to a middle ground between the doctrine of Birchard v. Booth and Morely v. Dunbar—that in an action for assault and battery, compensa-

that the offending person in an action for assault and battery has been subjected to fine in a criminal prosecution does not bar or mitigate his liability to exemplary¹ or compensatory² damages in a civil action. This question will be more fully considered in the chapter on exemplary damages.³ The character of the party assaulted cannot affect the damages which he is entitled to recover;⁴ nor can proof be made of the generally peaceable character of the defendant to rebut malice or mitigate the damages.⁵

[231] Immediately after the late civil war the plaintiff, hav-

tory as distinguished from punitive damages are of two kinds: 1. Those which may be recovered for the actual personal or pecuniary injury and loss, the elements of which are loss of time, bodily suffering, impaired physical or mental powers, mutilation and disfigurement, expenses of surgical and other attendance and the like. 2. Those which may be recovered for injuries to the feelings arising from the insult or indignity, the public exposure and contumely, and the like. That compensatory damages of the *first* kind are to be determined without reference to the question whether the defendant was influenced by malicious motives in the act complained of; and, on the other hand, evidence of threatening or aggravating language or malicious conduct on the plaintiff's part, not constituting a legal justification of the defendant's acts, cannot be considered in mitigation of such damages. That compensatory damages of the *second* kind depend entirely upon the malice of the defendant; and as evidence of such malice may be given to increase that kind of damages, so evidence of threatening and malicious words or acts on the plaintiff's part, just previous to the assault, though not constituting a legal justification, should be admitted to mitigate or even de-

feat such damages. The distinction above made between one kind of compensatory damages and another, overruled in *Craker v. Chicago*, etc. R. Co., 36 Wis. 657.

The rule is now settled in Wisconsin that "personal abuse which may have had something to do with inducing and bringing upon another an assault may be considered by a jury in mitigation of damages. But a man commencing an assault and battery under such circumstances is liable for the actual damages which result." *Fenelon v. Butts*, 53 Wis. 344; *Corcoran v. Harran*, 56 id. 120. See *Cushman v. Waddell*, 1 Bald. 57; *Yates v. New York*, etc. R. Co., 67 N. Y. 100; *Jacobs v. Hoover*, 9 Minn. 204; *McBride v. McLaughlin*, 5 Watts, 375.

¹ *Hoodley v. Watson*, 45 Vt. 289; *Cook v. Ellis*, 6 Hill, 466; *McWilliams v. Bragg*, 3 Wis. 424; *Brown v. Swineford*, 44 id. 282; *Wilson v. Middleton*, 2 Cal. 54; *Corwin v. Walton*, 18 Mo. 71. *Contra*, *Smithwick v. Ward*, 7 Jones' L. (N. C.) 64. See ch. 26, vol. 3.

² *Id.*; *Reddin v. Gates*, 52 Iowa, 210.

³ Ch. 9, *post*.

⁴ *Corning v. Corning*, 6 N. Y. 97, 104; *Smithwick v. Ward*, 7 Jones' L. (N. C.) 64; *Ward v. State*, 28 Ala. 53.

⁵ *Reddin v. Gates*, 52 Iowa, 210.

ing publicly and indecently exulted over the assassination of President Lincoln, was arrested pursuant to a general order of the defendant as commander of a military department. The order was illegal, but was issued without malice and was intended as a means of preserving the public peace. The plaintiff was held not entitled to exemplary damages for his arrest and imprisonment; but having been manacled and compelled to labor with other prisoners during the time he was held in custody these circumstances were held to be good ground for enhancement of the damages.¹

§ 152. **Provocation in libel and slander.** In actions for libel or verbal slander it may be proved in mitigation that there was an immediate provocation in the acts and declarations of the plaintiff.² The defendant cannot, however, prove such acts and declarations done or made at a different time or any antecedent facts which are not fairly to be considered part of the same transaction, however irritating and provoking they may be.³ It has been held that a criminary retort made after three days is not part of the same transaction, nor when it has no relation to the previous publication and there is no perceptible connection between them.⁴ It has also been [232] held that where a party is sued for republishing a libelous article in a newspaper, and the republication is accompanied by remarks tending to a justification of the article, but not amounting to it, the defendant is not permitted to prove the truth of the remarks in mitigation of damages because the evidence would tend to prove the charge well founded; and that evidence in mitigation must be such as admits the charge to be false.⁵ The defendant may show that he was drunk or insane when he spoke the words.⁶

¹ *McCall v. McDowell*, Deady, 233;
Roth v. Smith, 54 Ill. 431.

² *Miles v. Harrington*, 8 Kan. 425;
Jauch v. Jauch, 50 Ind. 185; *Beardsley v. Maynard*, 4 Wend. 836; *Moore v. Clay*, 24 Ala. 235; *Powers v. Presgroves*, 88 Miss. 227; *McClintock v. Crick*, 4 Iowa, 453; *Duncan v. Brown*, 15 B. Mon. 186; *Ranger v. Goodrich*, 17 Wis. 78; *Freeman v. Tinsley*, 50 Ill. 497; *Monsler v. Harding*, 83 Ind. 176.

³ *Hamilton v. Eno*, 81 N. Y. 110;
Lee v. Woolsey, 19 Johns. 319.

⁴ *Beardsley v. Maynard*, 4 Wend. 836. See *Graves v. State*, 9 Ala. 448; *Maynard v. Beardsley*, 7 Wend. 560; *Lister v. Wright*, 2 Hill, 320; *Underhill v. Taylor*, 2 Barb. 348; *Richardson v. Northrup*, 56 Barb. 105.

⁵ *Cooper v. Barber*, 24 Wend. 105.

⁶ *Howell v. Howell*, 10 Ired. 84;
Gates v. Meredith, 7 Ind. 440.

Upon common principles the general issue in an action on the case for slander would put in issue not only the speaking of the slanderous words but their alleged falsity and the malice. The early adjudications were in harmony with this view, but upon consultation of the judges in England about one hundred and sixty years ago it was resolved that in the future, if the defendant intend to justify, he shall plead his justification that the plaintiff may know what he has to meet.¹ The rule then promulgated has ever since prevailed in England and has been followed in this country.² It has also ensued that under the general issue in such actions the defendant cannot prove the truth of the words spoken either to rebut malice or mitigate damages.³ It has been deemed as important that the plaintiff should have notice that the truth of the words is intended to be proved when the purpose is mitigation of damages as when the proof is intended for any other object.⁴ In some jurisdictions, therefore, the defendant has been precluded from all proof under the general issue [233] which implies the truth of the charge or tends to prove it.⁵ To get the opportunity to adduce any such proof he was required to plead the truth of the words as a justification; then if he succeeded he was exonerated from all liability; but if he failed, the plea, being a repetition of the defamatory words, aggravated the damages, for malice was conclusively presumed.⁶ In New York by such an unsustained plea the

¹ Underwood v. Parker, 2 Strange, 1200.

² Bodwell v. Swan, 8 Pick. 376; Knight v. Foster, 39 N. H. 576; Taylor v. Robinson, 29 Me. 323; Kay v. Fredrigal, 3 Pa. St. 221; Jarnigan v. Fleming, 48 Miss. 710; Douge v. Pearce, 13 Ala. 127; Henson v. Veatch, 1 Blackf. 369; Gilman v. Lowell, 8 Wend. 573; Wagstaff v. Ashton, 1 Harr. (Del.) 503; Snyder v. Andrews, 6 Barb. 43; Shirley v. Keathy, 4 Cold. 29; Barns v. Webb, 1 Tyler (Vt.), 17; Updegrove v. Zimmerman, 13 Pa. St. 619; Root v. King, 7 Cow. 613; Swift v. Dickerman, 31 Conn. 283.

³ Knight v. Foster, 39 N. H. 576;

Bailey v. Hyde, 3 Conn. 463; Swift v. Dickerman, 31 Conn. 291; Andrews v. Vanduzer, 11 Johns. 38; Shepard v. Merrill, 13 Johns. 475.

⁴ Wolcott v. Hall, 6 Mass. 514; Jarnigan v. Fleming, 43 Miss. 710; Treat v. Browning, 4 Conn. 408.

⁵ Gilman v. Lowell, 8 Wend. 573; Knight v. Foster, 39 N. H. 576; Moyer v. Pine, 4 Mich. 409; Regnier v. Cabot, 7 Ill. 34; McAlexander v. Harris, 6 Munf. 465; Porter v. Botkins, 59 Pa. St. 484; Chamberlin v. Vance, 51 Cal. 75; Pease v. Shippen, 80 Pa. St. 513; Wormouth v. Cramer, 3 Wend. 395; McGee v. Sodusky, 5 J. J. Marsh. 185.

⁶ Id.; Gorman v. Sutton, 32 Pa. St.

defendant was held to admit the malice on his part, and he could not resort to any defense based on the absence of malice.¹ While he had technically a right to introduce evidence in mitigation, still without a plea of justification he could establish no fact which would show that he had good reason to believe the charge to be true when the words were spoken, and if he put in the only plea which would give him a right to introduce such proof he lost the benefit of it by the stubborn presumption of malice unless his proof was sufficient to establish the truth of the charge. There was therefore very little scope for mitigation in that class of actions.² The injustice of such a rule induced the courts in some of the states, as well as in England, to admit proof of facts and circumstances tending to show the truth of the words spoken, but falling short of proving it; in other words, the defendant might show that he had reason to believe when he uttered the words that they were true.³ Under this rule it has been allowed to be proved that there were reports in the neighborhood [234] that the plaintiff had been guilty of practices similar to those imputed to him,⁴ or that general reports that he was guilty of the very offense were, previously to the speaking of the words, in circulation.⁵ But the defendant to mitigate damages and repel the presumption of malice cannot give in evidence facts of which he was ignorant at the time of uttering the words

247; *Larned v. Buffinton*, 8 Mass. 546; *Robinson v. Drummond*, 24 Ala. 174; *Pool v. Devers*, 30 Ala. 672; *Downing v. Brown*, 8 Colo. 571; *Cavanaugh v. Austin*, 42 Vt. 576.

¹ *Gilman v. Lowell*, 8 Wend. 573; *Purple v. Horton*, 18 id. 9; *Fero v. Ruscoe*, 4 N. Y. 162.

² See *Bush v. Prosser*, 11 N. Y. 347; *Bisbey v. Shaw*, 12 id. 67.

³ *Knobell v. Fuller, Norris' Peake Add. Cas.* 32; ——— *v. Moor*, 1 M. & S. 285; *Leicester v. Walter*, 2 Camp. 251; *East v. Chapman*, 2 C. & P. 570; *Bailey v. Hyde*, 3 Conn. 463; *Bridgman v. Hopkins*, 34 Vt. 532; *Williams v. Miner*, 18 Conn. 464; *Haywood v. Foster*, 16 Ohio, 88; *Wagner v. Holbrunner*, 7 Gill, 296; *Huson v. Dale*,

19 Mich. 17; *Rigden v. Wolcott*, 6 Gill & J. 413; *Morris v. Barker*, 4 Harr. (Del.) 520; *Galloway v. Courtney*, 10 Rich. 414; *Williams v. Cawley*, 18 Ala. 206; *Brown v. Brooks*, 3 Ind. 518; *Wilson v. Apple*, 3 Ohio, 270; *Minesinger v. Kerr*, 9 Pa. St. 312; *Van Derveer v. Sutphin*, 5 Ohio St. 293; *Farr v. Rasco*, 9 Mich. 358.

⁴ ——— *v. Moor*, 1 M. & S. 285. See ch. 84, vol. 3.

⁵ *Calloway v. Middleton*, 2 A. K. Marsh. 372; *Kennedy v. Gregory*, 1 Bin. 85; *Treat v. Browning*, 4 Conn. 408; *Case v. Marks*, 20 Conn. 248; *Bridgman v. Hopkins*, 34 Vt. 532; *Blickenstaff v. Perrin*, 27 Ind. 527; *Morris v. Barker*, 4 Harr. (Del.) 520; *Henson v. Veatch*, 1 Blackf. 369;

complained of.¹ The fact that reports were in circulation prior to the uttering of the words, to the effect that plaintiff was guilty of the offense imputed to him cannot generally be proven in mitigation in courts which admit proof which is not full justification but which tends to show the truth of the words spoken.² The general character of the plaintiff at the time the defamatory words were spoken is uniformly deemed in issue, for it is the foundation of his claim for damages; and he is at all times, without special notice in the pleadings, supposed to be prepared to sustain it against any attack.³

§ 153. *Same subject.* It is held in Michigan that where only the general issue is pleaded and evidence is offered in mitigation tending to show the truth of the words spoken, the offer conclusively admits that the charge was false though at the time the defendant made it he believed it to be true. [235] Such an offer, under such pleadings, should be treated as involving a disclaimer of the truth of the words and a conclusive admission that they were not true; but not as inconsistent with the idea that the defendant at the time he uttered them may have believed them to be true. He therefore has a right to introduce any facts and circumstances tending to show grounds for such belief at the time of the speaking of the words.⁴ The same doctrine is held in Ohio. The whole reason of the rule for admitting such evidence is to relieve the defendant from the consequences which attach to *malice*

Church v. Bridgman, 6 Mo. 190; East-erwood v. Quin, 2 Brev. 64; Shilling v. Carson, 27 Md. 175; Cook v. Barkley, 2 N. J. L. 169; Wetherbee v. Marsh, 20 N. H. 561; Bowen v. Hall, 20 Vt. 232; Fletcher v. Burroughs, 10 Iowa, 557; Sheahan v. Collins, 20 Ill. 325. See ch. 34, vol. 8.

¹ Bailey v. Hyde, 3 Conn. 463; Hatfield v. Lasher, 81 N. Y. 246; Willower v. Hill, 72 id. 86; Barkly v. Copeland, 74 Cal. 1; Whitney v. Janesville Gazette, 5 Biss. 380.

² Anthony v. Stephens, 1 Mo. 254; Fisher v. Patterson, 14 Ohio. 418; Wilson v. Fitch, 41 Cal. 363; Bush v.

Prosser, 11 N. Y. 347, 361. See Bowen v. Hall, 20 Vt. 232.

³ Buford v. McLuny, 1 N. & McC. 268; Sawyer v. Eifert, 2 id. 511; Douglass v. Tousey, 2 Wend. 352; Hamer v. McFarlin, 4 Denio, 509; Pallet v. Sargent, 36 N. H. 496; Sanders v. Johnson, 6 Blackf. 53; Rhodes v. Ijams, 7 Ala. 574; Wolcott v. Hall, 6 Mass. 514; Moyer v. Moyer, 49 Pa. St. 210; Alderman v. French, 1 Pick. 1; Bodwell v. Swan, 8 id. 876; McNutt v. Young, 8 Leigh, 542; Dewic v. Greenfield, 5 Ohio, 225; Fitzgerald v. Stewart, 53 Pa. St. 343; Powers v. Presgroves, 38 Miss. 227.

⁴ Huson v. Dale, 19 Mich. 17.

in the speaking of the words. He may show particular acts of the plaintiff which unexplained gave him a just reason to believe the truth of the declarations which he uttered; but when explained and understood may be found to be compatible with the plaintiff's innocence. It is permitted upon the ground that the proof when introduced may serve to show that the defendant was mistaken in making the charge; that he misconstrued the act or conduct of the party by supposing it to be criminal, while in fact it was not. When the testimony can have no other effect than to make apparent the plaintiff's guilt and prove the truth of the words spoken, its introduction to the jury must tend to justify the speaking and not to mitigate damages by showing the absence of malice. To be competent for the former purpose the facts relied on must be pleaded specially and cannot be given in evidence under the general issue.¹

The rule has been far from universal that an unsustained plea of justification shall in all cases be deemed proof of malice or have the effect to exclude evidence of the absence thereof. Where a plea of justification is interposed without any expectation of sustaining it there is no reason why such deliberate repetition of the slander should not be taken into consideration in the assessment of damages. But it has not been deemed just to hamper a *bona fide* defense with the hazard of such a consequence as matter of law. Perley, C. J., said: "If he believed when he spoke the words that they were true, and makes a *bona fide* defense to the action under the plea of justification, we do not see why he should [236] make it under the penalty of being punished by increased damages if he should fail to satisfy the jury of the fact any more than in other cases where a defendant does not succeed in a *bona fide* defense. We think it should be left to the jury to decide the weight and character of the evidence introduced in support of the plea and the manner and spirit in which the defense is conducted; whether the real object of the plea and evidence was to defend the action with reasonable expectation of success or to repeat the original slander."²

¹ Reynolds v. Tucker, 8 Ohio St. Dewit v. Greenfield, 5 Ohio, 225; 516; Wilson v. Apple, 3 Ohio, 270; Haywood v. Foster, 16 Ohio, 88.

² Pallet v. Sargent, 36 N. H. 496;

These principles have now been established by statute in any of the states where the harsher rule formerly prevailed. In New York, as well as in many other jurisdictions having codes, it is provided therein that the defendant may allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not he may give evidence of such circumstances. It is held that this statute does not mean that he must connect them together; that he cannot allege one without the other; but that he would not be prohibited from alleging either; accordingly the defendant, without pleading the truth of the words spoken, may allege facts tending to establish their truth and prove them in mitigation.¹ If a plea of justification or in mitigation is interposed in bad faith and for the purpose of injuring the plaintiff's reputation the fact may be considered by the jury.²

§ 154. Mitigating circumstances in trespass and other actions. In trespass for levying on the plaintiff's property under an execution against a third party the defendant may show in mitigation of damages on a writ of inquiry, after judgment by default, that at and prior to the levy the property was in his possession, or that the plaintiff was not the owner; that he is estopped by the judgment from showing that the plaintiff had not such interest as would entitle him to maintain the suit.³ Where a building was blown up without authority to stay the progress of a conflagration, the fact was allowed to be shown; and the jury in estimating the damages, it was held, should consider the circumstances under which the building and its contents were and their chance of being saved, even though not at the time on fire; and should determine the damages with reference to the peril to which

Markett v. Monohon, 7 Blackf. 88; ²*Cruikshank v. Gordon*, 118 N. Y. 178; *Distin v. Rose*, 69 id. 123; *Benders v. Johnson*, 6 Blackf. 50; *Nett v. Matthews*, 64 Barb. 410. See *Thomas v. Dunaway*, 30 Ill. 373; *Doe v. Roe*, 32 Hun. 628. *Immerford v. McAvoy*, 13 Ill. 311; ³*Sterrett v. Kaster*, 37 Ala. 366; *Orbley v. Wilson*, 71 Ill. 209; *Ray- Squire v. Hollenbeck*, 9 Pick. 551; *r v. Kinney*, 14 Ohio St. 283. *Lowell v. Parker*, 10 Met. 309.

¹*Bush v. Prosser*, 11 N. Y. 847; *Sbey v. Shaw*, 12 N. Y. 67.

they were exposed.¹ So if a landlord enters to make repairs which are necessary and which the tenant ought to have made but neglected to make; or if he enters to make repairs which he is bound to make, but which the tenant forbids him to make, the damages will be estimated with reference to these circumstances and will be less than if the entry were made without color of excuse.² A person sued for entering and cutting down trees may show in mitigation a verbal license from the plaintiff;³ or when sued for breach of a contract that performance would have been useless.⁴ In actions for false imprisonment or malicious prosecution the fact that the defendant acted under instructions of his employer will not mitigate damages.⁵ The advice of counsel, if given *bona fide*, is a circumstance which may be considered to disprove malice and mitigate exemplary damages,⁶ if it was given on a full disclosure of the facts.⁷ The damages recoverable for the breach of a marriage promise are not lessened because the defendant withdrew his affections from the plaintiff without cause.⁸

§ 155. Plaintiff's negligence. The acts and negligences of the plaintiff which have enhanced the injury resulting from the defendant's act or neglect may be shown in mitigation of damages. The defendant is liable for the natural and proximate consequences of his violations of contract and of his wrongful acts; but if the plaintiff has rendered these consequences more severe to himself by some voluntary act which it was his duty to refrain from; or if by his neglect to exert himself reasonably to limit the injury and prevent damage, in the cases in which the law imposes that duty, and thereby he suffers additional injury from the defendant's act, evidence is admissible in mitigation to ascertain to what extent the damages claimed are to be attributed to such acts or omissions of the plaintiff. If he omit to use his opportunities and does [238]

¹ *Parsons v. Pettingell*, 11 Allen, 507; *Reed v. Bias*, 8 W. & S. 189. See *Workman v. Great Northern Ry. Co.*, 32 L. J. (Q. B.) 279.

² *Reeder v. Purdy*, 41 Ill. 279.

³ *Wallace v. Goodall*, 18 N. H. 439.

⁴ *Louisville & P. Canal Co. v. Rowan*, 4 Dana, 606.

⁵ *Joeselyn v. McAllister*, 22 Mich. 300.

⁶ *Fox v. Davis*, 55 Ga. 298; *Bohm v. Dunphy*, 1 Mont. 333.

⁷ *Shores v. Brooks*, 81 Ga. 468. See ch. 25, vol. 8.

⁸ *Richmond v. Roberts*, 98 Ill. 472.

not reasonably exert himself to lessen the damages which may result from the defendant's act he is not entitled to compensation for the injury which he might and ought to have prevented, except to the extent of proper compensation for such measures or acts of prevention as the case required and were within his knowledge and power.¹ The measure of his duty in this regard is ordinary care and diligence.² In some states contributory negligence to a certain extent is not a defense if the defendant was also at fault. There such negligence diminishes the damages which the plaintiff may recover,³ except where the defendant has been responsible for a positive, continuous tort.⁴ The general subject has already been discussed at some length and it need not now be enlarged upon.⁵

§ 156. Measures of prevention; return of property; discharge of plaintiff's debt. Acts of the plaintiff or defendant, and in some cases of third persons, by which the *prima facie* loss or injury from the act complained of has been reduced or partially compensated may be shown in reduction of damages. Measures of prevention taken by the plaintiff to prevent loss or to avert some of the consequences of the wrong complained of, and which have had an ameliorating effect, may

¹ Warren v. Stoddart, 105 U. S. 224; Goshen v. England, 119 Ind. 368; Louisville, etc. R. Co. v. Jones, 108 id. 551; Sherman Center Town Co. v. Leonard, 46 Kan. 854; Miller v. Mariners' Church, 7 Me. 51; Mather v. Butler Co., 28 Iowa, 258; Cincinnati, etc. R. Co. v. Rodgers, 24 Ind. 108; Maynard v. Maynard, 49 Vt. 297; Arden v. Goodacre, 11 C. B. 871; Howard v. Daly, 61 N. Y. 862; Sutherland v. Wyer, 67 Me. 64; Williams v. Chicago Coal Co., 60 Ill. 149; Heavilon v. Kramer, 31 Ind. 241; Benziger v. Miller, 50 Ala. 206; Dunn v. Johnson, 88 Ind. 54; Keyes v. Western Vt. Slate Co., 34 Vt. 81; Cook v. Soule, 56 N. Y. 430; Campbell v. Miltenberger, 26 La. Ann. 72; Parsons v. Sutton, 66 N. Y. 92; Milton v. Hudson R. S. Co., 87 N. Y. 210; Bisher v. Richards, 9 Ohio St. 495; Dobbins v. Duquid, 65 Ill. 464; Benton v. Fay, 64 Ill. 417;

Hayden v. Cabot, 17 Mass. 169; Emery v. Lowell, 109 Mass. 197; True v. International T. Co., 60 Me. 9; Reynolds v. Chandler R. Co., 43 Me. 513; Grindle v. Eastern Exp. Co., 67 Me. 817; Luce v. Jones, 39 N. J. L. 707; United States v. Smith, 94 U. S. 214; Beymer v. McBride, 37 Iowa, 114; Le Blanche v. London, etc. Ry. Co., 1 C. P. Div. 286; Hamlin v. Great N. Ry. Co., 1 H. & N. 406; Smeed v. Foord, 1 E. & E. 602.

² Louisville, etc. Ry. Co. v. Falvey, 104 Ind. 409.

³ Atlanta, etc. R. Co. v. Wyly, 65 Ga. 120; Hardin v. Ledbetter, 103 N. C. 90; East Tennessee, etc. R. Co. v. Fain, 12 Lea (Tenn.), 85; Louisville & N. R. Co. v. Conner, 2 Baxter (Tenn.), 382; East Tennessee, etc. R. Co. v. Thompson, 12 Lea, 200.

⁴ Satterfield v. Rowan, 83 Ga. 187.

⁵ See ante, §§ 88-90.

be proved; and the damages will be mitigated, according to the particular facts, to the actual loss. Where goods have been taken from the owner, and sold by an officer who cannot justify for want of a plea or because his writ would not avail for that purpose, such officer or any person liable for his tort may show that the plaintiff bought the goods at the tortious sale for less than their value.¹

Whenever the owner recovers his property after any [239] wrongful taking or detention the expense of procuring its return is the measure of damages, in the absence of special damage, if the property itself has not been injured nor diminished in value. In other words, the wrong-doer is *prima facie* liable for the value of property at the time he tortiously took or converted it, with interest; but if it has been returned and accepted by the owner its value then, or, if he has incurred expense to recover it, then its value less such expense, will be deducted by way of mitigation from the amount which would otherwise be the measure of damages.² Where one recovers property which had been unlawfully taken he is considered as having accepted it in mitigation of damages upon the principle that he has thereby received partial compensation for the injury suffered.³ In an action of trespass for goods taken and carried away it appeared that the plaintiff, before suing, had demanded their return, and the defendant had promised to return them, but while preparing to do so they were attached on a writ against the plaintiff; it was held that the measure

¹ Forsyth v. Palmer, 14 Pa. St. 96; lett v. Novion, 14 Johns. 273; Delano Murray v. Burling, 10 Johns. 175; v. Curtis, 7 Allen, 470; Cook v. Hartle, Baker v. Freeman, 9 Wend. 86; Ford 8 C. & P. 508; Bennett v. Lockwood, v. Williams, 24 N. Y. 359; Baldwin 20 Wend. 223; Burn v. Morris, 2 v. Porter, 12 Conn. 473; Hurlburt v. Cromp. & M. 579; Doolittle v. McGreen, 41 Vt. 490; McInroy v. Dyer, Cullough, 7 Ohio St. 299; Wheelock 47 Pa. St. 118; Tamvaco v. Simpson, v. Wheelwright, 5 Mass. 104; Cook H. & R. 374; Kaley v. Shed, 10 Met. v. Loomis, 26 Conn. 463; Hepburn v. 817; Sprague v. Brown, 40 Wis. 612; Sewell, 5 Har. & J. 211; Sprague v. Reynolds v. Shuler, 5 Cow. 323. Brown, 40 Wis. 612; Ewing v. Blount, 20 Ala. 694; Hurlburt v. Green, 41

² Leonard v. Maginnis, 84 Minn. 506; Dailey v. Crowley, 5 Lana. 301; Vt. 490; Johannesson v. Borschenius, Greenfield Bank v. Leavitt, 17 Pick. 35 Wis. 181.

³ Pierce v. Benjamin, 14 Pick. 356; Merrill v. How, 24 Me. 126; Dod- Lucas v. Trumbull, 15 Gray, 306; son v. Cooper, 37 Kan. 846, quoting Perkins v. Freeman, 20 Ill. 477; Hal- the text.

of damages was the same as though the defendant had returned them.¹ If restoration is obtained by the offer and payment of a reasonable reward this amount, with interest from the time of payment, is to be deducted from the value of the property returned.² Trouble and loss of time may be taken into consideration as part of the expense of obtaining restoration.³ Where there is a diminution in value from any cause [240] intermediate the taking or conversion and return, the loss falls on the wrong-doer, and will lessen the mitigation to which he is entitled because of the return of the property.⁴ A mere offer to return will not lessen the damages;⁵ nor will the tender of part of the value by an officer who has sold under a void process.⁶ A court may in a proper case, if the action is trover or trespass *de bonis*, order the plaintiff to accept the property in mitigation of damages, which will then be reduced to those actually sustained by the taking, with intervening costs and losses.⁷ In an action for damages for withholding or not conveying property, a tender of it or a part of it or a conveyance of the whole or a portion of it may be allowed at the trial in mitigation, if under the circumstances such a course is reasonable.⁸ But this cannot be done in actions of *assumpsit* for breach of contract.⁹ By a wrongful conversion of property a cause of action arises which cannot be discharged except by the owner's act.¹⁰ And his acceptance of a return of it is in general required to relieve the wrong-doer of any part of his liability for the value; but as damages in trover are assessed on equitable principles, as is the allowance of mitigations generally, if property wrongfully taken or its proceeds have been applied to the payment of the plaintiff's debts, or otherwise to his use, though without his direction or consent, such application may, under certain circum-

¹ Kaley v. Shed, 10 Met. 317; Lowell v. Parker, id. 309.

² Greenfield Bank v. Leavitt, 17 Pick. 1.

³ Johannesson v. Borschenius, 85 Wis. 181.

⁴ Lucas v. Trumbull, 15 Gray, 306; Perham v. Coney, 117 Mass. 102; Barrelett v. Bellgard, 71 Ill. 280.

⁵ Norman v. Rogers, 29 Ark. 365;

Stickney v. Allen, 10 Gray, 352. See Worman v. Kramer, 78 Pa. St. 373;

Dow v. Humbert, 91 U. S. 294.

⁶ Clark v. Hallock, 16 Wend. 607.

⁷ Yale v. Saunders, 16 Vt. 243.

⁸ Towle v. Lawrence, 59 N. H. 501.

⁹ Colby v. Reed, 99 U. S. 560.

¹⁰ Livermore v. Northrup, 44 N. Y. 107.

stances, be received in mitigation. An executor *de son tort* may show that he has applied the proceeds of the property with which he intermeddled in payment of the debts of the deceased.¹

§ 157. *Same subject.* Where a guardian having no power to commit waste by cutting and removing timber unauthorizedly gave a license to another to commit such waste, and the latter, with the former's assent, applied the proceeds of the timber to the payment of taxes upon or debts against the infant's estate, such payments were allowed to be shown by him in mitigation.² But it has been held that a voluntary purchaser from an executor *de son tort* when sued in trover by the rightful representative cannot show in mitigation of damages that since his purchase the executor *de son tort* has paid debts which the administrator was bound to pay in due course of administration.³ A defendant in an action of trespass *de bonis asportatis* who is a mere trespasser cannot take any benefit from the application to the plaintiff's use of property seized by him without the latter's express or implied authority or consent, although a lien held by a third party thereon is satisfied.⁴ "One who has wrongfully taken property cannot

¹ Mountford v. Gibson, 4 East, 441; Saam v. Saam, 4 Watts, 492; Hostler v. Scott, 2 Haywood, 179; Cook v. Sanders, 15 Rich. 63; Hanson v. Herrick, 100 Mass. 323; Perry v. Chandler, 2 Cush. 287.

² Probate Court v. Bates, 10 Vt. 235; Torry v. Black, 58 N. Y. 185.

³ Carpenter v. Going, 20 Ala. 587. In this case Dargan, C. J., said: "But the question is can the purchaser from the executor *de son tort* be substituted to this equitable defense that the executor *de son tort* might himself make? We think he cannot, at least in a court of law. We do not intend to deny the common saying that trover is an equitable action and that the plaintiff can recover damages only to the extent of the injury actually sustained; as if the mortgagee bring trover against the

mortgagor he can recover only the amount of the debt; or if the goods be sold illegally to discharge a lien the owner can recover of the purchaser only the value of the goods, deducting the value of the lien. But we hold that this equity or right must be personal to the defendant himself; that is, it must have existed in him at the time he became liable to the action; or if acquired afterwards it must have been acquired by his own act; for at law he cannot be subrogated to the equities of another which have sprung up after the liability of the defendant has become perfect."

⁴ Bird v. Womack, 69 Ala. 390; McMichael v. Mason, 13 Pa. St. 214 (wrongful levy by sheriff); Dallam v. Fitler, 6 W. & S. 323.

mitigate the damages by showing that he has himself applied the property to the owner's use without his consent; but when the property has been so applied by the act of a third person and the operation of law, that fact should be taken into the account in estimating the plaintiff's damages."¹ In trover by the mortgagee of crops against a purchaser with notice, or in a special action for damages in the nature of trover, the unauthorized sale and conversion being admitted, the defendant cannot prove in mitigation of damages that a part of the proceeds of the sale received by the mortgagor was applied by him to the discharge of a lien for rent which was superior to the mortgage.²

¹Higgins v. Whitney, 24 Wend. 379.

²Keith v. Ham, 89 Ala. 590. The court say: Had this action been against the mortgagor, there would have been more force in the position that the damages should be mitigated, for it was his duty to discharge the landlord's lien for rent; or had the case involved the general ownership of the property, and it appeared that the fruits of the conversion had been applied by the consent, express or implied, of the plaintiff, or through legal proceedings, had at the instance of a third person, to the payment of his debt, or in relieving his property from a lien, the damages recoverable by him in trover might be mitigated by the amount thus paid. Bird v. Womack, 69 Ala. 392; Street v. Sinclair, 71 id. 110. Or, had a recovery been had in favor of the landlord against the defendant, it may be that evidence of that fact might go in reduction of the mortgagee's damages. But here, even conceding that the payment was in some sort to the advantage of the plaintiff, we cannot conceive how that fact will avail the defendant in this action, the *gravamen* of which is the wrongful purchase and possession. The wrong was fully consummated, the injury

resulting from it had been sustained, and the plaintiff's right to sue had attached before the alleged payment to the landlord. The payment was not made by the defendant, but by the mortgagor. To hold that he is entitled to a credit for the amount would be to subrogate him to an equity created, if it exists at all, by an act with which he had no connection and to give him the benefit of a payment which he has not made.

If personal property is sold under a condition that the title shall be and remain in the vendor until a note given for the purchase price of it is fully paid, a purchaser of a part of such property who is chargeable with notice of the contract is liable to the original vendor for the value of the property purchased, and cannot claim a mitigation of the damages because the money he paid his vendor was by him paid to the owner and indorsement thereof made on the note he held. The person in whom the title was had a right to the whole security until his demand was fully paid. That was not affected by the diminution of the debt by payments. Defendant's vendor had no right to dispose of the property in order to make a payment. The wrong to the plaintiff, resulting from

Where a tax collector became a purchaser at a sale [241] made by him the sale was declared voidable in trover against him; but as the proceeds were applied to pay the plaintiff's tax the amount so paid was deducted from the damages.¹ So a sale by a sheriff without giving notice has been held a conversion, but the damages should be only the diminution of price caused by such omission.² If goods are tortiously taken and a creditor of the owner afterwards attaches and disposes of them according to law, and applies the proceeds in satisfaction of a judgment against the owner, such proceeding may be shown, not as a justification of the taking but in mitigation of damages. This is because it would be palpably unjust for the owner to receive the full value of his goods in their application to the payment of his debts, and afterwards recover that value from another who has derived no substantial benefit from his property. This rule is not only in conformity with justice, but has the sanction of authority.³ It is not the fact of the

the sale and conversion, was to diminish his security. If the proceeds of the property sold had paid the whole debt, there would be good reason for mitigating the damages, although the sale took place before the debt was paid; but under the facts the mitigation would not benefit plaintiff because, though the debt due him was lessened, he had lost an equivalent amount of property. *Morgan v. Kidder*, 55 Vt. 367.

¹ *Pierce v. Benjamin*, 14 Pick. 356.

² *Wright v. Spencer*, 1 Stewart, 576.

³ *Curtis v. Ward*, 20 Conn. 204. In this case Ward, an attaching creditor, and the officer who executed the writ, were defendants. Ward sued out an attachment and attached property, after which that writ was abandoned and the indorsement of service erased. Subsequently a new attachment was sued out, followed by judgment and execution, on which the goods were sold. The defendant in the execution brought

trover for the original taking. As the defendants could not justify that taking by any return upon the first attachment they suffered judgment by default, but they were allowed to show the subsequent disposition of the property in mitigation, on the authority of previous cases cited. *Baldwin v. Porter*, 12 Conn. 473; *Clark v. Whitaker*, 19 id. 330. Referring to the cases in New York denying the benefit of such mitigation to the wrong-doer when the sale is made upon process sued out by his agency or for his benefit, Waite, J., said: "We are unable to yield our assent to the correctness of that doctrine as applied to a case like the present, where there has been a legal appropriation of the property. Ward, the defendant, had a legal right to attach the goods in question; and as they were subsequently legally appropriated to the payment of the plaintiff's debt, he has in that way received the full value of his property. The defendants admit that

[242] seizure that gives the defense, but that it has been seized under such circumstances that the owner has had or could have the benefit of it.¹ But in New York, as the law is settled, to protect the wrong-doer or to entitle him to prove such sale and application of proceeds in mitigation the seizure must be at the instance of a third person and not at the instance of the wrong-doer or upon process in his favor.² Where the wrong-doer is not thus excluded by the policy of the law in reprobation of his tort from the benefit of such mitigation it is generally available to him.³

If animals are killed through negligence it is the duty of their owner, if their carcasses are of any appreciable value for any purpose, to use such measure of diligence as is reasonable considering the circumstances to realize for them all they are worth. If he fails to do so their net value must be estimated and deducted from the damages claimed.⁴

they have committed a trespass in taking the goods; and that they are liable to pay the plaintiff all the damage he has sustained thereby, and no more. These are for the original taking and detention until the second attachment. Beyond this they have done him no wrong. He has no more right to complain of a second attachment than he would if made by any other creditor, or if there had been no previous taking of the property. When the goods were attached the second time the copy left in service with him showed their situation. It was then at his option to regain the possession either by writ of replevin or by the payment of the debt upon which they were attached, or suffer them to be applied in satisfaction of that debt. Had he obtained his goods in either of the former modes it would hardly be claimed that he could afterwards recover their value of the defendant. The same result ought to follow if he suffer them to be applied in due form of law to the payment of his debt." See *Wehle v. Butler*, 61 N. Y. 245,

which was apparently a similar case, in which the New York doctrine was applied and mitigation denied. See *Bates v. Courtwright*, 36 Ill. 518; *Wanamaker v. Bowea*, 36 Md. 42; *Squire v. Hollenbeck*, 9 Pick. 551.

¹ *Ball v. Liney*, 43 N. Y. 6.

² *Id.*; *Otis v. Jones*, 21 Wend. 894; *Hanmer v. Wilsey*, 17 Wend. 91; *Lyon v. Yates*, 52 Barb. 237; *Peak v. Lemon*, 1 Lans. 295; *Higgins v. Whitney*, 24 Wend. 879; *Sherry v. Schuyler*, 2 Hill, 204; *Ward v. Benson*, 31 How. Pr. 411; *Wehle v. Haviland*, 42 id. 899; *Wehle v. Butler*, 43 id. 5; 61 N. Y. 245.

³ *Howard v. Cooper*, 45 N. H. 839; *Doolittle v. McCullough*, 7 Ohio St. 299; *Stewart v. Martin*, 16 Vt. 897; *Montgomery v. Wilson*, 48 Vt. 616.

⁴ *Case v. St. Louis R. Co.*, 75 Mo. 668; *Dean v. Chicago & N. Ry. Co.*, 48 Wis. 805; *Georgia P. R. Co. v. Fullerton*, 79 Ala. 298; *Illinois Central R. Co. v. Finnegan*, 31 Ill. 646; *Roberts v. Richmond & D. R. Co.*, 88 N. C. 560; *Harrison v. Missouri P. Ry. Co.*, 88 Mo. 625.

§ 158. No mitigation when benefit not derived from defendant. There can be no abatement of damages on the principle of partial compensation received for the injury where it comes from a collateral source, wholly independent of the defendant, and is as to him *res inter alios acta*. As where a man whose wife was killed remarries; the pecuniary value of the services rendered by the wife of the second marriage cannot avail the party who is responsible for the death of the first.¹ A man who was working for a salary was injured by the negligence of the carrier; the fact that the employer did not stop the salary of the injured party during the time he was disabled was held not available to the defendant sued for such injury in mitigation;² nor does the gratuitous care and nursing of an injured plaintiff relieve the party who caused the injury from liability for their worth.³ Nor will proof of money paid to the injured party by an insurer or other third person by reason of the loss or injury be admissible to reduce damages in favor of the party by whose fault such injury was done.⁴ The payment of such moneys not being procured by the defendant, and they not having been either paid or received to satisfy in whole or in part his liability, he can derive no advantage therefrom in mitigation of damages for which he is liable. As has been said by another, to permit a reduction of damages on such a ground would be to allow the wrong-doer to pay nothing and take all the benefit of a policy of insurance without paying the premium.⁵ The

¹Davis v. Guarnieri, 45 Ohio St. 470.

²Ohio, etc. R. Co. v. Dickerson, 59 Ind. 317. But see ch. 86, vol. 2.

³Pennsylvania Co. v. Marion, 104 Ind. 230.

⁴Cunningham v. Evansville, etc. R. Co., 102 Ind. 478; Hammond v. Schiff, 100 N. C. 161; Baltimore & O. Ry. Co. v. Wightman, 29 Gratt. 481; Pittsburg, etc. R. Co. v. Thompson, 56 Ill. 188; Texas & P. Ry. Co. v. Levi, 59 Texas, 674; Hayward v. Cain, 105 Mass. 213; Clark v. Wilson, 103 id. 219; Propellor Monticello v. Mollison, 17 How. 152; The Yeager,

20 Fed. Rep. 653; Owens v. Baltimore & O. R. Co., 85 id. 715; Weber v. Morris, etc. R. Co., 36 N. J. L. 213; Harding v. Townshend, 48 Vt. 536; Carpenter v. Eastern Transp. Co., 71 N. Y. 574; Briggs v. New York, etc. R. Co., 72 N. Y. 26; Perrott v. Shearer, 17 Mich. 48; Yates v. Whyte, 4 Bing. N. C. 272; Kingsbury v. Westfall, 61 N. Y. 856; Althorf v. Wolfe, 22 N. Y. 855; Sherlock v. Alling, 44 Ind. 184.

⁵Mayne on Dam. 92; Dillon v. Hunt, 105 Mo. 154, 163, quoting the whole paragraph of the text as it stood in the first edition.

same principle has been applied to life insurance in recent cases.¹ In the case last cited in the note the writer of the opinion of the house of lords said that money provisions made by a husband for the maintenance of his widow, in whatever form, are matters proper to be considered by the jury in estimating her loss by the death of her husband, but the extent, if any, to which these ought to be imputed in reduction of damages must depend upon the nature of the provision and the position and means of the deceased. When the deceased did not earn his own living, but had an annual income from property, one-half of which has been settled upon his widow, a jury might reasonably come to the conclusion that, to the extent of that half, the widow was not a loser by his death, and might confine their estimate of her loss to the interest which she might probably have had in the other half. Very different considerations occur when the widow's provision takes the shape of a policy on his own life effected by a man in the position of the deceased, whose earnings were \$75 a month, and who left no estate. "The pecuniary benefit which accrued to the respondent from his premature death consisted in the accelerated receipt of a sum of money, the consideration for which had already been paid by him out of his earnings. In such a case the extent of the benefit may fairly be taken to be represented by the use or interest of the money during the period of acceleration; and it was upon that footing that Lord Campbell² suggested to the jury that, in estimating the widow's loss, the benefit which she derived from acceleration might be compensated by deducting from their estimate of the future earnings of the deceased the amount of premiums which, if he had lived, he would have had to pay out of his earnings for the maintenance of the policy." On the same principle it would be no defense in an action by an annuitant or any other creditor that the value of the annuity had been recovered against the plaintiff's attorney in an action for negligence in its negotiation, or that the sheriff had been forced to pay the debt in an action for an escape.³ And where a number

¹ *Western & A. R. Co. v. Meigs*, 74 Ga. 857; *Grand Trunk Ry. v. Beckett*, 16 Can. Sup. Ct. 718; S. C., 13 Ont. App. 174; *Grand Trunk Ry. Co. v. Jennings*, 13 App. Can. (1888), 800.

² In *Hicks v. Newport, etc. Ry. Co.*, 4 B. & S. 408, n.

³ *Mayne on Dam.* 92; *Hunter v. King*, 4 B. & Ald. 202.

of plaintiffs sued for damages resulting from delaying their ship it was held to be no ground for reducing the amount that some of these plaintiffs had been benefited by getting an increase of passengers in another ship; the court said the result would have been the same if there had been only one plaintiff who owned both ships.¹ So general benefits resulting to a plaintiff from the erection and proximity to his property of defendant's mill are no ground for a reduction of the damages the plaintiff suffers by the overflowing of his land from the defendant's dam.² And in an action by the master for [244] seduction of his servant evidence that the defendant offered to marry the girl is not admissible in mitigation.³ In an action against one of several co-trespassers evidence of payments by any one of them, though not received in full satisfaction, is admissible; they are payments made on account of the injury by those primarily liable; full satisfaction from either would discharge all and partial compensation should have this effect *pro tanto*.⁴ An offer by a wrong-doer to purchase property which has been injured at a price put upon it by a third person cannot be proven.⁵ In a suit to recover for the breach of a contract to furnish employment the defendant may show that wages have been obtained from other parties.⁶

§ 159. Fuller proof of the *res gestæ* in trespass, negligence, etc. Mitigation of damages frequently results from fuller proof of the *res gestæ*, or the disclosure of some peculiar or exceptional features pertaining to the particular case, making it apparent that the plaintiff's injury is less than it would otherwise appear to be or that defendant is less culpable. A defendant in mitigation of damages for assault and battery may rely on the *res gestæ* although if pleaded it would amount to a justification and require a special plea.⁷ It has been held that in an action for breach of a marriage promise it may be shown that the defendant's family disapproved of the match on the

¹ Mayne on Dam. 92; Jebson v. East & W. India Dock Co., L. R. 10 C. P. 800.

⁴ Chamberlin v. Murphy, 41 Vt. 110.

⁵ Mayor v. Harris, 75 Ga. 761.

⁶ Owen v. Union Match Co., 48

² See Francis v. Schoellkopf, 53 N. Mich. 348.

Y. 152; Marcy v. Fries, 18 Kan. 353.

⁷ Byers v. Horner, 47 Md. 28; Rus-

³ Ingersoll v. Jones, 5 Barb. 661. See White v. Murland, 71 Ill. 250.

sell v. Barrow, 7 Port. 106. But see Watson v. Christie, 2 Bos. & P. 224.

ground that this would diminish the happiness of the union.¹ It may be shown in such an action that the defendant was afflicted with an incurable disease at the time of the breach.² But it has been ruled that the jury cannot consider in mitigation the possible consequences of marrying the defendant arising from a want of that love and affection which a husband should have for his wife.³

In trespass, under a plea of not guilty, it has been held that the defendant might show title in himself to confine the plaintiff's recovery to the quantity of his interest.⁴ In an action to recover for damages done by cattle it may be shown that the animals got upon plaintiff's land by reason of the defectiveness of his fence.⁵ An officer against whom an action is brought for entering the plaintiff's house and assaulting him may show in mitigation, but not to prove the entry lawful, that he entered for the purpose of making, and did in fact make, service under an attachment, although the attachment [245] was unlawful by reason of the writ not having been returned into court.⁶ Where, in consequence of the defendant's embankment, the flood waters of a river were pent up and flowed over the plaintiff's land and it appeared that had the embankment not been constructed the waters would have flowed a different way, but would have reached his land and done damage to a lesser extent, it was held that the measure of damages was the difference between the two amounts.⁷ And in an action for a nuisance in erecting mills and maintaining a steam-engine and furnaces in the vicinity of the plaintiff's dwelling, the defendant was held entitled to show the general character of the neighborhood, the various kinds of business carried on there, and the class of tenants by whom dwelling-houses in that vicinity were in general occupied, and also the probable disadvantage and loss to the plaintiff from an inabil-

¹ *Irving v. Greenwood*, 1 C. & P. 850.

² *Sprague v. Craig*, 51 Ill. 586.

³ *Piper v. Kingsbury*, 48 Vt. 480.

⁴ *Ballard v. Leavell*, 5 Call, 531.

In an action of trespass for killing a dog evidence of his bad habits other than such as are pleaded in justification may be proven in mitiga-

tion. *Reynolds v. Phillips*, 13 Ill. App. 557; *Dunlap v. Snyder*, 17 Barb. 561.

⁵ *Young v. Hoover*, 4 Cranch C. C. 187.

⁶ *Paine v. Farr*, 118 Mass. 74.

⁷ *Workman v. Great Northern Ry. Co.*, 32 L. J. (Q. B.) 279.

ity to rent his houses, if, in consequence of the destruction or removal of the defendant's mills, there were no longer workmen to whom they could be leased.¹ The concurrence of other causes with the defendant's acts in creating a nuisance may also be shown in mitigation.²

On an assessment of damages, after a default in an action for negligence, the defendant for mitigation and to reduce them to a nominal sum may show that there was no negligence; for this purpose it is immaterial whether the charge is of injury to person or property or that the damages are entire and indivisible.³ A total or partial want or failure of consideration, on the same principle, may be shown in an action upon contract,⁴ or any defense arising out of the plaintiff's cause of action itself, as where the action is for the price of labor or of a commodity and defects are proved.⁵ And in many English cases this defense is recognized where ac- [246] cording to the general course of American decisions the broader defense of recoupment would be allowed.⁶

§ 160. **Official neglect.** In actions for neglect of duty or misconduct of ministerial officers affecting parties entitled to call on them for service, or for whom such officers are required by law to perform duties, as well as in like actions by employers against agents and attorneys, the general rule is that the injured party is entitled to compensation commensurate with his actual loss.⁷ Where such neglect or misconduct results in a failure to collect a debt or impairs an existing security, and the *prima facie* loss is the amount of the debt, ordinarily any evidence is properly defensive or receivable in

¹Call v. Allen, 1 Allen. 187. See Francis v. Schoellkopf, 58 N. Y. 152.

²Sherman v. Fall River Iron Works, 5 Allen, 213.

³Batchelder v. Bartholomew, 44 Conn. 494.

⁴Darnell v. Williams, 2 Stark. 166; Simpson v. Clarke, 2 C., M. & R. 342.

⁵Crookshank v. Mallory, 2 Greene (Iowa), 257; Basten v. Butter, 7 East, 479; Farnsworth v. Garrard, 1 Camp. 88; Denew v. Daverell, 3 Camp. 451; Baillie v. Kell, 4 Bing. N. C., 633; Cut-

ler v. Close, 5 C. & P. 387; Sinclair v. Bowles, 9 B. & C. 92; Thornton v. Place, 1 M. & Rob. 218; Kelly v. Bradford, 83 Vt. 35; McKinney v. Springer, 3 Ind. 59; Allen v. McKibbin, 5 Mich. 449; Wood v. Schettler, 23 Wis. 501.

⁶Street v. Blay, 2 B. & Ad. 456; Parson v. Sexton, 4 C. B. 899; Poulton v. Lattimore, 9 B. & C. 259; Mondel v. Steel, 8 M. & W. 858; Dawson v. Collis, 10 C. B. 528.

⁷Amy v. Supervisors, 11 Wall. 136.

mitigation which negatives that loss either wholly or in part.¹ So a sheriff in an action for escape or any neglect in respect to an execution may show in mitigation that the execution debtor was wholly or partially insolvent; that if due diligence had been used the whole judgment or some part would have remained unsatisfied.²

There is an apparent exception to the general proposition that the party injured shall only recover his actual loss in the case of ministerial officers through whose diligent action the party interested must realize a debt or come into possession of a right. Where a sheriff suffers an escape on final process or fails to collect and return an execution, or to perform a peremptory duty to levy a tax or the like, it is generally held that the fact that the debt is still safe and collectible by a repetition of the resort to the defendant officially is no defense;³ otherwise, as Watson, J., said:⁴ "If the officer is sued for a neglect of duty he can say the defendant had no property out of which he could collect the money, and that, it is conceded, is a good defense; or he can say he has property out of which you can still collect it, and therefore nothing but nominal damages can be recovered." He adds: "The second execution issued upon the same judgment would admit of the same defense, and so on as often as they might be issued, provided the judgment debtor did not in the meantime get rid of his property."⁵ In an action against a supervisor of

¹ Van Wart v. Woolley, 3 B. & C. 439; Allen v. Suydam, 20 Wend. 321; Russell v. Turner, 7 Johns. 189; Russell v. Palmer, 2 Wils. 325; Stowe v. Bank of Cape Fear, 3 Dev. 408.

² Kellogg v. Manro, 9 Johns. 800; Patterson v. Westervelt, 17 Wend. 543; Hootman v. Shriner, 15 Ohio St. 43; Ledyard v. Jones, 7 N. Y. 550; People v. Lott, 21 Barb. 180; Brooks v. Hoyt, 6 Pick. 468; Shackford v. Goodwin, 13 Mass. 187; Nye v. Smith, 11 Mass. 188; Lush v. Falls, 63 N. C. 188; West v. Rice, 9 Met. 564; State v. Baden, 11 Md. 317; State v. Mullen, 50 Ind. 598; Coe v. Peacock, 14 Ohio St. 187; Cooper v. Wolf, 15 id. 523; Bank of Rome v. Curtiss, 1 Hill, 275; Pardee v. Robertson, 6 id. 550; Bowman v. Cornell, 39 Barb. 69; Dunphy v. Whipple, 25 Mich. 10.

³ Ledyard v. Jones, 7 N. Y. 550; Bank of Rome v. Curtiss, 1 Hill, 275; Pardee v. Robertson, 6 id. 550; Kellogg v. Manro, 9 Johns. 300; Arden v. Goodacre, 11 C. B. 371; Moore v. Moore, 25 Beav. 8; Hemming v. Hale, 7 C. B. (N. S.) 487; Macrae v. Clarke, L. R. 1 C. P. 403; Goodrich v. Starr, 18 Vt. 227; State v. Hamilton, 33 Ind. 502; Hodsdon v. Wilkins, 7 Me. 113; Weld v. Bartlett, 10 Mass. 470.

⁴ Ledyard v. Jones, 7 N. Y. 550.

⁵ But see Tempest v. Linley, Clay-

a town who was required by law to assess the damages which had been allowed the plaintiff for property taken for public use, and who had omitted to do so, it was held that the supervisor was personally liable for the whole amount which the plaintiff had been unable to obtain by reason of the refusal to perform his duty.¹ "It cannot be assumed," say the court, "that the defendant would be taught by the result of one action and proceed to do his duty, and thus avoid another. The plaintiff is not to be thus put off. The defendant's misconduct has deprived him of obtaining his money, and the defendant must answer to the whole injury which he has occasioned."² This rigorous severity is exceptional and based [248]

ton, 34; Norris' Peake, 608; Stevens v. Rowe, 8 Denio, 327.

¹ Clark v. Miller, 54 N. Y. 528.

² In the overruled case of Stevens v. Rowe, 8 Denio, 327, which was an action against a sheriff for neglecting to return an execution, Beardsley, J., said: "At common law no action lay for such violation of duty, although the sheriff might be attached and punished for it. I admit, however, that under the statute an action may be maintained for such misconduct, and in which the party aggrieved is entitled to recover 'for the damages sustained by him' (2 R. S. 440, § 77; Pardee v. Robertson, 6 Hill, 550). The amount to be recovered is thus prescribed by the statute, which is 'the damage sustained' by such violation of duty, whatever the amount may be. The full amount to be levied and made on the execution is not necessarily recoverable, although *prima facie* that may be the just measure of reparation where nothing is shown to induce a belief that the real loss of the aggrieved party is less than that amount." After referring to the point decided in Pardee v. Robertson, *supra*, and in Bank of Rome v. Curtiss, 1 Hill, 275, he continued: "I must say that I should find great

difficulty in following either of these cases as authority, even where the facts and circumstances were identically the same; and I am by no means disposed to extend them as authority to cases which admit of a plain distinction in matter of fact. The decision in The Bank of Rome v. Curtiss was said to be in accordance with the rule laid down in two cases adjudged in Massachusetts; but as I read those cases they have no application to such a state of facts as was shown to exist in The Bank of Rome v. Curtiss. In that case it appeared that the debt had not been lost, although its collection had been delayed by the neglect of the sheriff; for the proof shows that the debt was still safe and collectible. Yet the court held that the sheriff was liable for the full amount of the execution in his hands. I am unable to see any such rule laid down in either of the Massachusetts cases. In the first of these cases in order of time (Weld v. Bartlett, 10 Mass. 474), Parker, J., said that where an officer had neglected to do his duty, so that the effect of the judgment appears to be lost, the judgment in the suit so rendered ineffectual is *prima facie* evidence of the measure of injury which the plaintiff has sustained;

on considerations of policy to insure the active diligence of such officers; it is in fact punitive in its nature and object. In the case next referred to, however, the rule was applied to an officer who by an error of judgment omitted to assess a

but it may be met by evidence of the inability of the debtor to pay.' The other case (*Young v. Hosmer*, 11 Mass. 89) is equally explicit, and makes the sheriff liable for the entire debt; because 'the benefit of the judgment to the whole amount of it is to be presumed lost by the negligence of the officer.' This principle can surely have no bearing on a case in which it appears that the judgment had not been lost, but was still safe and collectible. In *Kellogg v. Manro*, 9 Johns. 800, which was also cited as sustaining *The Bank of Rome v. Curtiss*, the rule is stated as in the Massachusetts cases. It was said to be too plain for discussion that the plaintiff might recover beyond nominal damages. 'He is entitled,' say the court, '*prima facie*, to recover his whole debt, which is presumed to be lost by the escape.' I make no objection to this rule in any action brought against an officer for the violation of such a duty. *Prima facie* it may well be taken that the whole debt has been lost by the negligence of the officer; and if such be the fact, it is most just that he should pay the full amount. But when the proof shows that the debt has not been lost, although the collection has been delayed, and that it is still safe and collectible, it seems to me entirely clear that the rule laid down in the Massachusetts cases and in *Kellogg v. Manro* is wholly inapplicable. . . . In *Pardee v. Robertson* it was proved that the sheriff had actually collected the full amount of the execution; the money still remaining in his hands. But in the

case now to be decided the fact was otherwise. The proof showed that the money had not been collected; although, if the judgment was a lien on real estate in the county of Oswego, as the plaintiff offered to show, the sheriff might have made the amount as required by the execution. . . . If the sheriff should be compelled to pay the full amount of the execution, for the reason that the judgment was a lien on real estate out of which the money might have been collected, as was offered to be proved on the part of the plaintiffs, he would be entirely remediless. He could not enforce the judgment and execution for his own indemnity, but must stand the entire loss. This would be too severe where the debt is still safe and the only injury sustained has resulted from mere delay. It is just that the sheriff should make the party good by paying all the damages sustained by him; and so is the statute on which the action is founded; but to go beyond this seems to me quite too rigorous. *Prima facie* the sheriff is liable for the full amount of the execution debt, as it is presumed to have been lost by his neglect. This, in my estimation, is not a very violent presumption, but still may be just in regard to the officer who is in default. But when it is shown that the debt has not been lost, there is no room for presumption, and the *prima facie* case no longer exists. By the statute the measure of the recovery is the 'damages sustained,' which, presumptively, I admit is the full amount of the execution. But the sheriff may

tax for a sum due. He omitted to do it because he believed the law requiring it was unconstitutional. The court say honest ignorance does not excuse a public officer for disobedience of the law.¹ It will exempt him from punitive damages. In a case for escape Jarvis, C. J., said: "The rule might be supposed to operate unjustly towards the sheriff where the execution debtor has the means of paying the debt at the moment of the escape and still continues notoriously in solvent circumstances. In this case the value of the custody was the amount of the debt, and the plaintiff will be entitled to recover substantial damages. It is true that the recovery of such damages will not satisfy the execution; and the debtor may be retaken by the plaintiff; for the debtor cannot take advantage of his own wrong and avail himself of the recovery against the sheriff. On the other hand, the sheriff is not damaged, for he may retake the debtor or recover against him by action the amount he has been compelled to pay."² Where the officer fails to collect an execution from a debtor who is "notoriously in solvent circumstances," and continues so, there is no wrong done the execution debtor, as in an escape, to give the sheriff any action against him; nor do the authorities in this class of actions proceed on the theory that such a recovery against the sheriff transfers the judgment debt to him. Hence the recovery of the full amount of the judgment or other demand against an officer who has neglected to do [250] some act which would have enabled the party interested to realize at once, the debtor being still solvent, or the debt not being wholly lost by the default, is not a measure of damages which is strictly compensatory. To the extent of the actual value of the debt in respect to which the negligence occurred at the time of the recovery against the officer, the plaintiff is over-compensated when he has recovered from the officer the full amount. Exclusion of proof of that value in mitigation cannot rest on the argument that its reception and consideration would deprive the creditor of any compensation for actual loss.

mitigate the amount not simply by showing his inability to collect the money, but by proof that the debt is still safe and collectible."

¹ Clark v. Miller, 54 N. Y. 528. See Dow v. Humbert, *infra*, note.

² Arden v. Goodacre, 11 C. B. 371.

§ 161. **Modification of the old rule.** The supreme court of the United States¹ has limited the application of this rigorous rule against officers. The action was for neglect of duty by the defendants as supervisors in refusing to place upon the tax list as required by a statute the amount of two judgments recovered by the plaintiff against the town. The debtor being a township, it was presumed that its taxable property continued the same as when the levy should have been made. Miller, J., said: "The single question presented is whether these officers, by the mere failure to place on the tax list when it was their duty to do so the judgment recovered by the plaintiff against the town became thereby personally liable to the plaintiff for the whole amount of said judgment without producing any other evidence of loss or damage growing out of such failure. It is not easy to see upon what principle of justice the plaintiff can recover from the defendants more than he has been injured by their misconduct. If it were an action of *trespass* there is much authority for saying that the plaintiff would be limited to actual and compensatory damages unless the act were accompanied with malice or other aggravating circumstances. How much more reasonable that for a failure to perform an act of official duty, through mistake of what that duty is, that the plaintiff should be limited in his recovery to his actual loss, injury or damage. Indeed, where such is the almost universal rule for measuring damages before a jury there must be some special reason for a departure from it. . . . The expense and cost of the vain effort to have the judgment placed on the tax list; the loss of the debt, if it had been lost; any impairment of the efficiency of the tax levy, if such there had been; in short, any conceivable actual damage,—the court would have allowed if proved. But plaintiff, resting solely on his proposition that defendants by failing to make the levy had become his debtors for the amount of his judgment, asked for that, and would accept no less." The court reached the conclusion "that in the absence of any proof of actual damage . . . the defendants were liable to nominal damages and to costs, and no more."² In a later case which was very aggravated, the de-

¹ Dow v. Humbert, 91 U. S. 294.

soundness of this conclusion: "Coun-

² Judge Miller thus vindicates the self for plaintiff relies mainly on the

defendants having refused to obey a *mandamus* to collect the amount of a judgment by adding it to the tax roll, the court allowed the plaintiff his counsel fees and costs.¹

class of decisions in which sheriffs have been held liable for the entire judgment for failing to perform their duty when an execution has been placed in their hands. The decisions on this subject are not harmonious; for while it has been generally held that on a failure to arrest the defendant on a *capias*, or levy an execution on his property, or to allow him to escape when held a prisoner, the amount of the debt is the presumptive measure of damages, it has been held in many courts that this may be rebutted, or the damages reduced by showing that the prisoner has been re-arrested, or that there is sufficient property subject to levy to satisfy the debt, or other matter showing that the plaintiff has not sustained damages to the amount of the judgment. This whole subject is fully discussed in Sedg. on Damages, 506-525. *Richardson v. Spencer*, 6 Ohio, 13. But without going into this disputed question we are of opinion that those cases do not furnish the rule for the class to which this belongs.

"The sheriff, under the laws of England, was an officer of great dignity and honor. He was also the custodian of the jail in which all prisoners, whether for crime or for debt, were kept. He had authority in all cases, when it was necessary, to call out the whole power of the country, to assist him in the performance of his duty. The principle of the sheriff's liability, here asserted, originated undoubtedly in cases of suit for an escape. Imprisonment of the debtor was then the chief, if

not the only, mode of enforcing satisfaction of a judgment for money. It was a very simple, a very speedy, and a very effectual mode. The debtor being arrested on a *capias*, which was his first notice of the action, was held a prisoner, unless he could give bail, until the action was tried. If he gave bail, and judgment went against him, his bail must pay the debt, or he could be re-arrested on a *capias ad satisfaciendum*; and, if he had given no bail, he was holden under this second writ until the money was paid. To permit him to escape was in effect to lose the debt; for his body had been taken in satisfaction of the judgment. Inasmuch as the object of keeping the defendant in prison was to compel the payment of the debt, through his desire to be released, the plaintiff was entitled to have him in custody every hour until the debt was paid. It is also to be considered that, for every day's service in keeping the prisoner, the sheriff was entitled to compensation by law at the hands of the creditor. *Williams v. Mostyn*, 4 M. & W. 145; *Williams v. Griffith*, 3 Exch. 584; *Wylie v. Birch*, 4 Q. B. 566; *Clifton v. Hooper*, 6 id. 468. With the means at the hand of the sheriff for safe-keeping and re-arrest, with the escape of the debtor almost equivalent to a loss of the debt, and with compensation paid him by plaintiff for his service, it is not surprising that, when he negligently or intentionally permitted an escape, he should be held liable for the whole debt. How different the duties of the class of officers to which defend-

¹*Newark Savings Inst. v. Panhort*, 7 Biss. 99. See *Branch v. Davis*, 29 Fed. Rep. 888.

[252] § 162. **Plaintiff's consent.** The previous consent of the plaintiff to the act which he complains of, though not given in a form to bar him or support a plea of justification, may yet be proved in mitigation of damages. Thus in tres-

ants belong, and the circumstances under which their duties are performed! There is no profit in the office itself. It is undertaken mainly from a sense of public duty; and, if there be any compensation at all, it is altogether disproportionate to the responsibility and trouble assumed. They are in no sense the agents of creditors, and receive no compensation from the holders of judgments or other claims against the town, for the collection and payment of their debts. There are no prisons under their control, no prisoners committed to their custody, no *posse comitatus* to be brought to their aid; but without reward and without special process of a court to back them, they are expected to levy taxes on the reluctant community at whose hands they hold office. To hold these humble but necessary public duties can only be undertaken at the hazard of personal liability for every judgment which they fail to levy and collect, whether through mistake, ignorance, inadvertence, or accident, as a sheriff is for an escape, without any proof that the judgment creditor has lost his debt, or that its value is in any manner impaired, is a doctrine too harsh to be enforced in any court where imprisonment for debt has been abolished.

"The case of *The King on the Prosecution of Parbury v. The Bank of England*, Doug. 524, is cited as sustaining the plaintiff in error. It was an application for a *mandamus* to compel the governor and company of the Bank of England to transfer stock of the bank. The writ was denied on several grounds; among

which, as a suggestion, Lord Mansfield said that 'where an action will lie for complete satisfaction (as in that case), equivalent to specific relief, and the right of the party applying is not clear, the court will not interpose the extraordinary remedy of a *mandamus*.' He then shows that the right of the party in that case to have the transfer made is not clear. As this was not an action against the officers of the bank for damages, the remark that there was other relief is only incidental, and the point as to the measure of damages was not in issue. A note to the principal case shows that an action of *assumpsit* was afterwards brought and compromised before final judgment. But on the whole case there is no discussion of the measure of damages and that question remained undecided. The case of *Clark v. Miller*, 54 N. Y. 528, decided very recently in the commission of appeals, appears to be more in point. It was an action against the supervisor of the town of Southport, Chemung county, for refusing to present to the board of supervisors of the county the plaintiff's claim for damages as re-assessed for laying out a road through his land. The court without much discussion of the principle holds the defendant liable for the full amount of the re-assessment, on the authority of the *Commercial Bank of Buffalo v. Kortright*, 22 Wend. 848. That case was decided in the court of errors in 1839. It was an action for refusing to make a transfer of stock to the bank. The chancellor (Walworth) was of opinion that the extent of the damages was the depreciation

pass for an alleged injury to the plaintiff's wall by inserting joists in it, evidence that the wall was so used by the defendant in the erection of an adjoining building under an express parol agreement with the plaintiff is admissible under the [253] general issue in mitigation.¹ So it may be proved that the injury in question was inflicted in a fight by mutual consent.²

§ 163. **Injuries to character and feelings.** Any exceptional conduct or character of the plaintiff which impairs his title to compensation or diminishes the injury in question is provable in mitigation. In those actions where the wrong complained of involves injury to character the defendant may show, in order to reduce damages, the general bad character of the plaintiff.³ The weight of New York authority favors the proposition that in an action by a female for an indecent assault, the injury to her feelings being an element of damages, specific acts of lewdness with others than the defendant may be shown in mitigation without being specially pleaded.⁴ Evidence that the plaintiff's marriage with his reputed [254] wife was void is admissible in an action for seduction of his reputed daughter to rebut the presumption of actual service by showing that the plaintiff was not legally entitled thereto and in mitigation of damages.⁵ In an action for criminal conversation it may be shown that the plaintiff was wanting in affec-

of the stock and not its full value; and of this opinion were four senators.

"In the case of *The People v. The Supervisors of Richmond*, 28 N. Y. 112, also before the court in 20 id. 232, the relator had sued out a writ of *mandamus* requiring the supervisors to audit his claim for damages assessed for land taken as a highway. The supervisors made a return to the writ, which proving false, the supreme court rendered a judgment against them personally for the claim of \$200 and for \$84 damages for the delay. The court of appeals said that as the return of the supervisors was false, and the relator had been kept out of the money to which he was entitled from the town, the super-

visors may be properly made liable in damages to the extent of the interest upon \$200,—to wit, \$84, and they affirm the judgment as to the \$84 and reverse it as to the \$200, for which they order a peremptory writ of *mandamus*. This answer accords precisely with our views, and we think it of equal authority with *Clark v. Miller*."

¹ *Hamilton v. Windolf*, 36 Md. 301.

² *Adams v. Waggoner*, 83 Ind. 531. See § 151, *ante*.

³ *Fitzgibbon v. Brown*, 48 Me. 169. See *ante*, § 152.

⁴ *Guillette v. McKinley*, 27 Hun, 320, reviewing the cases in New York.

⁵ *Howland v. Howland*, 114 Mass. 517.

tion for his wife to support the inference that his loss was trifling;¹ or that there was but slight intercourse between them;² and in an action for breach of promise of marriage that the plaintiff was utterly unfit to appreciate the person to whom he engaged himself.³ Declarations by the plaintiff pending the action that she would not marry the defendant except for his money have been admitted.⁴ The fact of a female plaintiff having had an illegitimate child, though known to the defendant at the time of the promise, may be proved;⁵ and her intercourse with another man before and after the promise.⁶ In actions for seduction proof of plaintiff's careless indifference to defendant's opportunities for criminal intercourse with her daughter may be shown in mitigation,⁷ but actual connivance by the plaintiff would be a bar.⁸

§ 164. *Reduction of loss or benefit.* Whatever diminishes the loss of the injured party, or where the recovery is influenced by the amount of benefit derived from the act complained of by the defendant, whatever decreases the value of that benefit may be proved in mitigation, where the matter diminishing the loss in the former case, or impairing the benefit in the other, is part of the transaction. Thus in an action against a contractor for failing to fulfill his contract he may show that the agreed price has not been paid.⁹ And where A. took wrongful possession of premises on the 2d of June, and [255] a sum of money became due for ground rent on the 24th for the month ending on that day, which A. paid, it was held in an action for *mesne* profits that he was entitled to deduct the money so paid from the damages. In that case the payment of the ground rent diminished the value of the occupation to the defendant; and having paid what the plaintiff must otherwise have paid, his injury, for which *mesne* profits were compensation, was, to the amount paid, mitigated.¹⁰ So a tenant has a right to deduct from rent all expenses or taxes

¹ Bromley v. Wallace, 4 Esp. 287.

² Calcraft v. Harborough, 4 C. & P. 499.

³ Leeds v. Cook, 4 Esp. 256.

⁴ Miller v. Rosier, 81 Mich. 475. *Contra*, Miller v. Hayes, 84 Iowa, 496.

⁵ Denslow v. Van Horn, 16 Iowa, 476.

⁶ Burnett v. Simpkins, 24 Ill. 264.

⁷ Zerfing v. Mourer, 2 Greene (Ia.), 520; Parker v. Elliott, 6 Munf. 587.

⁸ Bunnell v. Greathead, 49 Barb. 106; Smith v. Masten, 15 Wend. 270; Sherwood v. Titman, 55 Pa. St. 77.

⁹ Ready v. Tuskalooza, 6 Ala. 327.

¹⁰ Doe v. Hare, 2 Cr. & M. 145.

which he has been compelled to pay for the lessor.¹ If a mortgagee who has brought an action for damage done to the mortgaged premises by a removal of fixtures has sold the premises intermediate the injury and the action for more than enough to pay his debt and all prior incumbrances, this fact may be proven in mitigation of damages.²

The immediate landlord is bound to protect his tenant from all paramount claims; and when, therefore, the tenant is compelled, in order to protect himself in the enjoyment of the land in respect to which the rent is payable, to make payments which ought, as between himself and his landlord, to have been made by the latter, he is considered as having been authorized by the landlord so to apply his rent due or accruing due.³ Of this nature are not only payments of ground rent to the superior landlord, but interest due upon a mortgage prior to the lease;⁴ an annuity charged upon the land;⁵ and rates and taxes.⁶ But where the payment of the ground rent or other like charge gives no right of action against the party suing for the rent, this right of deduction does not exist.⁷

§ 165. Pleading in mitigation. It has sometimes been held as a general rule that matters which would have gone in bar of the action cannot be given in evidence to reduce damages unless pleaded. Lord Abinger, C. B., said:⁸ "It is a principle as old as my recollection of Westminster Hall that matter of justification cannot be given in evidence in an action in order to mitigate damages." The case was an action for wrongfully discharging the plaintiff from the defendant's service. The defendant pleaded only payment of money into court. It was contended in his favor that he should be allowed to show in mitigation that the discharge was for misconduct, as under this issue there was merely an inquiry of damages; that the same evidence was admissible as [256] upon a writ of inquiry after a judgment by default. It was held properly rejected. Alderson, B., said: "The question is

¹ *Sapsford v. Fletcher*, 4 T. R. 511;
Taylor v. Zamira, 6 Taunt. 524; *Carter v. Carter*, 5 Bing. 406.

² *King v. Bangs*, 120 Mass. 514.

³ *Graham v. Allsopp*, 8 Exch. 186.

⁴ *Johnson v. Jones*, 9 A. & E. 809.

⁵ *Taylor v. Zamira*, 6 Taunt. 524.

⁶ *Baker v. Davis*, 8 Camp. 474; *Andrew v. Hancock*, 1 B. & B. 87.

⁷ *Graham v. Allsopp*, *supra*.

⁸ *Speck v. Phillips*, 5 M. & W. 279.

whether it is competent to the defendant in mitigation of damages to give evidence to contradict a fact admitted on the record. If it were the grossest injustice might be done; because the other party does not, of course, come prepared to prove the fact so admitted." And Maule, B., said: "No question was made that the plaintiff was wrongfully discharged; and I think it was not competent to the defendant to give evidence to negative that which is admitted by the plea. If it were the consequence would follow that no defendant would ever plead specially; he would pay a shilling into court and set up as many defenses as he pleased; and succeeding in any one of them, would get a verdict and his costs. This would be setting aside not only the new rules, but all the old rules which required special pleadings in actions of this nature."¹

In trespass against a constable for arresting the plaintiff and imprisoning him, the declaration stated it to have been without reasonable or probable cause; the court said a constable may justify an arrest for reasonable cause on suspicion alone; and in this respect he stands on more favorable ground than a private person who must show, in addition to such cause, [257] that a felony was actually committed; that the difficulty was

¹In *Watson v. Christie*, 2 B. & P. 224, tried before Lord Eldon, C. J., the action was for assault and battery, and not guilty pleaded. It was offered to be shown that the beating was given by way of punishment for misbehavior on shipboard. The jury were directed that the only questions for their consideration were whether the defendant was guilty of the beating, and what damages the plaintiff had sustained in consequence of it; that although the beating in question, however severe, might possibly be justified on the ground of the necessity of maintaining discipline on board the ship, yet such a defense could not be resorted to unless put upon the record in the shape of a special justification; that the defendant had not said on the record that this

was discipline, or justified it on any ground; that much evil beyond the mere act had been actually suffered which evil had been occasioned by a cause which the defendant admitted he could not justify; that in his lordship's judgment, therefore, the evil actually suffered in consequence of what was not justified ought to be compensated for in damages; that the jury should give damages to the extent of the evil suffered without lessening them on account of the circumstances under which it was inflicted; that if they gave damages beyond compensation for the injury actually sustained they would give too much; but if they gave less they would not give enough. See *Pujola v. Holland*, 3 Irish C. L. 533; *Gelston v. Hoyt*, 13 Johns. 561.

to determine whether circumstances of suspicion which might have been pleaded in justification were competent to go to the jury under the general issue in mitigation of damages. They say the objection rests on the rule which requires matter of justification to be pleaded specially. At the first blush one would not perceive a reason to preclude a party who had waived the benefit of a full defense from showing the purity of his motives to shield him from exemplary damages; and there is in truth none except that the plaintiff is not apprised by the pleadings of the defendant's intention. Yet where the defendant is not at liberty to apprise him by pleading in justification the matter is for that very reason allowed to be given in evidence. But whatever inconsistency there may seem to be in point of principle the defendant when charged with making an arrest without probable cause may rebut the charge.¹

§ 166. **Same subject.** In actions for slander this rule was adopted long ago and has since been generally adhered to for special reasons. These have more or less force in other actions where the matter sought to be proved in mitigation would be a serious surprise to the plaintiff if introduced at the trial without any notice in the pleadings. Under the common-law system matter of mitigation which could not be used in bar of the plaintiff's cause of action, nor of any severable part of it, was for that reason provable without being pleaded. But under this rule matter which could have been made available in bar by plea is not necessarily admissible in mitigation. The admission of such defense is not within the reason and necessity of that rule. Courts may therefore properly exercise a discretion to require notice of some sort as they do of defenses by way of recoupment. It is believed, however, not to be a general rule, at least in this country, except in actions for libel and slander, that matter which might be set up in bar and is not so pleaded cannot be proved in mitigation. The existence of such rule has been denied in New York.² Judge Selden said: "It was never any objection to evidence in mitigation that under a different state of the plead- [258] ings it would amount to a full defense." And again: "It seems to have been supposed that there was some sound legal

¹ Russell v. Shuster, 8 W. & S. 308.

² Bush v. Prosser, 11 N. Y. 347, 362,

objection to admitting proof of facts under the general issue *in mitigation merely*, which, if specially pleaded, would amount to a full defense. But there is not, and never was, any such objection.¹ In Vermont, it has been held in trover, after a default, that matter which shows that the plaintiff had no right to recover, and which might have been given in evidence under the general issue, may avail the defendant in mitigation of damages.² In a late case in Connecticut, in a hearing for the ascertainment of damages after a default in an action for negligence in setting a fire by which property of the plaintiff was injured to the amount of \$400, the defendants were allowed to introduce evidence, for the purpose of reducing the damages to a nominal sum, that they were guilty of no negligence whatever. The plaintiff objected to the reception of the evidence on the ground that the defendants by their neglect to traverse the declaration and by suffering a default conclusively admitted that they were guilty of negligence sufficient for the plaintiff to maintain his action; and that in a case of damage to property incapable of division, the least sum the court could assess as damages, consistent with the declaration, was the actual damage done to the property. The court said: "From a time early in the history of the jurisprudence of this state the law has been that where, in an action on the case for the recovery of unliquidated damages, the defendant has suffered a default, that is, has omitted [259] to make any answer, the assessment of damages has been made by the court without the intervention of a jury; also, that by his omission to deny them the defendant is held to have admitted the truth of all well pleaded material alle-

¹ In the subsequent case of *McKyring v. Bull*, 16 N. Y. 297, 304, the same learned judge said: "As the code contains no express rule on the subject of mitigation, except in a single class of actions, this question cannot be properly determined without a recurrence to the principles of the common law. By those principles defendants in actions sounding in damages were permitted to give in evidence in mitigation, not only matters having a tendency to reduce

the amount of the plaintiff's claim, but in many cases facts showing that the plaintiff had in truth no claim whatever. It was not necessarily an objection to matter offered in mitigation that if properly pleaded it would have constituted a complete defense." See *Smithies v. Harrison*, 1 *Ld. Raym.* 727; *Abbot v. Chapman*, 2 *Lev.* 81; *Nicholl v. Williams*, 3 *M. & W.* 758.

² *Collins v. Smith*, 16 *Vt.* 9.

gations in the declaration, and the consequent right of the plaintiff to a judgment for a limited sum for nominal damages and costs, without the introduction of evidence. The defendant standing silent, the law imputes the admission to him; but it does it with this limitation upon its meaning and effect, it does it for this special purpose and no other; and our courts have repeatedly explained that the admission founded on a default is not an admission of which the writers upon the law of evidence treat. The silent defendant, having been subjected to a judgment for nominal damages from which no proof can relieve him, the default has practically exhausted its effect upon the case; for if the plaintiff is unwilling to accept this judgment, evidence is received on his part to raise the damages above and on the part of the defendant to keep them down to that immovable base of departure, the nominal point, precisely as if the general issue had been pleaded; and although the evidence introduced by the latter has so much force that it would have reduced them to nothing but for the barrier interposed by the default, it cannot avail to deprive the plaintiff of his judgment; in keeping that the law perceives that he has all that the truth entitles him to and therefore refuses to hear any objection from him. . . . The plaintiff argues that his case differs from . . . all others which have gone before it, in that his damages are entire and indivisible and arise from a single act of the defendants. But the destruction of a life would seem to be an entire and indivisible wrong¹ in as complete a sense as the destruction of the plaintiff's grass, fence and wood; a single blow killed the man, a single spark fired the grass. The rule cannot be at all affected by the question as to whether the injury is inflicted upon person or property. In either case, at the outset, the damages are uncertain; in both they are made certain by the same tribunal, governed by the same rules, informed by evidence of the same character, received in the same order. An injury to the person may be the breaking of a finger or the tearing of both arms [260] from the body; an injury to property may be the destruction of a tree or of a forest. It is of course a much more difficult and delicate task to reduce to the standard of coin the value of a leg or an arm than to determine the market price for a

¹ Carey v. Day, 36 Conn. 152.

cord of wood, or for a standing tree of given dimensions; nevertheless, probably in every week, some one of the numerous courts of the country find for some plaintiff, presumably the money value of a lost limb. The judicial system has but one balance; in this is weighed every loss, even that of life."¹

In Maryland it has been held in an action of trespass for an injury to the plaintiff's wall by inserting joists into it, that evidence was admissible under the general issue of a previous license, in mitigation, which would have been a bar if specially pleaded.² Also, that a defendant in mitigation of damages for assault and battery may rely on the *res gestæ*; although if pleaded it would amount to a justification and require a special plea.³

In Virginia, in an action of trespass for taking a slave from the plaintiff's close, it was held that on a plea of not guilty evidence might be received in mitigation that the title to the slave was in the defendant.⁴

§ 167. **Payments.** Payments made either before or after suit brought may be proved in mitigation of damages, but not in bar without plea nor under the general issue.⁵ And the same rule is held in California under the code.⁶ If full payment is made after suit brought and is accepted for the debt [261] and costs, the defendant will be entitled to a verdict.⁷ It is necessary that the payment be made to cover the costs which have accrued,⁸ and it should be pleaded to the further maintenance of the action.⁹

¹ *Batchelder v. Bartholomew*, 44 Conn. 494; *Saltus v. Kipp*, 12 How. Pr. 342.

² *Hamilton v. Windolf*, 36 Md. 301.

³ *Byers v. Horner*, 47 Md. 23.

⁴ *Bullard v. Leavell*, 5 Call, 531. See *Moore v. McNairy*, 1 Dev. 319.

⁵ *Dana v. Sessions*, 46 N. H. 509; *Shirley v. Jacobs*, 2 Bing. N. C. 88; *Lediard v. Boucher*, 7 C. & P. 1; *Britton v. Bishop*, 11 Vt. 70; *Bischof v. Lucas*, 6 Ind. 26; *Moore v. McNairy*, 1 Dev. 319; *Nicholl v. Williams*, 2 M. & W. 753. See *McKyring v. Bull*, 16 N. Y. 297.

In *Plevin v. Henshall*, 10 Bing. 24, after a verdict for the plaintiff in

trover, the goods were seized in the hands of the defendant for rent which the plaintiff was liable to pay; the defendant having paid the rent, the court allowed him to deduct the amount from the verdict. But see *Buell v. Flower*, 39 Conn. 462.

⁶ *Wetmore v. San Francisco*, 44 Cal. 294, 300; *Davanay v. Eggenhoff*, 43 Cal. 395; *Frisch v. Caler*, 21 Cal. 71; *Brown v. Orr*, 29 Cal. 120.

⁷ *Thame v. Boast*, 12 Q. B. 803; *Bendit v. Annesley*, 27 How. Pr. 184.

⁸ *Belknap v. Godfrey*, 22 Vt. 288.

⁹ *Thame v. Boast*, *supra*; *Dana v. Sessions*, 46 N. H. 509; *Bank v. Brackett*, 4 id. 558.

SECTION 4.

RECOUPMENT AND COUNTER-CLAIM.

§ 168. **Definition and history of recoupment.** The term *recoupment*, derived from the French word *recouper*, to cut again, signifies in the law a cutting off and keeping back a part of the plaintiff's claim in satisfaction, by set-off, of cross-demands of the defendant growing out of the same contract or transaction on which the claim is founded. The same thing is meant by defalcation and discount. Literally understood, recoupment would include mere mitigation of damages, and the instances of this defense in the old books are mostly of that nature.¹ In the endeavor to reduce the controversy to a single point or issue, very little scope was given by the early common law to defenses which rested on the principle of allowing cross-claims in favor of the defendant.

At one time it was doubted that in an action on a *quantum meruit* for services the defendant was entitled to reduce the damages by showing that the work had not been well done.² The allowance of such defenses was the result of a consultation of the judges in England. In an action of that character Lord Ellenborough said: "This is an action founded on a claim for meritorious services. The plaintiff is to receive what he deserves. It is therefore to be considered how much he deserves, or if he deserves anything. If the defendant has derived no benefit from his services he deserves nothing, and there must be a verdict against him. There was formerly considerable doubt on this point. Mr. Justice Buller thought (and I, in deference to so great an authority, have at times

¹Dyer, 2; 8 Vin. Abr. 556-7; Croke's Eliz. 681; Taylor v. Beal, Croke's Eliz. 222; Shetelworth v. Neville, 1 T. R. 454.

The supreme court of Illinois must have had in mind the older meaning of the word when it said that "recoupment, in its strict common-law sense, is a mere reduction of the damages claimed by the plaintiff by proof under the general issue of

mitigating circumstances connected with or growing out of the transaction upon which the plaintiff's claim is based, showing that it would be contrary to equity and good conscience to suffer the plaintiff to recover the full amount of his claim." Wadhams v. Swan, 109 Ill. 46, 62.

²Farnsworth v. Garrard, 1 Camp. 38.

ruled the same way) that in cases of this kind a cross-action for the negligence was necessary; but that if the work be done the plaintiff must recover for it. I have since had a conference with the judges on the subject, and now I consider this as the correct rule: that if there has been no beneficial service there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the extent of the plaintiff's demand, leaving the defendant to his action for the negligence."¹ He also remarked that where a specific sum has been agreed to be paid by the defendant, "the plaintiff may have some ground to complain of surprise if evidence be admitted to show that the work and materials provided were not worth so much as was contracted to be paid because he may only come prepared to prove the agreement for the specified sum, and the work done, unless notice be given to him that the payment is disputed on the ground of the inadequacy of the work done. But where the plaintiff comes into court upon a *quantum meruit* he must come prepared to show that the work done was worth so much, and therefore there can be no injustice in suffering the defense to be entered into even without notice."² The right to make such defenses is no longer in question; the plaintiff must show his performance of a condition precedent as a basis of the recovery either of an agreed sum or on a *quantum meruit*; and there is included in the mere right to make a defense the right to rebut the evidence of performance; and where the value is not fixed by agreement the amount reasonably due for such performance. In such cases, to the extent that the plaintiff's [263] recovery proceeds on proof of performance or its reasonable value, the defendant, if he dispute either as shown by the plaintiff, must defend, or lose all right to contest the conclusions so arrived at or to redress for the deficiencies of the plaintiff's performance.³ The direct defense by negating the facts which the plaintiff assumes to prove to measure his compensation, or those which, on the theory of his action, enter into the price and fix the amount of damages, is not recoupment;⁴ nor is a defense which consists of a denial of

¹ *Basten v. Butter*, 7 East, 479.

² *Id.*

³ *Kellogg v. Denslow*, 14 Conn. 411;

Davis v. Talbot, 12 N. Y. 184.

⁴ *Steamboat Wellsville v. Geisse*, 8 Ohio St. 388.

facts which the plaintiff must prove to maintain his action, as the performance of a condition precedent.¹ The defense which is allowed under the name of recoupment is not a keeping back a part of the plaintiff's *prima facie* damage on the case he seeks to establish by evidence of the character explained under the title "mitigation of damages;" but a reduction of the plaintiff's recovery by the allowance against him in his action of damages due the defendant on a substantive cause of action in his favor, growing out of the same transaction on which the plaintiff's claim or demand arises.

§ 169. **Same subject.** Until near the close of the last century the strict rules of the common law as to the independency of covenants and the entirety of conditions were rigidly enforced. A defendant sustaining damages from the breach of any counter or reciprocal obligation in the contract sued upon was put to his cross-action unless he had made the performance of such obligation strictly a condition precedent to his undertaking to the plaintiff.² These rules were often attended with hardship, as where the plaintiff was insolvent and unable to respond afterwards or in a separate action. Thus, in an action for breach of a covenant to recover unliquidated damages the defendant pleaded set-off of like damages for plaintiff's breach of his covenants in the same instrument. This defense was urged on grounds which now support recoupment. It, however, was rejected without any allusion to the right of recoupment because the statute of set-offs only applied to mutual debts, which did not include demands for un- [264] liquidated damages.³ Until this species of defense had become firmly established, the severe adherence to the old practice was in no cases more marked than in actions between landlord and tenant; — the former was allowed to collect his rent, notwithstanding his covenant to repair remained unperformed, and even if he was himself insolvent.⁴ The doctrine of recoupment has attained its growth since the revolution; but the courts of this country and of England have not given it

¹Thompson v. Richards, 14 Mich. 172; Stoddard v. Treadwell, 26 Cal. 294.

²Howlet v. Strickland, 1 Cowp. 56.

³Taylor's L. & T., § 873; 7 Am. L. Review, 392.

⁴7 Am. L. Review, 392.

the same expansion; nor has it made the same progress in all the states of the Union.

In New York the defense was at first admitted in mitigation of damages where there was fraud in respect to the consideration;¹ next where there was breach of warranty without fraud.² At this time it elicited increased discussion and received more emphatic judicial recognition. Marcy, J., said: "From an examination of the cases I am satisfied that in those where the damages arising from a breach of warranty in the sale of chattels have been allowed to be given in evidence by the defendant to reduce the amount of recovery below the stipulated price, the decisions of the court have not proceeded upon the ground that the express contracts were void by reason of fraud, and a recovery had upon a *quantum meruit* or *quantum valebat* upon implied contract; but upon a principle somewhat different from those adverted to in this case in the court below; upon a principle which has of late years been gaining favor with courts and extending the range of its operations. Such a defense is admitted to avoid circuity of action; " hence he insisted, and the court decided, that damages arising from breach of warranty should be allowed to reduce the recovery as well where there was no fraud as where there was. So true was it that this new principle of avoiding circuity of action "was *gaining* favor with the courts and *extending* the range of its operations," that the discrepancies at any given time to be noticed between the decisions of courts of [265] different states have indicated a relative progress rather than a permanent disagreement.³

§ 170. **Nature of defense.** This defense is founded on the natural equity that mutual demands growing out of the same transaction should compensate each other by deducting the less from the greater and treating the difference as the sum justly due.⁴ It is also founded on the policy and convenience

¹ Beecker v. Vrooman, 18 Johns. 302.

² Spalding v. Vandercook, 2 Wend. 481; McAllister v. Reab, 4 Wend. 488.

³ The principle of recoupment, under various names, has been adopted in the general jurisprudence of this country. And it is believed

that it is now universally in force either by statute or otherwise; though in some states, in controversies at law where title to real estate is involved, the doctrine is not applied.

⁴ Green v. Farmer, 4 Burr. 2214, 2230; Reab v. McAllister, 8 Wend.

of settling an entire controversy in one action where it can be justly done, thus saving needless delay and litigation. By proper pleading, in the application of the doctrine of recoupment, the court may look through the whole contract, treating it as an entirety, and the things done and stipulated to be done on each side as the consideration for the things done and stipulated to be done on the other. When either party seeks redress for the breach of stipulations in his favor the grievances on each side are summed up, instead of those only on the plaintiff's side; a balance is struck, and the plaintiff can recover only when that balance is in his favor.¹ Some confusion has arisen from treating this defense as one of failure of consideration.² In an Alabama case³ the plaintiff sued on a note which had been given for a clock sold by him to the defendant with warranty that it would keep good time. The clock was shown to be worthless as a time-piece; but the case alone was worth more than a nominal sum, and it was held that the plaintiff might claim an abatement on the note to the amount of damage that he had sustained. Having kept the clock, however, judgment must go against him [266] for what it was actually worth. By this decision the breach

109, 115; *Myers v. Estell*, 47 Miss. 4, 17-21.

¹ *Lufburrow v. Henderson*, 30 Ga. 432; *Myers v. Estell*, 47 Miss. 4.

² The supreme court of Illinois indorses the view of Mr. Freeman as expressed in his note to *Van Epps v. Harrison*, 40 Am. Dec. 323: "In its modern application the foundation of recoupment is failure of consideration. The defendant in effect admits his failure to perform the contract upon which he is sued, and seeks to extenuate his default by showing that the plaintiff has failed in some particular to do that which was the consideration of the defendant's promise, and to that extent, therefore, the plaintiff has no right to hold the defendant liable; hence it is essential that the wrong of which the defendant complains should in some

way impair the consideration of his contract — in other words, it must appear that the express or implied promise broken by the plaintiff was the consideration for the defendant's promise." *Keegan v. Kinnare*, 123 Ill. 280. See *Watkins v. Hopkins*, 13 Gratt. 743. Compare *Perley v. Balch*, 23 Pick. 288; *Comparet v. Johnson*, 6 Blackf. 59; *Herbert v. Ford*, 29 Me. 546; *Drew v. Towle*, 27 N. H. 412; *Wheat v. Dotson*, 12 Ark. 699; *Van Buren v. Digges*, 11 How. (U. S.) 461; *Van Epps v. Harrison*, 5 Hill, 63; *Withers v. Greene*, 9 How. (U. S.) 213; *Wynn v. Hiday*, 2 Blackf. 123; *Elminger v. Drew*, 4 McLean, 388; *Washburn v. Picot*, 8 Dev. 390; *Pulsifer v. Hotchkiss*, 12 Conn. 234; *Avery v. Brown*, 81 Conn. 398; *Peden v. Moore*, 1 Stew. & Port. 71.

³ *Davis v. Dickey*, 23 Ala. 848.

of warranty avoided the special contract and recovery proceeded on a *quantum meruit*.¹ This is in accordance with the English rule; the damages are reduced by showing how much less the article is worth by reason of the breach of warranty; in other words, the plaintiff having failed to perform the agreement which was the consideration of the defendant's promise, the judicial inquiry is what is the property or service which the defendant has received worth. Thus, A. sold B., for 95*l.*, two pictures, representing them to be "a couple of ponsins;" they were in fact not originals, but very excellent copies. B. did not offer to return them, and it was held that if the jury thought that he believed from the representation of A. that they were originals, he was not bound to pay the price agreed; but that, as he kept them, he was liable to pay such sum as the jury might consider to be their value.² In an English case ³ Parke, B., said: "Formerly it was the practice where an action was brought for an agreed price of a specific chattel sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross-action for breach of the warranty or contract; in which action, as well the difference between the price contracted for and the real value of the article or of the work done, as any consequential damage, might have been recovered; and this course was simple and consistent. In the one case, the performance of the warranty, not being a condition precedent to the payment of the price, the defendant who received the chattel warranted has thereby the property vested in him indefeasibly, and is incapable of returning it back; he has all he stipulated for as the condition of paying the price, and therefore it was held that he ought to pay it and seek his remedy on the plaintiff's contract of warranty. In the other case, the law appears to have construed the contract as not importing that the performance of every portion of the work should be a condition precedent to the payment of the stipulated price, [267] otherwise, the least deviation would have deprived the

¹ Harman v. Sanderson, 6 S. & M. P. 848; Poulton v. Lattimore, 9 B. & C. 259; Street v. Blay, 2 B. & Ad.

² Lomi v. Tucker, 4 C. & P. 15; 456; Mondel v. Steel, 8 M. & W. 858. De Sewanhery v. Buchanan, 5 C. & ³ Mondel v. Steel, *supra*.

plaintiff of the whole price; and therefore the defendant is obliged to pay it, and recover for any breach of contract on the other side. But after the case of *Basten v. Butter*¹ a different practice, which had been partially adopted before in the case of *King v. Boston*,² began to prevail, and being attended with much practical convenience has been since generally followed; and the defendant is now permitted to show that the chattel, by reason of the non-compliance with the warranty in the one case, and the work in consequence of the non-performance of the contract in the other, were diminished in value.³ The same practice has not, however, extended to all cases of work and labor, as for instance that of an attorney,⁴ unless no benefit whatever has been derived from it; nor in an action for freight.⁵ It is not so easy to reconcile these deviations from the ancient practice with principle in those particular cases above mentioned as it is in those where an executory contract, such as this, is made for a chattel to be manufactured in a particular manner or goods to be delivered according to a sample;⁶ where the party may refuse to receive or may return in a reasonable time if the article is not such as bargained for; for in these cases the acceptance or non-return affords evidence of a new contract on a *quantum valebat*; whereas, in a case of a delivery with a warranty of a specific chattel there is no power of returning and consequently no ground to imply a new contract; and in some cases of work performed there is difficulty in finding a reason for such presumption. It must, however, be considered that in all these cases of goods sold and delivered with a warranty, and work and labor, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and that it is competent for the defendant in all of these not to set off, by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth by reason of the breach of contract; and to the extent [268]

¹ 7 East, 479.⁴ *Templer v. McLachlan*, 2 N. R.² 7 East, 481, note.

136.

³ *Kist v. Atkinson*, 2 Camp. 63;⁵ *Sheels v. Davies*, 4 Camp. 119.*Thornton v. Place*, 1 M. & Rob. 218.⁶ *Germaine v. Burton*, 8 Stark. 82.

that he obtains or is capable of obtaining an abatement of price on that account he must be considered as having received satisfaction for the breach of the contract and is precluded from recovering in another action to that extent, but no more." The defendant was not entitled to show damages resulting from such breach nor the breach of any other stipulation.¹

¹ Francis v. Baker, 10 Ad. & E. 642; Bartlett v. Holmes, 13 C. B. 680; Davis v. Hedges, L. R. 6 Q. B. 687.

In McAllister v. Reab, 4 Wend. 490, the theory of recoupment is thus discussed by Marcy, J.: "Upon what principle are the damages for the breach of warranty allowed in a case where there is fraud to be given in evidence to reduce the recovery below the stipulated price? Not on the ground of (statutory) set-off, because these damages are unliquidated. Is it upon the ground that the contract is destroyed by the fraud? If it is rendered void, upon what principle can the vendor recover at all? I know it has been said he recovers upon a *quantum meruit* or *quantum valebat*; but if there was no contract by reason of his fraud, there was no sale; no passing of title. Can an implied sale be set up in lieu of the express one? This, I think, may well be doubted, although the express contract may be void. The case of Beecker v. Vrooman (13 Johns. 302) seems to have been put on the ground that the sale is valid. The language of the court does not countenance the idea that the question in that case was the mere value of the horse. It is there intimated that a different rule now prevails from what formerly governed, which commends itself to the court, because it is calculated to do *final* and complete justice between the parties, most expeditiously and least expensively; but if the parties were proceeding without regard to the express contract upon

an implied one, and were only establishing the true value of the horse, there was no new rule, and the language of the court was not very appropriate to the question before them. In the case of Leggett v. Cooper (2 Starkie N. P. 103), where the counsel for the defendant resisted the recovery on the contract for the sale of hops on account of fraud, Lord Ellenborough said, 'if there is no contract for the sale of the goods at the stipulated price, there is no contract upon the *quantum meruit* for goods sold and delivered.' The action in the case of Frisbee v. Hoffnagle (11 Johns. 50) was on a note for the consideration of deed with warranty for land. The defense was that the vendor had no title, and it was allowed to prevail, not upon the ground that the contract of sale was invalid by reason of fraud, but for the purpose of avoiding circuity of action. The decision in the case of Spaulding v. Vandercook (2 Wend. 431) does not, I apprehend, proceed on the ground of fraud alone. The consideration of the note was the fulfillment of the contract to deliver barrels. If the whole contract was cut up by the fraudulent conduct of the plaintiff, the note was entirely without consideration; but it was not so considered. So in the case of Burton v. Stewart (3 Wend. 286) there was fraud in the sale of the horse, yet the note given on the sale was not adjudged to be without consideration. The contract was broken, but it had a valid existence; and the court en-

§ 171. **Same subject.** It is true that the plaintiff's [269] breach of stipulations in favor of the defendant impairs the consideration of his agreement in favor of the plaintiff; but the defense of recoupment is not based on the principle of treating the defendant as relieved from his obligation [270] to perform his undertaking because the consideration is impaired. On the contrary it is based on the opposite principle, namely, the enforcement of the contract on both sides; and that the damages which the plaintiff has sustained from the breach of the engagements in his favor shall, in whole [271] or in part, be compensation, by allowance in favor of the defendant, and application thereto of such damages as he has suffered from the infraction of the correlative duties and stipulations of the plaintiff which were the consideration. [272] The law will *cut off* so much of the plaintiff's claim as the cross-damages may come to.¹ Wherever recoupment, strictly such, is allowed, distinct causes of action are set off against each other.² It is not a bar to the plaintiff's action like the technical plea in avoidance of circuitry of action, but in pursuance of the same policy of the law it seeks to satisfy and discharge the whole or a part of the plaintiff's claim with damages for which he is liable in respect of the same transaction.³

§ 172. **Constituent features of recoupment.** For the purpose of discussing the principal constituent features of recoupment, the following propositions are sufficiently comprehensive: 1. The claim or demand for which the defendant seeks to recoup must be a valid cause of action upon which a separate suit might be maintained against the party beneficially interested in the plaintiff's action, or his assignor. 2. It

retained no doubt in that case that if there had been a proper notice the amount of recovery would have been greatly abated by the proof of what was offered; it was, however, rejected for the want of such notice." He concludes that the recovery of the plaintiff is based on the express contract, and the amount of it reduced by the allowance of damages on the defendant's cross-claim to save a multiplicity of actions, and as a sub-

stitute for a cross-action by the defendant.

¹ *Ives v. Van Epps*, 22 Wend. 155, 156; *McAllister v. Reab*, 4 Wend. 488; *Reab v. McAllister*, 8 Wend. 109; *Batterman v. Pierce*, 3 Hill, 171.

² *Minnaugh v. Partlin*, 67 Mich. 391; *Grant v. Button*, 14 Johns. 377; *Gillespie v. Torrance*, 25 N. Y. 306, 309; *Price's Ex'rs v. Reynolds*, 39 N. J. L. 171.

³ *McCullough v. Cox*, 6 Barb. 387.

must arise from the same subject-matter or spring out of the same contract or transaction on which the plaintiff relies to maintain his action. 3. It is immaterial whether it be in itself or is set up as a defense against a claim for liquidated or unliquidated damages. Nor is it necessary that the claims on both sides be of the same nature. 4. It is available only as a defense; for, except by statute, it can have no further effect than to answer the plaintiff's damages in whole or in part; the defendant cannot recover any balance or excess. 5. A defendant has an election to use such a cross-demand as a defense or bring a separate action upon it; but he will not have the election to set up his claim by way of recoupment unless it would be just and practicable to adjust it in the plaintiff's action. 6. When made the subject of recoupment the defendant assumes the burden of proof in respect to it, and the same rule or measure of damages applies, subject to the limitation just stated, as would be applicable if the defendant had brought a separate action. 7. When submitted as a subject of recoupment the judgment will be a bar to any other suit or recoupment upon it.

[273] § 173. **Remedy by counter-claim.** The counter-claim of the code adopted in many of the states includes recoupment and is more comprehensive; and the remedy by both has been made more useful and complete by statutory provision against voluntary discontinuance of the action by the plaintiff without the defendant's consent after this defense has been interposed; and for judgment on the adverse claim, if any amount is established after satisfying the plaintiff's claim, or where no claim in favor of the plaintiff is adjudged.

§ 174. **Validity of claim essential to recoupment.** The claim or demand to be recouped must be a valid cause of action for which a separate suit could be maintained.¹ Hence it is essential that the subject of it be such as the court in which it is pleaded has jurisdiction of;² that the damages set up were not incurred through defendant's fault or negligence;³

¹ Davidson v. Rountree, 69 Wis. 513; Sylte v. Nelson, 26 Minn. 105; this section.

Rhymney Ry. Co. v. Rhymney Iron Co., 25 Q. B. Div. 146; Barnes v. Me-

² Cragin v. Lovell, 88 N. Y. 258.
³ Provenzano v. Thayer Manuf. Co., 9 Daly, 90.

that the contract sued upon and out of which the claim arises is valid;¹ that the plaintiff is a party subject to suit;² that the allowance of the counter-claim will not deprive the plaintiff of the exemptions given him by statute.³

Reduction of damages may often be claimed upon facts which do not constitute a cause of action in favor of the defendant. Of this class and nature are those provable in *mitigation of damages*. The distinction is important; for it is necessary to use the latter in defense; the benefit of such facts will be lost if they are not then introduced. But if the defense consists of a substantive cause of action, it will not be lost or barred by the defendant failing to put it forward when there is an opportunity to make it available. The fact that the defendant has the option to avail himself of matter of recoupment or bring a cross-suit upon it necessarily implies that such matter constitutes a cause of action.⁴ In an action to recover for labor, if the benefit of the labor is lost by causes for which the plaintiff would be answerable in a cross-action, the same matter which would support a cross-action may be given in evidence in defense of the suit to recover payment.⁵ Bigelow, C. J., said: "That doctrine (of recoupment) does not rest on the nature of the right which the plaintiff has in the contract which he seeks to enforce, nor on the fact that his interest in it is the same at the time of suit brought as when it was originally entered into. The essential elements on which its application depends are two only. The first is that the damages which the defendant seeks to

¹ Ryan v. Dunphy, 4 Mont. 342, 354.

² A tax is not a debt or obligation to pay money founded upon contract and cannot be counter-claimed against. Gatling v. Commissioners, 92 N. C. 596; Cobb v. Elizabeth City, 75 id. 1; Finnegan v. Fernandina, 15 Fla. 379.

A defendant cannot plead a counter-claim against the state without its consent. State v. Bradley, 37 La. Ann. 623; People v. Dennison, 84 N. Y. 272; Battle v. Thompson, 65 N. C. 406.

A set-off cannot be maintained of a debt contracted by the plaintiff during infancy and not ratified by him after becoming of full age. Rawley v. Rawley, 1 Q. B. Div. 460; Widrig v. Taggart, 51 Mich. 108.

³ Bauer v. Teasdale, 25 Mo. App. 25; Curlee v. Thomas, 74 N. C. 51; Wilson v. McElroy, 32 Pa. St. 82.

⁴ Brown v. Gallaudet, 80 N. Y. 418; Gillespie v. Torrance, 25 id. 309. See Houston v. Young, 7 Ind. 200; Clark v. Wildridge, 5 id. 176.

⁵ Austin v. Foster, 9 Pick. 341.

set off shall have arisen from the same subject-matter or sprung out of the same contract or transaction as that on which the plaintiff relies to maintain his action. The other is [274] that the claim for damages shall be against the plaintiff, so that their allowance by way of set-off, or defense to the contract declared on, shall operate to avoid circuity of action, and as a substitute for a distinct action against the plaintiff to recover the same damages as those relied on to defeat the action."¹

§ 175. **Parties.** The cause of action set up for recoupment must be one against the party beneficially interested in the plaintiff's action; a claim against the nominal plaintiff personally when he sues in a fiduciary capacity or for the benefit of another is not available. Thus, where property attached by an officer upon *mesne* process was replevied from him, and on the failure of the plaintiff in that suit to comply with the judgment for return of the property suit was brought on the bond by the officer, it was held that the other party could not recoup the damages adjudged in his favor against such officer for false return on the process upon which he originally attached the property, because the damages recovered by the officer on the bond would be held in trust for the benefit of the attaching creditor and his debtor, and the damages sought to be recouped were assessed against him personally for a wrong committed by him.² So in action by executors, as such, for the recovery of purchase-money of land sold by them, the purchaser making no offer or attempt to rescind the contract cannot avail himself of false and fraudulent representations made by them at the time of the sale in respect to the subject-matter either as a defense or by way of recoupment or counter-claim. His remedy, if he has any, is against the executors personally.³

¹ Sawyer v. Wiswell, 9 Allen, 39.

² Wright v. Quirk, 105 Mass. 44.
See Beckman v. Manlove, 18 Cal. 388.

³ Westfall v. Dungan, 14 Ohio St. 276.

A plaintiff who sues as assignee for the benefit of creditors to recover the price of goods is not subject to a counter-claim for damages resulting

from the malicious prosecution by him of a former suit for the same cause of action unless it is shown that his *cestuis que trust* participated in or approved his wrongful act. Gelshenen v. Harris, 26 Fed. Rep. 680.

If the beneficial interest in a claim or demand remains in the assignor

It is not essential to the exercise of the right of recoupment that the suit in which the right is asserted should be brought in the name of the party who is liable for the cross-claim, nor need it be against the party who is entitled to the benefit of such claim. It is enough that the suit is substantially between them; that the claim sued on is subject to this defense, or that the proceeding be of such a nature that the mutual claims can be adjusted in it; and that whatever is recovered is enforceable against the property of the party seeking to [275] recoup; and whatever is deducted upon the cross-claim properly inures to his benefit.¹ By the water-craft law of some states demands of certain descriptions are liens upon and enforceable against the water-craft, which may be discharged by bond or some form of undertaking in behalf of the owners conditioned for the payment of amounts found to be liens. In actions upon such security, or against the water-craft not bonded, any matter of recoupment in respect to the demand alleged to be a lien may be set up.² The surety of a principal entitled to recoupment may, as a general rule, avail himself of that defense because of the natural equity that mutual debts and liabilities growing out of the same transaction shall compensate each other.³ In New York, however, this application of recoupment is refused.⁴ The prevailing view is that a

the assignee cannot set it off against the debtor. *Olmstead v. Scutt*, 55 Conn. 125.

¹In an action by A. against B. and C. they sought to recoup his demand. It appeared that D., who was not a party to the record, was a partner of the defendants in the original contract, was interested in the reduction of A.'s claim and suffered in common with them the damages sought to be recouped. A recoupment was allowed. *Baltimore United Oil Co. v. Barber*, 2 Mackey (D. C.), 4.

If contemporaneously with the execution of notes for the purchase-money of land the parties agree in writing that the vendor shall furnish the vendee a complete chain of title to the land purchased, for the per-

formance of which it is stipulated that the notes shall be bound, the damages resulting from the non-performance of such agreement may be recouped against the notes although the latter were, at the vendor's request, made payable to a third party, no consideration moving from him. *Hooper v. Armstrong*, 69 Ala. 848. See last note.

²*Steamboat Wellsville v. Geisse*, 8 Ohio St. 333; *Ward v. Willson*, 3 Mich. 1.

³*Reeves v. Chambers*, 67 Iowa, 81; *McHardy v. Wadsworth*, 8 Mich. 849; *Waterman v. Clark*, 76 Ill. 428. See *Hobbs v. Duff*, 23 Cal. 596.

⁴*Lasher v. Williamson*, 55 N. Y. 619; *Gillespie v. Torrance*, 25 id. 806; *La Farge v. Halsey*, 4 Abb. 397.

counter-claim or cross-claim must be against all the plaintiffs and them only and in favor of all the defendants and no others.¹ In an action upon a contract a balance due the defendant upon an unsettled partnership account between the parties, the firm having been dissolved prior to the commencement of the action, is a proper counter-claim.² If some of the defendants set up that the contract sued upon was made with them they may plead a counter-claim though the other defendants have no interest in it.³ Where the plaintiff's conduct indicates that he considered the defendants as the parties with whom he was dealing and he has sued them both he cannot controvert their right to establish a counter-claim.⁴ In an action brought by an executor or administrator upon a contract made by him after the death of his testator or intestate or to recover assets belonging to the estate in the hands of a third person a claim due from the deceased to the defendant cannot be counter-claimed. "The reason of the rule is that in all such cases the allowance of such set-off or counter-claim would necessarily destroy the equal and just distribution of the assets belonging to the estate among the creditors in every case where the assets were insufficient to pay all the debts of the deceased."⁵ An administrator who is sued upon a personal

¹ *Brown v. Morris*, 88 N. C. 251; used as a counter-claim to a joint indebtedness unless the insolvency of the plaintiff is shown. *Collier v. Erwin*, 3 Mont. 142; *Kemp v. McCormick*, 1 id. 420.

² *Waddell v. Darling*, 51 N. Y. 827. See *Pendergast v. Greenfield*, 40 Hun, 494.

³ *Clegg v. Cramer*, 82 Hun, 162.

⁴ *Drew v. Ellison*, 60 Vt. 401.

⁵ Per *Taylor, J.*, in *McLaughlin v. Winner*, 63 Wis. 120, 124, citing *Aldrich v. Campbell*, 4 Gray, 284; *Smith v. Boyer*, 2 Watts, 173; *Aiken v. Bridgman*, 37 Vt. 249; *Woodward v. McGaugh*, 8 Mo. 161; *Newhall v. Turney*, 14 Ill. 338; *Patterson v. Patterson*, 59 N. Y. 574; *Lawrence v. Vilas*, 20 Wis. 381, 389-391; *Lombarde v. Older*, 17 Beav. 542; *Wrout v. Daves*, 25 id. 369; *Root v. Taylor*, 20

An individual demand cannot be

claim cannot counter-claim a debt which is due from the plaintiff to him in his representative capacity.¹ Under a statute which provides that in an action brought by an executor or administrator in his representative capacity a demand against the decedent belonging at the time of his death to the defendant may be set up as a counter-claim, the wrongful acts of an executor cannot give the defendant a right to counter-claim against a demand owing to the testator in his life-time.²

§ 176. **Same subject.** The question arose in *Newfoundland v. Newfoundland Ry. Co.*³ whether a right of set-off existing in favor of the government was available against such of the plaintiffs as were assignees of the original corporation. The facts were that the plaintiff was incorporated for the purpose of constructing and working a railway in pursuance of a contract with the government, for which the latter was to pay a subsidy and grant lands. The assignees took whatever right the company had to the subsidy and the grants of land in respect to a particular portion of the road. The contention of the plaintiff was that the government was bound to pay a certain amount of subsidy and to make grants of land for a completed portion of the road, though it was not finished as a whole. This was disputed, but if such liability existed it was asserted that the government could set up counter-claims against the company for its breach of contract in not completing the road. It was held by the privy council that the counter-claim was good as against the assignees of the company, it and the claim having their origin in the same portion of the contract and the obligations which gave rise to them being closely intertwined. "The claim of the government," it was said, "does not arise from any fresh transaction freely entered into by it after notice of assignment by the company. It was utterly powerless to prevent the company from inflicting injury on it by breaking the contract. It would be a lamentable thing if it were found to be the law that a party to a contract may assign a portion of it, perhaps a beneficial portion, so that the assignee shall take the benefit,

Johns 137; *Steel v. Steel*, 12 Pa. St.

¹ *Gourley v. Walker*, 69 Iowa, 80.

64; *Shipman v. Thompson*, Willes,

² *Wakeman v. Everett*, 41 Hun,

103. *Thompson v. Whitmarsh*, 100

278.

N. Y. 36, is to the same effect.

³ 12 App. Cas. 199.

wholly discharged of any counter-claim by the other party in respect of the rest of the contract, which may be burdensome. There is no universal rule that claims arising out of the same contract may be set against one another in all circumstances. But their lordships have no hesitation in saying that in this contract the claims for subsidy and for non-construction ought to be set against one another."¹ Where the plaintiff sues an assignee and is not entitled to protection as a *bona fide* holder of negotiable paper, his action is subject to any defense by way of recoupment which would be good against the party to whom the plaintiff's demand accrued.² Where a note for the price of property sold was made payable to the vendor's wife, and no portion of the consideration moved from her, it was held that the note was subject to the same defense by way of recoupment for the vendor's fraud in the sale, as if it had been made payable to himself.³

§ 177. **Maturity of claim or demand.** Must the matter of recoupment be a mature cause of action at the time of the commencement of the plaintiff's action, or will it be sufficient that it is such at the time of pleading? Campbell, J.,⁴ said: "The purpose of recoupment would be defeated if the [276] party cannot be allowed to plead what he might, at the time of pleading, have declared upon. The object of this practice is to diminish litigation by consolidating controversies into one action. The whole doctrine is one of the equitable outgrowths of the improvement of legal practice; and no obstacle should be thrown in the way of its encouragement. Our legislation has indicated this design by enlarging the defense and permitting defendants to recover damages beyond the plaintiff's claim. We do not feel disposed to accept any technical doctrines which would prevent its full efficacy unless compelled by a weight of authority which we do not find here." But it was said by Jarvis, C. J.,⁵ "It

¹ If the party who agrees to perform makes an assignment of the entire contract before any money is due under it the other party may recoup his damages for a breach thereof by the assignors. *Smith v. Wall*, 12 Colo. 363.

² *Wood v. Brush*, 72 Cal. 224; *Mc-*

Knight v. Devlin, 52 N. Y. 399; *Van de Sande v. Hall*, 18 How. Pr. 458; *Hinsdell v. Weed*, 5 Denio, 172; *Rockwell v. Daniels*, 4 Wis. 432.

³ *Kelly v. Pember*, 35 Vt. 183.

⁴ In *Platt v. Brand*. 26 Mich. 175.

⁵ In *Rartlett v. Holmes*, 18 C. B.

630.

seems to me we should carry the doctrine respecting the avoiding of circuity of action very much further than any case has yet carried it if we were to hold that the damages may be reduced by showing a breach of the contract on the plaintiff's part subsequently to the commencement of the plaintiff's action. There are many cases where circumstances existing before action brought have been allowed to be given in evidence to mitigate or reduce the damages; but none that I am aware of where matters arising after action brought have been so received." Under the English judicature act of 1873¹ it is held that relief can be given on a counter-claim in respect of a cause of action accrued to the defendant subsequently to the issue of the writ in the original suit.² It had previously been ruled otherwise.³ The later case is rested on the generality of the language of the statute, the orders made pursuant thereto and the nature of a counter-claim which had been before spoken of as being an wholly independent suit from the claim.⁴ It is now settled in England that a counter-claim must be treated as if it were a proceeding in an action; it is not the latter because it is not commenced by a writ or summons; and that the plaintiff cannot after a counter-claim has been delivered discontinue his action so as to prevent the defendant from enforcing his cause of action.⁵ The weight of authority in America is that a demand which is not due at the time the action was brought cannot be counter-claimed or set off.⁶ The codes of some states express that

¹Sec. 24, subsec. 3: "The said courts respectively, and every judge thereof, shall also have the power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner."

²Beddall v. Maitland, 17 Ch. Div. 174.

³Original Hartlepool Collieries Co. v. Gibb, 5 Ch. Div. 718.

⁴Winterfield v. Bradnum, 3 Q. B. Div. 324; Stooke v. Taylor, 5 id. 569.

⁵McGowan v. Middleton, 11 Q. B. Div. 464, overruling Vavasour v. Krupp, 15 Ch. Div. 474.

⁶Ellis v. Cothran, 117 Ill. 458; Orton v. Noonan, 29 Wis. 541; Simpson v. Jennings, 15 Neb. 671; Tessier v. Lockwood, 18 id. 161; Hogan v. Kirkland, 64 N. C. 250; Lee v. Eure, 93 id. 5, 9.

the right to counter-claim must exist at the commencement of the action.¹ This means that it must then exist in the hands of those who plead it.² In New York it has been held in an action for rent that the tenant cannot recoup his damages for a breach of covenant on the part of the plaintiff after the commencement of the suit.³ But in a later case the court of appeals affirmed a judgment on a counter-claim for conversion of property after the commencement of the action.⁴ The court say: "Strictly speaking, the act of the plaintiff in procuring and serving the injunction would, ordinarily, be an act at or after the commencement of the action, and therefore one the damages for which could not be set up as a counter-claim in a pleading which is presumed to state the claims of the parties as existing at the time of bringing the suit; but as the act of the plaintiff related to the very property which was the subject of the action and materially affected the defendant's rights and defense therein, I do not see why it could not have been set up in a subsequent or supplemental answer and have thus been rendered effectual to the defendant."

The connection between a plaintiff's cause of action and a defendant's cross-claim is so close that until the former is barred by the statute of limitations the latter is available.⁵ "Not only does the bringing of an action stop the operation of the statute as to a proper matter of set-off, but it also seems that it revives a claim which is actually barred out, which is the proper subject of recoupment in the action, as damage growing out of the same transaction. Thus, in an action to recover the price of goods sold, unsoundness may be set up by way of defense, although an action to recover damages therefor is barred."⁶ In an action on a note a total failure of consideration and a parol warranty of the property for which the obligation was given were pleaded in defense, and the latter was sustained, although the period for bringing

¹ *Davis v. Frederick*, 6 Mont. 300. 513; *Stillwell v. Bertrand*, 22 Ark.

² *Mayo v. Davidge*, 44 Hun, 342. 875; *Eve v. Louis*, 91 Ind. 457;

³ *Harger v. Edmonds*, 4 Barb. 256. *Walker v. Clements*, 15 Q. B. 1046.

⁴ *Ashley v. Marshall*, 29 N. Y. 494. ⁵ *Wood's Lim.*, § 282; *Riddle v.*

⁶ *Beecher v. Baldwin*, 55 Conn. *Kreimbricht*, 12 La. Ann. 297; *Lastrapes v. Rocquet*, 23 id. 68.

an action upon the parol agreement had passed.¹ If a contract is not satisfactorily performed, the right to recover under it is qualified. To the extent that the contractee has been injured by the method of the contractor's performance or by his neglect to perform he may defeat the latter's demand. If the statute of limitations does not bar the contractor the other party may plead a counter-claim. The statute is tolled by the commencement of an action, and though the counter-claim is not pleaded until more than the statutory period fixed for bringing an action on the contract has gone by, it is in time if it is pleaded within the period fixed for answering the complaint.² In Pennsylvania the running of the statute is not stopped until the defendant pleads his set-off or gives the plaintiff notice of it.³

§ 178. Cross-claim must rest on contract or subject-matter of action. It must arise from the same subject [277] matter, or spring out of the same contract or transaction on which the plaintiff relies to maintain his action.⁴ The same thing is substantially necessary to constitute one branch of the counter-claim of the modern codes in which it is required that it arise out of the same transaction set forth in the complaint as the foundation of the plaintiff's claim or be connected with the subject of the action.⁵

§ 179. Recoupment for fraud, breach of warranty, negligence, etc. If a party in negotiating a contract commits an

¹ *Morrow v. Hanson*, 9 Ga. 898.

² *Herbert v. Dey*, 15 Abb. N. C. (N. Y.) 172.

³ *Gilmore v. Reed*, 76 Pa. St. 462.

⁴ *Sawyer v. Wiswell*, 9 Allen, 39;

Logie v. Black, 24 W. Va. 1, 20;

Bozarth v. Dudley, 44 N. J. L. 804;

Gilchrist v. Partridge, 78 Me. 214;

Washington v. Timberlake, 74 Ala.

280; *Keegan v. Kinnare*, 128 Ill. 280.

⁵ *Xenia Branch Bank v. Lee*, 7

Abb. 372; *Epperly v. Bailey*, 8 Ind.

73; *Slayback v. Jones*, 9 Ind. 472;

Barhyte v. Hughes, 33 Barb. 320;

Bazemore v. Bridges, 105 N. C. 191;

Demartin v. Albert, 68 Cal. 277;

Allen v. Coates, 29 Minn. 46;

Schmidt v. Bickenbach, id. 122;

Standley v. Northwestern Mut. L.

Ins. Co., 95 Ind. 254; *Lee v. Eure*,

98 N. C. 5; *Wilkerson v. Farnham*,

82 Mo. 672; *Clark's Cove Guano Co.*

v. Appling, 38 W. Va. 470; *Logie v.*

Black, 24 id. 1.

If the plaintiff fails to prove the

contract upon which he sues, the de-

fendant cannot prove another and

different contract and recoup dam-

ages for the breach thereof. *Halde-*

man v. Berry, 74 Mich. 424; *More-*

house v. Baker, 48 id. 335; *Holland*

v. Rea, id. 218; *Brighton Bank v.*

Sawyer, 132 Mass. 185; *Bozarth v.*

Dudley, 44 N. J. L. 804; *The Zouave*,

29 Fed. Rep. 296; *The C. B. Sanford*,

22 id. 803.

actionable fraud upon the other contracting party touching the subject of their negotiation, the latter, though he has not exercised his privilege to repudiate the contract on the discovery of the fraud, may recoup his damages therefor in any action brought by the guilty party upon the contract. Such a cross-claim does not grow out of the contract, but it is part of the same transaction and is connected with the subject of the action.¹ A. executed in February a memorandum under [278] seal stating that he had hired of W. a certain lot in the city of New York, for one year from the 1st of May following, at a rent of \$1,000. He was induced to make the contract by the fraudulent representations of W. that the lot embraced a certain other parcel of land which belonged to the corporation. A. discovered the fraud before the 1st of May, and on that day, having obtained a lease of the parcel owned by the corporation, took possession of the whole and occupied it during the year. It was held in an action by W.

¹ Walker v. France, 112 Pa. St. 203; Dowagiac Manuf. Co. v. Gibson, 73 Iowa, 525; Birdsey v. Butterfield, 84 Wis. 52; Van Epps v. Harrison, 5 Hill, 63; Myers v. Estell, 47 Miss. 4, 17, 21; Estell v. Myers, 54 id. 174; 56 id. 800; Kelly v. Pember, 85 Vt. 183; Kennedy v. Crandall, 3 Lans. 1; Rotan v. Nichols, 22 Ark. 244; Perley v. Balch, 28 Pick. 283; Timmons v. Dunn, 4 Ohio St. 680; Avery v. Brown, 31 Conn. 898; Caldwell v. Sawyer, 30 Ala. 283; Cage v. Phelps, 38 Ala. 383; Moberly v. Alexander, 19 Iowa, 162; Johnson v. Miln, 14 Wend. 195; President, etc. v. Wadleigh, 7 Blackf. 102; Light v. Stoevers, 12 S. & R. 431; Haynes v. Harper, 25 Ark. 541; Wardell v. Fosdick, 13 Johns. 325; Brown v. Tuttle, 66 Barb. 169; Hogg v. Cardwell, 4 Sneed, 151; Nelson v. Johnson, 25 Mo. 430; Withers v. Greene, 9 How. (U. S.) 213; Estep v. Fenton, 66 Ill. 467; Sawyer v. Wiswell, 9 Allen, 39; Bradley v. Rea, 14 id. 20; Mixer v. Coburn, 11 Met. 561; Westcott v. Nims, 4 Cush. 215; Cook v. Castner, 9 Cush. 266; Harrington v. Stratton, 22 Pick. 510; Hall v. Clark, 21 Mo. 415; Rawley v. Woodruff, 2 Lans. 419; More v. Rand, 60 N. Y. 208; Price v. Lewis, 17 Pa. St. 51; Graham v. Wilson, 6 Kan. 489; Allen v. Shackleton, 15 Ohio St. 145; Sumpster v. Welsh, 2 Bay, 553; Wheat v. Dotson, 12 Ark. 699; Tunno v. Fludd, 1 McCord, 121; Abercrombie v. Owings, 2 Rich. 127; Adams v. Wylie, 1 Nott & McC. 78; McFarland v. Carver, 34 Mo. 195; Christy v. Ogle, 33 Ill. 295; Reynolds v. Cox, 11 Ind. 262; Cox v. Reynolds, 7 id. 257; House v. Marshall, 18 Mo. 369; Shute v. Taylor, 5 Met. 61; Owens v. Rector, 44 Mo. 389; James v. Lawrenceburgh Ins. Co., 6 Blackf. 525; Burton v. Stewart, 3 Wend. 236; Hammatt v. Emerson, 27 Me. 308; White v. Sutherland, 64 Ill. 181; Gibson v. Marquis, 29 Ala. 668; Isham v. Davidson, 52 N. Y. 237; Simmons v. Cutreer, 12 Sm. & M. 584; Holton v. Noble, 83 Cal. 7.

for the rent that A. was entitled to a deduction by reason of the fraud of at least what he was obliged in good faith to pay for the corporation lease.¹ And in action for fraudulent representations made on the exchange of property the defendant was allowed to recoup his damages resulting therefrom.² Where an action was brought to recover a balance due on a contract of sale of two separate patented processes described and contracted for in a single written agreement for an entire sum payable in instalments, it was held that the vendee was entitled to set off damages arising out of the vendor's fraudulent representations as to one of the processes, although the other proved to be more valuable than the amount paid for both.³ If several distinct purchases are made at the same time, though by different instruments, they will be regarded for the purposes of recoupment as being connected.⁴ So, in actions for the price of property sold, damages for breach of any warranty made by the vendor of the property, whether it be express or implied, may be recouped.⁵ If there is a sale

¹ *Allaire v. Whitney*, 1 Hill, 484; *Whitney v. Allaire*, 1 N. Y. 805; *Holton v. Noble*, 83 Cal. 7.

² *Carey v. Guillow*, 105 Mass. 18; *Chandler v. Childs*, 42 Mich. 128.

³ *Rawley v. Woodruff*, 2 Lans. 419.

⁴ *Benjamin v. Richards*, 51 Mich. 110.

⁵ *Wilson v. Hughes*, 94 N. C. 182; *Bitting v. Thaxton*, 72 id. 541; *Walsh v. Hall*, 66 id. 288; *Hurst v. Everett*, 91 id. 899; *Dushane v. Benedict*, 120 U. S. 630; *Spalding v. Vandercook*, 3 Wend. 481; *Hoover v. Peters*, 18 Mich. 51; *McAllister v. Reab*, 4 Wend. 433; *Reab v. McAllister*, 8 Wend. 109; *Herbert v. Ford*, 29 Me. 546; *Kellogg v. Denslow*, 14 Conn. 411; *Hitchcock v. Hunt*, 28 Conn. 848; *Mercer v. Hall*, 2 Tex. 284; *Mears v. Nichols*, 41 Ill. 207; *Miller v. Smith*, 1 Mason, 437; *Love v. Oldham*, 23 Ind. 51; *Getty v. Rountree*, 2 Pin. (Wis.) 379; *McAlpin v. Lee*, 12 Conn. 129; *Withers v. Greene*, 9 How. (U. S.) 214; *Van Buren v. Digges*, 11 id. 461; *Fisk v. Tank*, 12 Wis. 276; *Deen v. Herrold*, 37 Pa. St. 150; *Ketchum v. Wells*, 19 Wis. 25; *Steigleman v. Jeffries*, 1 S. & R. 477; *Murphy v. Gay*, 37 Mo. 535; *Barth v. Burt*, 43 Barb. 628; *Brown v. Tuttle*, 66 Barb. 169; *Westcott v. Nims*, 4 Cush. 215; *Miller v. Gaither*, 3 Bush, 152; *Culver v. Blake*, 6 B. Mon. 528; *McMillion v. Pigg*, 8 Stew. 165; *Lemon v. Trull*, 13 How. Pr. 248; *Plant v. Condit*, 22 Ark. 454; *Jemison v. Woodruff*, 34 Ala. 148; *Hoe v. Sanborn*, 3 Abb. (N. S.) 189; *Harman v. Sanderson*, 6 Sm. & M. 41; *Rumsey v. Sargent*, 21 N. H. 397; *Williams v. Miller*, 21 Ark. 469; *Love v. Oldham*, 22 Ind. 51; *Goodwin v. Morse*, 9 Met. 278; *Harrington v. Stratton*, 22 Pick. 510; *Flint v. Lyon*, 4 Cal. 17; *Dennis v. Belt*, 30 Cal. 247; *Hodgkins v. Moulton*, 100 Mass. 309; *Burnett v. Smith*, 4 Gray, 50; *Allen v. Furbish*, id. 504; *Stacy v. Kemp*, 97 Mass. 166; *Darnell v. Williams*, 2 Stark. 166; *Parish v. Stone*, 14 Pick. 198; *Judd v. Denni-*

and delivery of property *in presenti* which is expressly warranted and the warranty is not true, the vendee does not lose his right to recoup the damages by receiving and using the property.¹ In New York, where the contract of sale is executory and a time is agreed upon for making a test of the property which is the subject of the contract, the acceptance and use of it after the test has been made waives the right to claim a breach of the warranty.² This is not the rule in Illinois.³ If goods are warranted the purchaser may, after he has admitted that they correspond with the contract and promised to pay the purchase price, recoup any damages resulting from a breach of the warranty, or he may, after paying the price, recover such damages in a separate suit.⁴ Giving a renewal note after knowledge of the breach of a warranty is

son, 10 Wend. 518; *Murray v. Carlin*, 67 Ill. 286; *Owens v. Sturges*, id. 366; *Nixon v. Carson*, 38 Iowa, 838; *Walker v. Hoisington*, 48 Vt. 608; *Parker v. Pringle*, 2 Strobb. 242; *Babcock v. Trice*, 18 Ill. 420.

If several suits are brought in an inferior court on notes given for property which is not of the quality bargained for the defendant may set up the breach of warranty in each suit until the damages are neutralized, and on appeal and consolidation of the actions the whole damage suffered may be recouped. *Hurst v. Everett*, 91 N. C. 399.

¹ *Getty v. Rountree*, 2 Pin. (Wia.) 379; *Fisk v. Tank*, 12 Wia. 276; *Dailey v. Green*, 15 Pa. St. 118; *Polhemus v. Heiman*, 45 Cal. 573; *Warder v. Fisher*, 48 Wia. 334; *Vincent v. Leland*, 100 Mass. 432; *Lewis v. Rountree*, 78 N. C. 323; *Gurney v. Atlantic, etc. R. Co.*, 58 N. Y. 358; *Day v. Pool*, 52 id. 416.

In *Locke v. Williamson*, 40 Wia. 377, the property was accepted with knowledge that it was not such as the contract called for. The buyer set up the defect in the quality and the court said: "We have concluded

to hold this rule in respect to an executory contract, that when the defects in the goods are patent and obvious to the senses, when the purchaser has a full opportunity for examination and knows of such defects, he must, either when he receives the goods or within a reasonable time thereafter, notify the seller that the goods are not accepted as fulfilling the warranty, otherwise the defects will be deemed waived." See *Nye v. Iowa City Alcohol Works*, 51 Iowa, 129; *Reed v. Randall*, 29 N. Y. 358; *McCormick v. Sarson*, 45 id. 256; *Gaylord Manuf. Co. v. Allen*, 53 id. 515. Compare these New York cases with the two cited above.

² *McParlin v. Boynton*, 8 Hun, 449; affirmed by a majority of one and without opinion, 71 N. Y. 604.

³ *Underwood v. Wolf*, 131 Ill. 425, citing and discussing previous decisions in that state.

⁴ *Bretz v. Fawcett*, 29 Ill. App. 319; *Harrington v. Stratton*, 22 Pick. 510; *Hodgkins v. Moulton*, 100 Mass. 309; *Ruff v. Jarrett*, 94 Ill. 475; *Shackelton v. Lawrence*, 65 id. 175; *Reed v. Hastings*, 61 id. 266.

presumptive, but not conclusive, evidence of a waiver of the claim for damages.¹ In suits for labor or goods the warranty of either is not a matter altogether collateral; it forms an essential portion of the consideration for the defendant's undertaking, and therefore the breach of it is proper to be shown in reduction of the stipulated price.² When damages for the breach of a warranty as to the quality of a chattel are established they are to be applied in reduction of plaintiff's recovery as of the date of the contract.³

§ 180. **Same subject.** Whatever the nature of the contract, however numerous or varied its stipulations, and whether they are all written and embodied in one or several instruments, or only partly written or partly implied, if they are connected, so that what is undertaken to be done on one side altogether is the consideration, or part of the consideration, either in promise or performance, for what is engaged to be done on the other, the range of the right of recoupment is co-extensive with the duties and obligations of the parties respectively both to do and to forbear,—as well those imposed at first by the language of the contract as those which subsequently arise out of it in the course of its performance.⁴ It extends to damages result-

¹ *Aultman v. Wheeler*, 49 Iowa, 647; *Cantralt v. Fawcett*, 2 Ill. App. 571.

² *Allen v. Hooker*, 25 Vt. 187; *Cole v. Colburn*, 61 N. H. 499.

³ *Wilson v. Reedy*, 33 Minn. 503.

⁴ *Green v. Batson*, 71 Wis. 54; *Bross v. Cairo & V. R. Co.*, 9 Ill. App. 363; *Wilson v. Greensboro*, 54 Vt. 533; *Babbitt v. Moore*, 51 N. J. L. 229; *Deitz v. Leete*, 28 Mo. App. 540; *Logie v. Black*, 24 W. Va. 1, 19; *Brigham v. Hawley*, 17 Ill. 38; *Lee v. Clements*, 48 Ga. 138; *Satchwell v. Williams*, 40 Conn. 371; *Fowler v. Payne*, 49 Miss. 32; *Branch v. Wilson*, 12 Fla. 543; *Mell v. Moony*, 30 Ga. 418; *Rogers v. Humphrey*, 39 Me. 382; *Winder v. Caldwell*, 14 How. (U. S.) 434; *Cherry v. Sutton*, 30 Ga. 875; *Bowker v. Hoyt*, 18 Pick. 555; *Fab-ricotti v. Launitz*, 3 Sandf. 743; *Van Buren v. Digges*, 11 How. (U. S.) 461;

Dennis v. Belt, 30 Cal. 247; *Logan v. Tibbott*, 4 Greene (Ia.), 389; *Heaston v. Colgrove*, 3 Ind. 265; *Keyes v. Western Vt. Slate Co.*, 34 Vt. 81; *Willey v. Fractional School Dist.*, 25 Mich. 419; *Elliot v. Heath*, 14 N. H. 181; *Bloodgood v. Ingoldsby*, 1 Hilt. 388; *Walker v. Millard*, 29 N. Y. 375; *Guthman v. Castleberry*, 49 Ga. 272; *Mack v. Patchin*, 42 N. Y. 167; *Eldred v. Leahy*, 31 Wis. 546; *Whitney v. Meyers*, 1 Duer, 267; *Peden v. Moore*, 1 Stew. & Port. 71; *Wilder v. Boynton*, 63 Barb. 547; *Cook v. Soule*, 56 N. Y. 420; 45 How. Pr. 340; *Holzworth v. Koch*, 26 Ohio St. 33; *Myers v. Burns*, 33 Barb. 401; 35 N. Y. 269; *Ives v. Van Epps*, 22 Wend. 155; *Warfield v. Booth*, 33 Md. 63; *Mayor v. Mabie*, 18 N. Y. 151; *Rogers v. Ostrom*, 35 Barb. 523; *Westlake v. De Graw*, 25 Wend. 669; *Goodwin v. Morse*, 9 Met. 273; *Sanger v. Fincher*,

[280] ing from negligence where care, activity and diligence are required;¹ where damages accrue from excess of action, as where it injuriously transcends the limits of duty or authority;² from ignorance, where knowledge and skill are due;³ and honesty and good faith, being always obligations upon contracting parties, all damages which result from any covinous practice or tort within the scope of the transaction which the plaintiff's action involves may be the subject of recoupment. Thus money paid to contractors by government officers without authority or in violation of law may be recovered on a counter-claim in a suit on the contract under which such payment was made.⁴ An employer may recoup against a servant's wages not only the damages arising from his negligence

27 Ill. 846; *Bee Printing Co. v. Hichborn*, 4 Allen, 63; *Turner v. Gibbs*, 50 Mo. 556; *Dermott v. Jones*, 2 Wall. 1; *Overton v. Phelan*, 2 Head, 445; *Bloom v. Lehman*, 27 Ark. 489; *Berry v. Diamond*, 19 Ark. 262; *Desha's Ex'r v. Robinson's Adm'r*, 17 Ark. 228; *Springdale Ass'n v. Smith*, 32 Ill. 252; *Porter v. Woods*, 8 Humph. 56; *Crouch v. Miller*, 5 id. 586; *Fisk v. Tank*, 12 Wis. 276; *Lufburrow v. Henderson*, 30 Ga. 483; *Molby v. Johnson*, 17 Mich. 382; *Stow v. Yarwood*, 14 Ill. 424; *Stewart v. Bock*, 8 Abb. 118; *Hoopes v. Meyer*, 1 Nev. 483; *Caldwell v. Pennington*, 3 Gratt. 91; *Burroughs v. Clancey*, 53 Ill. 80; *Lunn v. Gage*, 37 Ill. 19; *Evans v. Hughey*, 76 Ill. 115; *Hubbard v. Rogers*, 64 Ill. 434; *Eckles v. Carter*, 26 Ala. 563; *Ewart v. Kerr*, 2 McMull. 141; *Moore v. Caruthers*, 17 B. Mon. 669; *Whitbeck v. Skinner*, 7 Hill, 53; *Chatterton v. Fox*, 5 Duer, 64; *Hill v. Southwick*, 9 R. I. 299; *Fitchburg, etc. R. Co. v. Hanna*, 6 Gray, 539; *Allen v. McKibbin*, 5 Mich. 449; *Key v. Henson*, 17 Ark. 254; *Hutt v. Bruckman*, 55 Ill. 441; *McDowell v. Milroy*, 69 Ill. 498; *Latham v. Sumner*, 89 Ill. 283; *Cooke v. Preble*, 80 Ill. 381; *Bishop v. Price*, 24 Wis. 430.

¹ *Sinker v. Diggins*, 76 Mich. 557; *Macgowan v. Whiting*, 9 Daly, 86; *Whitellegge v. De Witt*, 12 Daly, 319; *Lee v. Clements*, 48 Ga. 128; *Fowler v. Payne*, 49 Miss. 32; *Phelps v. Paris*, 39 Vt. 511; *Still v. Hall*, 20 Wend. 51; *Briggs v. Montgomery*, 3 Heisk. (Tenn.) 673; *Denew v. Daverell*, 3 Camp. 451; *Grant v. Button*, 14 Johns. 877; *Shipman v. State*, 43 Wis. 881; *Garfield v. Huls*, 54 Ill. 427; *Forman v. Miller*, 5 McLean, 218; *Doan v. Warren*, 11 Up. Can. C. P. 423; *McCracken v. Hair*, 2 Speer, 256; *Marshall v. Hann*, 17 N. J. L. 425; *Eaton v. Woolly*, 28 Wis. 628.

² *McEwen v. Kerfoot*, 37 Ill. 580.

³ *DeWitt v. Cullings*, 33 Wis. 296; *Stoddard v. Treadwell*, 26 Cal. 294; *Goslin v. Hodson*, 24 Vt. 140; *Hunt v. Pierpont*, 27 Conn. 301; *Shipman v. State*, 43 Wis. 881; *Robinson v. Mace*, 16 Ark. 97; *Hopping v. Quin*, 12 Wend. 517; *Gleason v. Clark*, 9 Cow. 57; *Hill v. Featherstonehaugh*, 7 Bing. 569; *Cardell v. Bridge*, 9 Allen, 355; *Eaton v. Woolly*, 28 Wis. 628.

⁴ *Barnes v. District of Columbia*, 22 Ct. of Cla. 366; *McElrath v. United States*, 102 U. S. 426, 440.

and want of skill and knowledge, but for any fraudulent or tortious waste, conversion or destruction of his master's property intrusted to him or placed in his care in the course of his employment.¹ If a servant lives in the family of his employer and while there seduces the latter's daughter, the damages resulting may be recouped in an action to recover wages.² The same remedy is available where the employee quits the service without giving the notice required by his contract;³ and against a pledgee suing for the debt secured by the pledge, where he has converted it.⁴ So in an action by the pledgor against the pledgee for conversion of the pledge the latter may recoup the amount of the debt secured thereby.⁵ Where a carrier injures or loses goods, or any of them, or incurs a liability for negligent delay in transportation and delivery, the

¹ *Barretta, etc. Dyeing Establishment v. Wharton*, 101 N. Y. 681; *S. C.*, with opinion in full, 2 Cent. Rep. 109; *Gibson v. Carlin*, 18 Lea (Tenn.), 440; *Heck v. Shener*, 4 S. & R. 249; *Allaire Works v. Guion*, 10 Barb. 55; *Coit v. Stewart*, 50 N. Y. 17; *Hatchett v. Gibson*, 18 Ala. 587; *Pierce v. Hoffman*, 4 Wis. 277; *Brigham v. Hawley*, 17 Ill. 88; *Brady v. Price*, 19 Tex. 285. See *Ward v. Willson*, 8 Mich. 1, where it was held that proof that the plaintiff, while employed as a cook on board a boat, wilfully destroyed the hose belonging to the boat should be excluded in an action to enforce the payment of his wages, the tort not appearing to have any connection with his duties as cook. *Nashville R. Co. v. Chumley*, 6 Heisk. 325.

² *Bixby v. Parsons*, 49 Conn. 488.

³ *Stockwell v. Williams*, 40 Conn. 371.

⁴ *Bulkeley v. Welch*, 81 Conn. 339; *Ainsworth v. Bowen*, 9 Wis. 848.

Where the defendant deposited a bond as collateral security for the payment of his note, and the bond was stolen after the note became due and before it was paid, the value of

the bond could not be recouped in a suit on the note. To make the defense of recoupment available some stipulation in the contract sued upon must have been violated by the plaintiff. The deposit of the bond was perhaps a part of the transaction of giving the note, but it was not the same transaction. The note was a contract independently of the pledging of the bond in itself. *Winthrop Bank v. Jackson*, 67 Me. 570. The same rule was applied where the pledgee sold notes given him to secure the payment of the note in suit, which made no reference to the collateral. *Fletcher v. Harmon*, 78 Me. 465.

⁵ *Belden v. Perkins*, 78 Ill. 449; *Jarvis v. Rogers*, 15 Mass. 389; *Stearns v. Marsh*, 4 Denio, 227; *Fowler v. Gilman*, 13 Met. 267; *Work v. Bennett*, 70 Pa. St. 484; *Brown v. Phillips*, 3 Bush, 656.

The right to recoup does not rest upon the principle of lien; it exists after the lien has been destroyed by a tortious act of the party in whose favor it was originally obtained. *Ludden v. Buffalo Batting Co.*, 22 Ill. App. 415.

damage therefor may be recouped in an action for freight;¹ damages for the culpable negligence of a physician who carries infection from patients having small-pox to the defendant's family, when called to prescribe for other diseases, may be recouped against his charges for services.² The remedy extends to the vendor of rags sold as clean and free from infection and fit to be manufactured into paper if in fact they are infected with small-pox and cause that disease to break out in the paper mill of the vendee, whereby some of his workmen lose their lives and others are disabled, causing a loss of business and increase of expense to the purchaser of the rags.³

§ 181. What acts may be the basis of recoupment. If the contract has been executed on the part of the plaintiff, and, therefore, the defendant's contract sued on is based upon an executed consideration, then any tortious act of the former subsequently impairing, in fact, that consideration has been deemed an independent tort, and not a part of the transaction, or not connected with the subject of the action for breach of the defendant's undertaking. Thus, it has been held to be no defense to an action on a bill of exchange given for the price of goods sold that two months after their delivery to the vendee the vendor forcibly retook possession.⁴ But where [282] a note was given for a judgment assigned, proof that the assignor afterwards collected part of the judgment was held a defense *pro tanto* to the note.⁵ In an action for the price of specific articles bargained and sold but not delivered the defendant may set up by way of recoupment any injury to such articles occasioned by the fault or negligence of the

¹ Empire Transportation Co. v. Bog-
giano, 52 Mo. 294; Ewart v. Kerr, 2
McMull. 141; Sears v. Wingate, 3
Allen, 108; Boggs v. Martin, 13 B.
Mon. 239; The Nathaniel Hooper, 3
Sumn. 542; Jordan v. Warren Ins.
Co., 1 Story, 352; Bradstreet v. Heron,
1 Abb. Adm. 209; Fitchburg, etc. Co.
v. Hanna, 6 Gray, 539; Davis v. Pat-
tison, 24 N. Y. 317; Edwards v. Todd,
2 Ill. 463; Leech v. Baldwin, 5 Watts,
446; Humphrey v. Reed, 6 Whart.
435; Hinsdell v. Weed, 5 Denio, 172.

But see Bornman v. Tooke, 1 Camp.
377, and Sheels v. Davies, 4 Camp.
119; Mayne on Dam. 70.

² Piper v. Menifee, 12 B. Mon. 465.

³ Dushane v. Benedict, 120 U. S.
630.

⁴ Stephens v. Wilkinson, 2 B. & Ad.
320; Huelet v. Reyns, 1 Abb. (N. S.)
27; Slayback v. Jones, 9 Ind. 472.
See Martin v. Brown, 75 Ala. 442;
Gerding v. Adams, 65 Ga. 79.

⁵ Harper v. Columbus Factory, 85
Ala. 127.

vendor subsequent to the sale and prior to the time of delivery;¹ for the vendor's duty was to keep the articles sold with ordinary care, and he is responsible for the want of such care or of good faith.² So a vendee when sued for the price of land sold may recoup for the vendor's tort which diminishes the value of the property purchased,³ or which consists of carrying away crops or fixtures before the sale is consummated by deed and delivery of possession.⁴

Where a contract for particular works has been entered into, or for service, or for the sale and delivery of property, and there has been a part performance for which an action in general *assumpsit* is maintainable, the special contract is a part of the transaction in question. Although the plaintiff does not bring his action upon it, it is connected with the subject thereof.⁵ Though the performance of the plaintiff's part of the contract may at first have been a condition, yet the defendant may waive the right to forfeit the contract for non-performance, and retain his right to damages. These he may recoup in an action on a *quantum meruit* or a *quantum valebat*, or in an action upon the contract.⁶ In such cases if the defendant thinks proper to present his cross-claim by way of recoupment [283] the court will consider the whole contract under which the plaintiff's demand arose, and direct a deduction from what he would otherwise be entitled to recover of all damages sustained by the defendant in consequence of the plaintiff's failure to fulfill any or all of the stipulations on his side.⁷

¹ Barrow v. Window, 71 Ill. 214.

² McCandlish v. Newman, 22 Pa. St. 460; Chinery v. Viall, 5 H. & N. 288.

³ Streeter v. Streeter, 48 Ill. 155.

⁴ Gordon v. Bruner, 49 Mo. 570; Grand Lodge v. Knox, 20 Mo. 433; Patterson v. Hulings, 10 Pa. St. 506; Owens v. Rector, 44 Mo. 389. But see Slayback v. Jones, 9 Ind. 472.

⁵ Twitty v. McGuire, 8 Murphy, 501; Grannis v. Linton, 30 Ga. 330; Steamboat Wellsville v. Geisse, 3 Ohio St. 333; Bishop v. Price, 24 Wis. 480; Hayward v. Leonard, 7 Pick. 181; Bowker v. Hoyt, 18 Pick. 555; Barber v. Rose, 5 Hill, 76.

⁶ Wiley v. Athol, 150 Mass. 426;

Reynolds v. Bell, 84 Ala. 496; Bell v. Reynolds, 78 id. 511; Schweickhart v. Stuewe, 71 Wis. 1; Fabbriotti v. Launitz, 3 Sandf. 743; Vanderbilt v. Eagle Iron Works, 25 Wend. 665; Van Buren v. Digges, 11 How. (U. S.) 461; Harralson v. Stein, 50 Ala. 347; Polhemus v. Heiman, 45 Cal. 573; Wheelock v. Pacific, etc. Co., 51 Cal. 223; Upton v. Julian, 7 Ohio St. 95; Harris v. Rathbun, 2 Keyes, 812; Hayward v. Leonard, 7 Pick. 181; Allen v. McKibbin, 5 Mich. 449; McKinney v. Springer, 8 Ind. 59.

⁷ Id.; Lomax v. Bailey, 7 Blackf.

On the sale of a quantity of standing wood the vendor agreed to indemnify the vendees against any damage that might happen to the wood in consequence of the burning of an adjoining fallow. The latter gave their notes for the price; and, afterwards, the fallow being burned over, the wood in question was destroyed by the fire; and it was held, in an action by the vendor upon the note, that they might recoup their damages arising from the loss of the wood.¹ The

599; *Hollinsead v. Mactier*, 18 Wend. 275; *Adams v. Hill*, 16 Me. 215; *Koon v. Greenman*, 7 Wend. 121; *Ladue v. Seymour*, 24 id. 60; *Brewer v. Tyringham*, 12 Pick. 547; *Coe v. Smith*, 4 Ind. 79; *Major v. McLester*, id. 591; *Milnes v. Vanhorn*, 8 Blackf. 198; *Fenton v. Clark*, 11 Vt. 557; *Britton v. Turner*, 6 N. H. 481; *Seaver v. Morse*, 20 Vt. 620; *Epperly v. Bailey*, 8 Ind. 72; *Goodwin v. Morse*, 9 Met. 278; *Wilkinson v. Ferree*, 24 Pa. St. 190; *Higgins v. Lee*, 16 Ill. 495; *Van Densen v. Blum*, 18 Pick. 229; *Lee v. Ashbrook*, 14 Mo. 378; *White v. Oliver*, 36 Me. 92; *Hayden v. Madison*, 7 Me. 76; *Morrow v. Huntton*, 25 Vt. 9; *Booth v. Tyson*, 15 Vt. 515; *Blood v. Enos*, 12 Vt. 625; *Preston v. Finney*, 2 W. & S. 53; *Ligget v. Smith*, 8 Watts, 381; *Danville Bridge Co. v. Pomroy*, 15 Pa. St. 151; *Allen v. Robinson*, 2 Barb. 341; *Jewett v. Weston*, 11 Me. 346; *Rogers v. Humphreys*, 39 Me. 382.

¹ *Batterman v. Pierce*, 3 Hill, 171. This was an early and leading case on the subject of recoupment, and Bronson, J., comprehensively stated the doctrine underlying and governing it. He said: "When the demands of both parties spring out of the same contract or transaction, the defendant may recoup, although the damages on both sides are unliquidated. . . . It was formerly supposed that there could only be a recoupment where some fraud was imputable to the plaintiff in relation

to the contract on which the action is founded; but it is now well settled that the doctrine is also applicable when the defendant imputes no fraud and only complains that there has been a breach of the contract on the part of the plaintiff. For the purpose of avoiding a circuitry or the multiplication of actions, and doing complete justice to both parties, they are allowed and compelled, if the defendant so elect, to adjust all their claims growing out of the same contract in one action. It was well remarked by Chancellor Walworth, in *Reab v. McAlister*, 8 Wend. 109, that 'there is a natural equity, especially as to claims arising out of the same transaction, that one claim should compensate the other, and that the balance only should be recovered.' The defendant has the election whether he will set up his claim in answer to the plaintiff's demand, or resort to a cross-action; and whatever may be the amount of his damages, he can only set them up by way of abatement, either in whole or in part of the plaintiff's demand. He cannot, as in case of set-off, go beyond that, and have a balance certified in his favor. It is no objection to the defense that the plaintiff is not suing upon the original contract of sale, but upon a note given for the purchase-money. The promise of the defendants to pay the purchase-money has undergone the slight modification of being put into

plaintiff in one agreement stipulated to deliver forth- [284] with a quantity of dressed pork to the defendant for a certain price; and also to sell him, upon their arrival, at a different price, a number of live hogs then on the way and expected in a few days; no stipulation being made as to the time [285] of payment for either. It was held that the plaintiff was entitled to recover the sum stipulated for the dressed pork, notwithstanding that after it became due a breach of the stipulation in respect to the live hogs had accrued, but subject to recoupment of the defendant's damages for such breach.¹

These are instances of cross-claims arising from the same

the form of a written obligation, and on that the action is founded; but still the plaintiff is in effect seeking to enforce the original contract of sale, and the question must be settled in the same manner as though the action was, in form, upon that contract. But the objection still remains, and it has been strenuously urged against the defense, that the damages claimed by the defendants do not spring out of the contract of sale, but arise under the collateral agreement of the plaintiff to indemnify against fire. It is undoubtedly true that there can be no recoupment by setting up the breach of an independent contract on the part of the plaintiff. But that is not this case. Here there were mutual stipulations between the parties, all made at the same time, and relating to the same subject-matter; and there can be no difference, in principle, whether the whole transaction is embodied in one written instrument setting forth the cross-obligations of both parties, or whether it takes the form of a separate and distinct undertaking by each party. The plaintiff proposed to sell his wood at auction, and as an inducement to obtain a better price he stipulated with the bidders that they should have two winters and one summer to get away the wood,

and that in the meantime he would insure them against the consequence of setting fire to his adjoining fallow grounds. Upon these terms the purchase was made by the defendant.

. . . The nature of the transaction cannot be changed by putting the several stipulations of the parties into distinct written contracts; nor can it make any substantial difference that the undertaking of one party has been reduced to writing, while the engagement of the other party remains in parol. In substance it is still the case of mutual stipulations between the same parties, made at the same time and relating to the same subject-matter. The forms which the parties may have adopted for the purpose of manifesting their agreement cannot affect their rights so far as this question is concerned. Whether all the mutual undertakings have been embodied in one written instrument, or in several, or whether some have been put upon paper while others rest in parol, the reason still remains for allowing the claims of both parties growing out of the same transaction to be adjusted in one action."

¹ Tipton v. Feitner, 20 N. Y. 423; Prairie Farmer Co. v. Taylor, 69 Ill. 440; Cherry v. Sutton, 30 Ga. 875.

contract. Stipulations are parts of the same contract for the purpose of this defense though they relate to distinct subjects, and a different time of performance, and a distinct and severable compensation is provided for each; so any implied or express warranty or guaranty which forms part of the consideration of the defendant's undertaking which is the foundation of the plaintiff's action is part of the same contract; and all damages to which the defendant is entitled thereon may be recouped in such action. Many examples have been given.¹ In England the damages which may be recouped are limited to those which directly result from the character of the property or the work done; consequential damages must be recovered in a separate action.² "But in this country the courts in order to avoid circuitry of action, have gone further and have allowed the defendant to recoup damages suffered by him from any fraud, breach of warranty or negligence of the plaintiff growing out of or relating to the transaction in question."³

§ 182. **Cross-claims between landlord and tenant.** In actions between landlord and tenant they have each the right to recoup damages in the other's action brought on the covenants in the lease, or those which are implied from the relation. Although there be a written lease or even an indenture containing express stipulations and covenants, if others are implied, the latter belong to and are parts of the same contract.⁴ The landlord impliedly, in the absence of an express agreement defining his obligation in that regard, undertakes for the quiet enjoyment of the premises by his tenant as against any hostile assertion of a paramount title; and that so far as

¹ In an action upon one of several notes given for a chattel, a breach of warranty being alleged, the defendant may interpose a counter-claim for his entire damage. *Geiser Threshing M. Co. v. Farmer*, 27 Minn. 428; *Minneapolis Harvester Works v. Bonnallie*, 29 id. 373. *Contra*, *Aultman & T. Co. v. Hetherington*, 42 Wis. 622; *Same v. Jett*, id. 488.

² *Mondel v. Steel*, 8 M. & W. 858; *Davis v. Hedges*, L. R. 6 Q. B. 637.

³ *Dushane v. Benedict*, 120 U. S. 630; *Harrington v. Stratton*, 22

Pick. 510; *Withers v. Greene*, 9 How. 213; *Van Buren v. Digges*, 11 id. 661; *Winder v. Caldwell*, 14 id. 434; *Lyon v. Bertram*, 20 id. 149; *Railroad Co. v. Smith*, 21 Wall. 255; *Marsh v. McPherson*, 105 U. S. 709.

⁴ *Culver v. Hill*, 68 Ala. 66; *Vandegrift v. Abbott*, 75 id. 487; *Jones v. Horn*, 51 Ark. 19; *Gocio v. Day*, id. 46; *Lewis v. Chisholm*, 68 Ga. 46; *Stewart v. Lanier House Co.*, 75 Ga. 582, 598; *Howdyshell v. Cary*, 21 Ill. App. 288; *Burroughs v. Clancey*, 53 Ill. 30; *Gregory v. Scott*, 5 id. 392;

he is concerned, he will do no act to interrupt the tenant's free and peaceable possession during the term granted.¹ For any violation or breach of this obligation the tenant may recoup his damages in any action by the landlord against him based on his liabilities as a tenant.² But for mere tortious acts of interference by the landlord with the demised premises, not done in the assertion of a right nor amounting to an eviction, damages by way of recoupment have been denied.³ Where a cross-claim exists in favor of the tenant he may avail

Dodds v. Toner, 8 Ind. 427; Slack v. McLagan, 15 Ill. 242; Blair v. Claxton, 18 N. Y. 529; Caldwell v. Pennington, 3 Gratt. 91; Vining v. Lee-man, 45 Ill. 248; Hobein v. Drewell, 20 Mo. 450; Lynch v. Baldwin, 69 Ill. 210; Whitbeck v. Skinner, 7 Hill, 53; Mack v. Patchin, 42 N. Y. 167; Whitney v. Meyers, 1 Duer, 267; Chatterton v. Fox, 5 id. 64; Mayor v. Mabie, 13 N. Y. 151; Rogers v. Ostrom, 35 Barb. 523; Wade v. Halligan, 16 Ill. 507; Hatfield v. Fullerton, 24 Ill. 278; Lindley v. Miller, 67 Ill. 244; Westlake v. De Graw, 25 Wend. 669; Lunn v. Gage, 37 Ill. 19; Guthman v. Castleberry, 49 Ga. 272; Tone v. Brace, 8 Paige, 597; Graves v. Berdan, 26 N. Y. 498; Vernam v. Smith, 15 N. Y. 328; Myers v. Burns, 35 N. Y. 269; Hexter v. Knox, 63 N. Y. 561; Eldred v. Leahy, 31 Wis. 546; Morgan v. Smith, 5 Hun, 220; Commonwealth v. Todd, 9 Bush, 708; Holbrook v. Young, 108 Mass. 88.

If the landlord does not furnish the quantity of land or the number of animals he agrees to, the tenant may recoup his damages in an action brought to recover advances made. Horton v. Miller, 84 Ala. 537.

If the tenant makes special inquiry as to the condition of water on the premises he leases, and it is in fact unfit for use, and the landlord, knowing it, fails to remove the cause, the tenant is justified in regarding the

condition of the water as an eviction from the premises, and in an action to recover rent may recoup the expenses of sickness, including physician's fees, resulting from the use of such water. Maywood v. Logan, 78 Mich. 185.

¹ Mayor v. Mabie, 13 N. Y. 151; Dexter v. Manley, 4 Cush. 14; Bradley v. Cartwright, 36 L. J. (C. P.) 218; Maule v. Ashmead, 20 Pa. St. 482; Hart v. Smith, 2 A. K. Marsh. 301; Young v. Hargrave, 7 Ohio, 394.

² McAlester v. Landers, 70 Cal. 79; Kelsey v. Ward, 38 N. Y. 83; Mayor v. Mabie, 13 N. Y. 151; Wade v. Halligan, 16 Ill. 507; Lynch v. Baldwin, 69 Ill. 210; Rogers v. Ostram, 35 Barb. 523; Chatterton v. Fox, 5 Duer, 64.

The fact that the lessee has paid the rent for the greater part of the term will not deprive him of the right to counter-claim his damages for the entire term. McAlester v. Landers, *supra*.

³ Edgerton v. Page, 20 N. Y. 281; Hulme v. Brown, 3 Heisk. (Tenn.) 679; Bartlett v. Farrington, 120 Mass. 284; Campbell v. Shields, 11 How. Pr. 565; Drake v. Cockroft, 10 id. 377; Walker v. Shoemaker, 4 Hun, 579; Lounsbery v. Snyder, 31 N. Y. 514; Ogilvie v. Hull, 5 Hill, 52; Vatek v. Herner, 1 Hilt. 149; Cram v. Dresser, 2 Sandf. 120. But see Kame-rick v. Castleman, 23 Mo. App. 481.

himself of it not only in an action against him by the landlord on the contract, but also in replevin of property distrained for rent;¹ but not in a summary proceeding for possession based on the determination of the lease by forfeiture.² In an action for rent the defendant may show that the plaintiff agreed to build a fence, or make certain repairs or other improvements, and has neglected to perform the agreement.³

§ 183. Cause of action, connection between and cross-[287] claim. Where the basis of the transaction between the parties is a contract and its breach amounts to a trespass or entitles the injured party to an action for negligence or fraud, or to any action *ex delicto*, he is not deprived of his right to set off such a claim, nor the other party to set off a claim arising upon the contract against such a cause of action. In all such cases, there being a contract in fact, the party in default is not allowed to deprive the injured party of the right to take advantage of such default by way of recoupment or counterclaim by alleging that the contract was tortiously violated.⁴

¹ Nichols v. Dusenbury, 2 N. Y. 283; Fowler v. Payne, 49 Miss. 82; Breese v. McCann, 52 Vt. 498; Fairman v. Fluck, 5 Watts, 516; Guthman v. Castleberry, 49 Ga. 272; Phillips v. Monges, 4 Whart. 225; Peterson v. Haight, 3 id. 150; Warner v. Caulk, id. 198; Wade v. Halligan, 16 Ill. 507; Hatfield v. Fullerton, 24 Ill. 278; Lindley v. Miller, 67 Ill. 244.

Where the board of supervisors allowed a claim for repairing a bridge, and issued a warrant therefor, and afterwards the claimant committed a breach of his contract by failing to keep it in repair pursuant to his bond, and he and his sureties became insolvent, held, that the board, in an action of *mandamus* to compel payment of the warrant, could recoup the breach, occurring before notice of assignment, against the assignee of the warrant. Jefferson Co. v. Arrghi, 51 Miss. 668.

² McSloy v. Ryan, 27 Mich. 110;

D'Armond v. Pullen, 13 La. Ann. 137; Johnson v. Hoffman, 53 Mo. 504.

³ Miller v. Gaither, 8 Bush, 152; Myers v. Burns, 35 N. Y. 269; Hexter v. Knox, 63 N. Y. 561; Guthman v. Castleberry, 49 Ga. 272; Fairman v. Fluck, 5 Watts, 516; Lunn v. Gage, 87 Ill. 19.

The tenant may rely upon his landlord to repair according to his agreement, and is not barred of the right to recoup because he might have made the repairs at small cost. Culver v. Hill, 68 Ala. 66.

⁴ Morrison v. Lovejoy, 6 Minn. 319; Hatchett v. Gibson, 13 Ala. 587; Williams v. Schmidt, 54 Ill. 205; Chamboret v. Cagney, 2 Sweeney, 378; S. C., 41 How. Pr. 125; Starbird v. Barrons, 43 N. Y. 200; Wadley v. Davis, 63 Barb. 500; Griffin v. Moore, 52 Ind. 295; McArthur v. Green Bay, etc. Co., 34 Wis. 139; Bitting v. Thaxton, 72 N. C. 541;

If the buyer of goods brings an action against the seller for not completing the contract the latter may [288, 289]

Price v. Lewis, 17 Pa. St. 51; Scott v. Kenton, 81 Ill. 96. See Scheunert v. Kaehler, 23 Wis. 523.

In all cases in which the parties have entered into an express contract and in which a tort has been suffered which the sufferer may waive and sue in *assumpsit* a counter-claim may be made under the contract. Barnes v. McMullins, 78 Mo. 260. And where the actor elects to sue in tort for a wrong originating in or growing out of a contract which he pleads as an inducement, the defendant may counter-claim for damage sustained by the breach of the contract. Kamerick v. Castleman, 23 Mo. App. 481.

The rule in Pennsylvania is that, independently of statute, any matter either of contract or of tort, immediately connected with the plaintiff's cause of action, may be set up by way of defense to the action and in abatement of the plaintiff's damages only; any matter of contract may be set up by way of counter-claim under the statute, not only to defeat the action, but for the purpose of establishing a liability of the plaintiff to the defendant in excess of the latter's demand. No mere matter of tort can be availed of by the defendant under the statute. Dushane v. Benedict, 120 U. S. 630, 644, citing many Pennsylvania cases.

In Conner v. Winton, 7 Ind. 523, the court defined a counter-claim to be that which might have arisen out of or could have had some connection with the original transaction in the view of the parties, and which at the time the contract was made they could have intended might in some event give one a claim against the other for compliance or non-compliance with its provisions. In Slayback v. Jones, 9 Ind. 472, the court,

referring to recoupment and counter-claim, said: "They relate more especially to damages for breach of contract which may be recouped in a suit for what may have been done or rendered in part performance of a contract. In such cases the cause of action and defense are part of the same transaction." In Lovejoy v. Robinson, 8 Ind. 399; Terre Haute & L. R. Co. v. Pierce, 95 Ind. 496, the court say that trespasses cannot be made to compensate each other. In Minnesota independent torts cannot be counter-claimed. Allen v. Coates, 29 Minn. 46. In Barhyte v. Hughes, 83 Barb. 320, and Lowenberg v. Rosenthal, 18 Ore. 178, the word "transaction" was construed to refer to business dealings, and did not include torts. Macdougall v. Maguire, 35 Cal. 274. A counter-claim founded on contract cannot be interposed in an action based on fraud. People v. Dennison, 84 N. Y. 272; Davis v. Frederick, 6 Mont. 300; Humbert v. Brisbane, 25 S. C. 506; Copeland v. Young, 21 id. 275.

Where there is no contract relation between the parties touching the subject in question, mutual torts committed at the same time or in such succession or sequence as would make them parts of the *res gestæ* cannot be made the basis of recoupment or counter-claim. In an action for assault and battery the defendant cannot counter-claim or recoup for a battery committed at the same affray by the plaintiff on the defendant (Schnaderbeck v. Worth, 8 Abb. 37); nor can the defendant in an action for slander counter-claim for slanderous words uttered by the plaintiff. Kemp v. Amacker, 13 La. 65. In Askins v. Hearn, 3 Abb. 184, Justice Emott

counter-claim or recoup for the goods already delivered.¹ And so in an action by the vendor to recover the price of

thought a counter-claim could not be sustained upon the following facts: The plaintiff sued for damages for conversion of a ring. The defendant alleged an exchange of rings, each to be kept until the other should be returned, and averred a tender of the one and demand of the other, and asked judgment for his ring. Such a counter-claim would now be allowed without hesitation. Hoffman, J., said of this case, that "a distinction may be suggested, that where the ground of each claim is really a contract, although the form of action under the old system would be for a wrong, then, when the transaction which gives rise to each is the same, the code is broad enough to include a counter-claim. The exchange alleged of the rings was in fact a mutual agreement." *Xenia Branch Bank v. Lee*, 7 Abb. 377. In this case Woodruff, J., said: "The great question in controversy is, in an action in the nature of trover by a plaintiff who has indorsed notes or bills of exchange, brought to recover the value thereof from a defendant in whose possession they are, and who claims title thereto through the plaintiff's indorsement, can the defendant set up title in himself, demand of payment, protest and notice, and ask by way of counter-claim a judgment against the plaintiff as indorser?" It was decided in the affirmative. After quoting subdivisions 1 and 2 of section 150 of the New York code, this learned judge said: "This division of the section shows that there may be a counter-claim when the *action itself does not arise* on contract; for the second clause is expressly

confined to actions arising upon contract and allows counter-claims in such cases of any other cause of action also arising on contract; and this may embrace probably all cases heretofore denominated 'set-off,' legal or equitable, and any other legal or equitable demand, liquidated or unliquidated, whether within the proper definition of set-off or not if it arise on contract. *Gleason v. Moen*, 2 Duer, 639. The first subdivision would therefore be unmeaning as a separate definition if it neither contemplated cases in which the action was not brought on the contract itself in the sense in which these words are ordinarily used, nor counter-claims which did not themselves arise on contract. The first subdivision by its terms assumes that the plaintiff's complaint may set forth, as the foundation of the action, a contract or a transaction. The legislature in using both words must be assumed to have designed that each should have a meaning; and in our judgment this construction should be according to the natural and ordinary signification of the terms. In this sense every contract may be said to be a transaction, but every transaction is not a contract. Again, the second subdivision having provided for all counter-claims arising on contract — in all actions arising on contract — no cases can be supposed to which the first subdivision can be applied unless it be one of three classes, viz: 1st. In actions in which a contract is stated as the plaintiff's claim — counter-claims which arise out of the same contract; or, 2d. In actions in which some transaction,

¹ *Leavenworth v. Packer*, 52 Barb. 132.

goods sold and only delivered in part the purchaser may recoup any damages sustained by him by reason of the failure

not being a contract, is set forth as the foundation of the plaintiff's claim—counter-claims which arise out of the same transaction; or, 3d. In actions in which either a contract, or a transaction which is not a contract, is set forth as the foundation of the plaintiff's claim—counter-claims which neither arise out of the same contract, nor out of the same transaction, but which are connected with the subject of the action."

In *Glen & Hall M. Co. v. Hall*, 61 N. Y. 226, an action was brought to restrain defendant from using the plaintiff's trade-mark; the defendant claimed it was his, and asked damages for plaintiff's use of it by way of counter-claim, and it was held to be proper.

A claim on the part of the defendant for the price and value of the identical goods which are the subject of the action is a cause of action arising out of the same transaction alleged as the foundation of the plaintiff's claim, or is at least connected with the subject of the action. *Thompson v. Kessel*, 80 N. Y. 388; *Brown v. Buckingham*, 11 Abb. 387.

The words "subject of the action" refer to the origin and ground of the plaintiff's right to recover rather than to the thing itself in controversy. *Collier v. Erwin*, 8 Mont. 142. In an action for assault and battery the injury which provoked the defendant to commit the wrong is not connected with the subject of the action. *Ward v. Blackwood*, 48 Ark. 396. The debauchery of the defendant's daughter is not ground for a counter-claim in an action brought by him guilty thereof to recover money obtained by duress. *Heckman v. Swartz*, 55 Wis. 173. In an

action against a judgment creditor for the unlawful seizure of exempt property the defendant cannot set up the judgment under which the seizure was made as a counter-claim. *Elder v. Frevert*, 18 Nev. 446. The "subject of the action" is the facts constituting the plaintiff's cause of action. The mere fact that the defendant sets up acts on the part of the plaintiff which are prejudicial to his rights, and alleges that these acts on his part give the reason the defendant conducted himself as complained of by the plaintiff does not show such a connection as is necessary to constitute such acts a counter-claim. *Mulberger v. Koenig*, 62 Wis. 558. The word "connected" may have a narrow or broad signification, according to the facts of the case.

"The counter-claim must have such relation to and connection with the subject of the action that it will be just and equitable that the controversy between the parties as to the matters alleged in the complaint and the counter-claim should be settled in one action by one litigation; and that the claim of the one should be offset against or applied upon the claim of the other." This rule includes a case where a second mortgagee in possession of land committed waste for the alleged purpose of depriving defendant, the first mortgagee, of his security. In an action for the conversion of wood cut by the second mortgagee the damage sustained by the prior incumbrancer was connected with the subject of the action. *Carpenter v. Manhattan L. Ins. Co.*, 93 N. Y. 552. See *Thomson v. Sanders*, 118 id. 252. In an equitable action to cancel an insurance policy a counter-claim alleging

or refusal to deliver the residue;¹ and in an action by the seller for the price the buyer may recoup for any deficiency in quantity, delay in delivery or breach of warranty.² So in an action on a note given for the good will of a business the defendant may recoup his damages resulting from the plaintiff's resumption of that business;³ and in an action on an agreement not to set up business in a certain place the defendant may recoup the amount agreed to be paid for the good will.⁴ A contract which gives the sole right to sell an article in a specified place is not so disconnected with a note executed at the same time for the purchase-money of the article to be sold as that the damages resulting from the breach of the former cannot be recouped in a suit on the latter.⁵

§ 184. Recoupment between vendor and purchaser. On the same principles recoupment is reciprocally available between vendor and purchaser of real estate as well as of personal property. Recoupment may be had against the vendor for false representations affecting the identity and value of the land.⁶ The purchaser's right to do so is not affected by the fact that the sale included both personal and real property, and that the misrepresentation related to only one class, if the transaction and the consideration were an entirety.⁷ If tenants in common make partition to each other by quitclaim deeds the law implies a warranty that each will make

a cause of action on the policy for the loss of property insured is connected with the subject of the action. *Revere F. Ins. Co. v. Chamberlin*, 56 Iowa, 508. The penalty imposed upon a national bank for taking an unlawful rate of interest cannot be counterclaimed in an action upon the instrument discounted by it. *Barnet v. Nat. Bank*, 98 U. S. 555. See, generally, *Keegan v. Kinnare*, 123 Ill. 280; *Evans v. Hughey*, 76 id. 115; *Nolle v. Thompson*, 3 Met. (Ky.) 121; *Kingman v. Draper*, 14 Ill. App. 577; *Cow Run Co. v. Lehmer*, 41 Ohio St. 384; *Tarwater v. Hannibal, etc. R. Co.*, 42 Mo. 193; *McArthur v. Green Bay, etc. Co.*, 34 Wis. 139; *Walsh v. Hall*,

66 N. C. 238; *Walker v. Johnson*, 28 Minn. 147; *Poston v. Rose*, 87 N. C. 279; *Whitlock v. Ledford*, 82 Ky. 390; *Cornelius v. Kessel*, 58 Wis. 237.

¹ *Harrolson v. Stein*, 50 Ala. 347; *Platt v. Brand*, 26 Mich. 173; *Bowker v. Hoyt*, 18 Pick. 555.

² *Cooke v. Preble*, 80 Ill. 381; *Hitchcock v. Hunt*, 28 Conn. 343; *Stieglerman v. Jeffries*, 1 S. & R. 477.

³ *Warfield v. Booth*, 33 Md. 63; *Herbert v. Ford*, 29 Me. 546; *Burkhardt v. Burkhardt*, 36 Ohio St. 261.

⁴ *Baker v. Connell*, 1 Daly, 469.

⁵ *Andre v. Morrow*, 65 Miss. 315.

⁶ *Mulvey v. King*, 39 Ohio St. 491.

⁷ *Baughman v. Gould*, 45 Mich. 481.

good to the other any loss resulting from a superior title;¹ hence a counter-claim may be maintained by the tenant who is evicted on that account against his co-tenant.² In debt on a bond given for real estate or other action for the price the defendant may recoup his damages for the plaintiff's breach of an agreement to give possession, as well as for injury to the premises,³ or for a violation of an agreement to dig a well on the premises sold.⁴ So a vendee's action to recover the purchase-money is subject to recoupment for his negligent destruction of the subject of the purchase.⁵ Recoupment has been allowed in a suit for purchase-money for damages [290] done to the premises by an adverse claimant, pending a litigation with the vendor, in which the latter's title was maintained; because, as plaintiff, he could have indemnified himself against the spoliator by the recovery of *mesne* profits.⁶

It is well settled that when a deed has been made and accepted, and possession taken under it, defects in the title will not enable the purchaser to resist the payment of the purchase-money, or recover more than nominal damages on his covenants for title, except in some states on the covenant of seizin, while he retains the deed and possession, and has been subjected to no inconvenience or expense on account of the defect.⁷ Though if no title or possession passed by the deed it would seem that any undertaking for payment of the purchase-money would be void for want of consideration notwithstanding the covenants in the deed.⁸

¹ *Nixon v. Lindsay*, 2 Jones' Eq. 230; *Rogers v. Turley*, 4 Bibb, 355; *Morris v. Harris*, 9 Gill, 26.

² *Huntley v. Cline*, 93 N. C. 458.

³ *Patterson v. Hulings*, 10 Pa. St. 506; *Owens v. Rector*, 44 Mo. 389; *Gordon v. Bruner*, 49 Mo. 570; *Grand Lodge v. Knox*, 20 Mo. 438; *Streeter v. Streeter*, 43 Ill. 155.

⁴ *Maguire v. Howard*, 40 Pa. St. 391.

⁵ *Hatchett v. Gibson*, 18 Ala. 587.

⁶ *Weakland v. Hoffman*, 50 Pa. St. 513.

⁷ *Whisler v. Hicks*, 5 Blackf. 100; *Delavergne v. Norris*, 7 Johns. 358;

Stanard v. Eldridge, 16 id. 254; *Stephens v. Evans*, 30 Ind. 39; *Marvin v. Applegate*, 18 Ind. 425; *Brandt v. Foster*, 5 Iowa, 287; *McCaslin v. State*, 44 Ind. 151; *Edwards v. Bodine*, 26 Wend. 109; *Abbott v. Allen*, 2 Johns. Ch. 519; *Bumpus v. Platner*, 1 id. 213; *Farnham v. Hotchkiss*, 2 Keyes, 9. But see *Walker v. Wilson*, 13 Wis. 522; *Hall v. Gale*, 14 Wis. 54; *Akerly v. Vilas*, 21 Wis. 88; *Lowry v. Hurd*, 7 Minn. 356; *Scantlin v. Allison*, 12 Kan. 85; *Tarpley v. Poage*, 2 Tex. 139.

⁸ *Dickinson v. Hall*, 14 Pick. 217; *Rice v. Goddard*, id. 293; *Trask v.*

A vendee is authorized to extinguish an incumbrance or to remedy a defect of title after a breach of the covenant of warranty, without a special request from or the consent of the vendor, and may recoup the amount reasonably paid for that purpose in an action for purchase-money, where there are covenants for title and against incumbrances.¹ So the vendee may [291] recoup his damages on the covenant of warranty after the title has failed and there has been an eviction, or what is equal thereto.² In some states, however, the defense for partial failure of title to real estate is not allowed at law in actions for the price.³ Generally no difference is made as to the exercise of the right of recoupment whether the plaintiff's action is brought on the original contract, or on a note or other security given for the price, and the latter under seal.⁴ Such a distinc-

Vinson, 20 id. 105; Key v. Henson, 17 Ark. 254; Tillotson v. Grapes, 4 N. H. 444.

¹ Delavergne v. Norris, 7 Johns. 358; Stanard v. Eldridge, 16 id. 254; Johnson v. Collins, 116 Mass. 393; Leffingwell v. Elliott, 10 Pick. 204; Brooks v. Moody, 20 Pick. 474; Norton v. Babcock, 2 Met. 510; Doremus v. Bond, 8 Blackf. 368; Baker v. Railsback, 4 Ind. 538; Brandt v. Foster, 5 Iowa, 287; McDaniel v. Grace, 15 Ark. 465; Lamerson v. Marvin, 8 Barb. 11; Detroit & M. R. Co. v. Griggs, 12 Mich. 45; Stillwell v. Chappell, 30 Ind. 72; Brown v. Crowley, 39 Ga. 876; Deen v. Herrold, 87 Pa. St. 150; Key v. Henson, 17 Ark. 254; Brown v. Starke, 3 Dana, 816; Burk v. Clements, 16 Ind. 132; Schuchmann v. Knoebel, 27 Ill. 175; Christy v. Ogle, 33 Ill. 295; Kent v. Cantrall, 44 Ind. 452; Robinius v. Lister, 30 Ind. 142; Davis v. Bean, 114 Mass. 358; Scantlin v. Allison, 12 Kan. 85; McKee v. Bain, 11 Kan. 569.

² McDaniel v. Grace, 15 Ark. 487; Tallmadge v. Wallis, 25 Wend. 107; Sargeant v. Kellogg, 10 Ill. 278; Edwards v. Todd, 2 id. 462; Nichols v. Ruckella, 4 id. 299; Kaskaskia Bridge

Co. v. Shannon, 6 id. 15; Wilson v. Burgess, 34 id. 494; Coster v. Monroe M. Co., 2 N. J. Eq. 467; Tone v. Wilson, 81 Ill. 529; McDowell v. Milroy, 69 id. 498.

³ Cullum v. Bank of Mobile, 4 Ala. 21; Starke v. Hill, 6 Ala. 785; Tankersly v. Graham, 8 id. 247; Cole v. Justice, id. 793; Knight v. Turner, 11 id. 636; Patton v. England, 15 id. 71; McLemore v. Mabson, 20 id. 137; Thompson v. Christian, 28 id. 399; Helvenstein v. Higgason, 35 Ala. 259; Wentworth v. Goodwin, 21 Me. 154; Jenness v. Parker, 24 Me. 294; Herbert v. Ford, 29 Me. 546; Morrison v. Jewell, 34 Me. 146; Thompson v. Mansfield, 43 Me. 490; Wheat v. Dotson, 12 Ark. 699; Bowley v. Holway, 124 Mass. 395.

⁴ Harrington v. Stratton, 22 Pick. 510; Van Epps v. Harrison, 5 Hill, 63; Judd v. Dennison, 10 Wend. 512; Payne v. Cutler, 18 Wend. 605; Goodwin v. Morse, 9 Met. 278; Purkett v. Gregory, 3 Ill. 44; Christy v. Ogle, 33 Ill. 295; Hitchcock v. Hunt, 28 Conn. 343; Mears v. Nichols, 41 Ill. 207; Kellogg v. Denslow, 14 Conn. 411; Wilmot v. Hurd, 11 Wend. 585; Dailley v. Green, 15 Pa. St. 118; Ward v.

tion, however, seems to be recognized in New Jersey¹ and in England. In an action on a bill of exchange for goods supplied which were "to be of good quality and moderate price," and were estimated at about 400*l.*, and bills were given for that amount, it was held to be no defense that the goods turned out to be worth much less than the estimated price. Lord Tenterden said: "The cases cited by the plaintiffs have completely established the distinction between an action for the price of the goods and an action on the security given for them. In the former, only the value can be recovered; in the latter, I take it to have been settled by these cases, and acted upon ever since as law, that a party holding bills given for the price of goods supplied can recover upon them unless [292] there has been a total failure of consideration. If the consideration fails partially, as by the inferiority of the article furnished to that ordered, the buyer must seek his remedy by cross-action. The warranty relied on in this action makes no difference."²

In Wisconsin it has been held that where notes are given for the contract price they are not payment unless so agreed and in a suit upon one of several such notes it will be presumed in the absence of evidence that those not yet due are still in the vendor's hands, and that it is error to render judgment for the defendant on a counter-claim for the excess of his damages for breach of warranty over the note in suit.³ It was held to be unjust to allow the defendants full damages for breach of warranty, the same as though they had paid for the property, when these damages largely exceed the amount sued for. In Minnesota the decisions are to the contrary and rest upon the principle that the defendant's cause of action is one and indivisible; that a recovery of a part of the damages would bar a subsequent counter-claim to recover for the remainder.⁴

Reynolds, 32 Ala. 384; Key v. Hen- Smith, McC. & Y. 338; Warwich v son, 17 Ark. 254. Nairn, 10 Exch. 762.

¹ Price v. Reynolds, 39 N. J. L. 171; ² Aultman & T. Co. v. Hetherington, 42 Wis. 622; Aultman & T. v Hunter v. Reiley, 48 id. 480.

³ Obbard v. Betham, Moo. & M. 488; Jett, id. 488.

Morgan v. Richardson, 1 Camp. 40, n.; ⁴ Geiser Threshing M. Co. v. Farmer Day v. Nix, 9 Moore, 159; Trickey v. 27 Minn. 428; Minneapolis Harvester Works v. Bonnallie, 29 id. 873. Larne, 6 M. & W. 278; Gascoyne v.

§ 185. **Liquidated and unliquidated damages may be recouped.** It is immaterial whether the damages which a defendant seeks to recoup or counterclaim are liquidated or unliquidated; nor is it material whether the plaintiff's demand is liquidated or not.¹ The theory of this defense being the setting off of the damages on one cause of action against those recoverable on another to avoid the necessity of other suits, where both arise out of the same transaction, the defendant puts forward a substantive cause of action, becomes an actor to assert and prove it, with no other hampering conditions than would apply to him as plaintiff in a separate action upon his claim. When it appears to be so connected with the subject of the plaintiff's action as to be available as a counter-[293] claim or by way of recoupment, it must be pleaded and proved according to the same rules as when it is made the basis of an action; the damages, if of such nature as to be submitted to the consideration of a jury in a suit brought for their recovery, are equally subject to determination by a jury for the purpose of redress in favor of a defendant. The policy of admitting this defense to avoid circuitry of action obviously embraces all cases where the rights of the parties are of such a character as to be susceptible of adjustment in one action. Accordingly, where the defense has the necessary connection with the subject of the plaintiff's action, and the rights of both parties may be finally and justly settled by one adjudication, it is not essential that the damages on either side should be liquidated, nor of the same nature;—they may be liquidated on one side and unliquidated on the other; on one side they may be claimed strictly for violation of contract, and on the other for fraud,² or negligence,³ or other tort;⁴ the damages may be claimed for tort on both sides.⁵

¹ *Weaver v. Penny*, 17 Ill. App. 628; *Cal.* 247; *Earl v. Bull*, 15 Cal. 421; *Batterman v. Pierce*, 3 Hill, 171; *Edwards v. Todd*, 2 Ill. 462; *Kaskas-Ward v. Fellers*, 3 Mich. 281; *Winder v. Caldwell*, 14 How. (U. S.) 434; *Schubert v. Harteau*, 84 Barb. 447; *Van Buren v. Digges*, 11 id. 461; *McLure v. Rush*, 9 Dana, 64; *Bayne v. Fox*, 18 La. 80; *Stoddard v. Treadwell*, 26 Cal. 294; *Keyes v. Western Vt. Slate Co.*, 84 Vt. 81; *Hubbard v. Fisher*, 25 Vt. 539; *Dennis v. Belt*, 30

Cal. 247; *Earl v. Bull*, 15 Cal. 421; *Edwards v. Todd*, 2 Ill. 462; *Kaskas-Ward v. Fellers*, 3 Mich. 281; *Winder v. Caldwell*, 14 How. (U. S.) 434; *Schubert v. Harteau*, 84 Barb. 447; *Speers v. Sterrett*, 29 Pa. St. 192; *Hayne v. Prothro*, 10 Rich. 218.

² See *ante*, § 179.

³ *Ante*, § 180.

⁴ *Ante*, § 180.

⁵ *Carey v. Guillow*, 105 Mass. 18;

§ 186. **Affirmative relief not obtainable.** Recoupment is available only as a defense; for, except by statute, it can have no further effect than to answer the plaintiff's damages in whole or in part; the defendant cannot recover any balance or excess.¹ It is not necessary that it be a full defense;² it cuts off so much of the plaintiff's damages as the cross-claim comes to,³ and when sufficient in amount, may, of course, satisfy his claim entirely. The verdict will then be for the defendant. In this respect it is different from mere mitigation, for damages can never be mitigated below a nominal sum. But however large the damages assessable in respect of the defendant's cross-claim set up by way of recoupment, if it exceed the plaintiff's damages, only so much is taken into account as is required to annul his demand; the excess is lost.⁴ This limitation has been obviated by the defendant bringing a [294] cross-suit as well as setting up the claim by way of recoupment, and having the actions consolidated or tried together.⁵ If two cross-actions are so tried, one for the price of property sold and the other for fraud in the vendor, the jury, if they find the fraud, and that the damages equaled or exceeded the purchase-money, may render a verdict for the defendant in the first action and for the plaintiff in the second for the excess, if any, of such damages.⁶ But in such case a party who defends by recoupment and brings a cross-suit, on the trial of both together is not entitled to have damages assessed in both actions for the same breach of contract, nor to divide his claim for damages as he sees fit between the two. Both actions being tried together, however, his entire damages for breaches of the contract, or in respect of his cross-demand, must be assessed and applied first to cancel in whole or in part the damages of the plaintiff in the first action; then if

Estell v. Myers, 54 Miss. 174. *Contra*, *Terre Haute & I. R. Co. v. Pierce*, 95 Ind. 496.

¹ *Hay v. Short*, 49 Mo. 139; *Ward v. Fellers*, 8 Mich. 281; *Estell v. Myers*, 54 Miss. 174; *Fowler v. Payne*, 52 Miss. 210.

² *Ross v. Longmuir*, 15 Abb. 326.

³ *Ives v. Van Epps*, 22 Wend. 155.

⁴ *Brunson v. Martin*, 17 Ark. 270;

Burlingame v. Davis, 13 Ill. App. 602; *Kingman v. Draper*, 14 id. 577; *Waterman v. Clark*, 76 Ill. 428; *Stow v. Yarwood*, 14 id. 424; *Charles City P. & M. Co. v. Jones*, 71 Iowa, 234.

⁵ *Cook v. Castner*, 9 Cush. 266; *Star Glass Co. v. Morey*, 108 Mass. 570.

⁶ *Cook v. Castner*, *supra*.

there be an excess it should be returned in a verdict for the plaintiff in the cross-action.¹ Very generally in this country this limitation has been abolished by statute, and authority given to render judgment in favor of the defendant for any excess of damages after satisfying the plaintiff's demand against which his cross-claim is preferred. But when the plaintiff sues as assignee of the demand, the defendant having a cross-claim against the assignor can only use it for defense; to that extent it is available the same as though the suit were in the name of the assignor.²

§ 187. Election of defendant to file cross-claim or sue upon his demand. A defendant has an election to use such cross-demand as a defense by way of recoupment or to bring a separate action upon it; but he will not have an election to set up his claim by way of recoupment unless it would be just and equitable, and it is practicable to adjust and allow it in the plaintiff's action. The omission to take advantage of matter of recoupment or counter-claim as a defense is no bar to a [295] cross or separate action upon it; so that though the cross-claim be admissible by way of defense, the defendant has an option to avail himself of it in that form or to sue upon it in another action.³ The reason for allowing the defendant an option is that it would greatly diminish the benefit to which he is entitled and in some cases wholly neutralize it, because while the right of action exists the extent to which the breach of warranty or of contract may afford a defense is usually uncertain; it may require some time for the development of all the injury which will result from the plaintiff's misconduct or default. It is unreasonable, therefore, that he should have the right to fix the time at which the money value of his wrongdoing or negligent omission shall be ascertained.⁴

But the defendant will be denied the right of recoupment when it cannot be justly and equitably allowed.⁵ It is a de-

¹ *Star Glass Co. v. Morey*, *supra*.

² See *ante*, § 176; *Desha's Ex'r v. Robinson*, 17 Ark. 228.

³ *Barth v. Burt*, 43 Barb. 628; *Mimnaugh v. Partlin*, 67 Mich. 391.

⁴ *Davis v. Hedges*, L. R. 6 Q. B. 687.

⁵ Judgment may be ordered for the plaintiff on the pleadings if the

answer states a counter-claim for merely nominal damages and the costs will not be affected by doing so. *Hitchcock v. Turnbull*, 44 Minn. 475. Where notes are given on a settlement for a balance found due after all the grounds for claiming a recoupment are known to their maker he is

fense on principles borrowed from equity, and if a superior equity intervene it will be denied; and when any equitable barrier exists and the whole controversy cannot be settled in the plaintiff's action a separate suit must be brought. On this ground, in many states, defenses of this kind in suits for the purchase-money of land based on breaches of covenants for title will not be allowed in actions at law.¹ The owner of a lot entered into a contract with others for the latter to build a warehouse upon it for a specified sum. The contract also contained a lease to this party for thirteen years from the date fixed for its completion at a stated yearly rent. After the building had been erected the builders and lessees entered a mechanic's lien for the work and materials, and two years afterwards the property was sold, and it had to be determined how the fund should be distributed. The lessees had occupied for two years without paying any rent, and during that time the lessor became indebted to them on account to an amount nearly equal to the rent for that period. The court below excluded the lessee's account as a set-off against the rent, and set off the rent against the lien debt because these latter were part of one transaction. This decision was the subject of review. Thompson, J., said: "There are undoubtedly cases in which the transaction is so entirely a unit that it is most just and proper when litigation arises that matters arising directly out of it should be determined in one suit. These cases are not parallel with this. Here the same paper, it is true, contains the contract out of which the lien arises as well as that out of which the rent accrued; but they are as distinct and separate covenants as if written on separate sheets of paper. There is a complete contract for building, describing the kind of structure, and the time when to be completed and paid for. Then follows a complete lease of the building for a long term, to commence shortly before its comple- [296] tion and to continue for thirteen years. The former, the building contract, was to be finished in about eight months, and to be then paid for. The first year's rent would not fall due for near a year after. These things show the distinctive-

stopped from urging any such matters in defense to an action upon them. *Hill v. Parsons*, 110 Ill. 107.

¹ See *ante*, § 184.

ness of the covenants as contracts. Now the lien might have been reduced under the principle invoked by showing defectiveness in the work and the like, and so might the rent if the landlord had been suing for it on account of interference with the tenant's possession, not amounting to eviction, but acts against quiet enjoyment. These would be instances of claims arising in the same transaction being allowed to be given in evidence to extinguish the claim by a liberal construction of our defalcation act. . . . It was impossible to settle the entire covenants in one action. They were of different and distinct natures, and to be performed at different and distinct periods. In applying the rent, therefore, to the extinguishment of the lien, on this principle alone, when the plaintiffs had other claims entitled to its application on equitable principles, was of course error in the absence of appropriation by the debtor and creditor. They therefore should have been allowed to put in evidence their book account; if it was unpaid and unsecured, and no appropriation by the parties of the rent, equity would apply it to the book account in preference to the old debt secured by the lien. This is the well settled rule."¹

In an action on a note against the executor of an accommodation indorser, it appeared that the note was made, indorsed and transferred to the plaintiff in payment of, or as collateral security for, an antecedent debt of a firm of which the maker was a member; that afterwards the firm made an assignment to the plaintiff for the benefit of the creditors, preferring the plaintiff and the defendant's testator. The answer setting up these facts alleged also that the assets were more than sufficient to pay in full all the preferred creditors. But as these facts could not be established without an accounting, and the plaintiff was entitled, when compelled to account, to do so entirely, which could not occur in that action for the want of necessary parties, all evidence touching the counter-claim was properly rejected.²

§ 188. Burden of proof; measure of damages. When a defendant sets up a cross-claim by way of recoupment he assumes, like a plaintiff, the burden of proof in respect to it; and

¹ *McQuaide v. Stewart*, 48 Pa. St. 198. See *Howe Machine Co. v. See* *Duncan v. Stanton*, 30 Barb. 533. *Hickox*, 106 Ill. 461.

² *Bailey v. Bergen*, 67 N. Y. 346.

the same rule or measure of damages applies as would be applicable in a separate suit upon such claim; subject, however, to the limitation already mentioned, that there can be no recovery by a defendant for any balance found in his favor beyond the damages established on the part of the plaintiff, in the absence of a statute authorizing it. The burden of proof rests upon him because he asserts a claim or right, and must therefore produce the proof necessary to make good his contention.¹ That the same rule of damages applies has been repeatedly held;² and it is universally assumed by actually applying it.³ But the rule is the rule of compensatory damages — no recovery on a claim set up for recoupment can be had for malice or any aggravation in the form of exemplary damages.⁴ The consideration that this defense is to avoid circuitry [298] of action, and when resorted to is a substitute, renders it desirable and necessary to its usefulness that the defendant, to the extent of full defense, should have the benefit of the rule of damages to which he would be entitled if he elected to bring a separate action.

¹ Mendel v. Fink, 8 Ill. App. 378; 1 Whart. Ev., § 356.

The defendant has the burden of establishing all the elements of a cause of action (Heedstrom v. Baker, 13 Ill. App. 104); and must plead them. Rawson v. Pratt, 91 Ind. 9.

² Goodwin v. Morse, 9 Met. 278; Myers v. Estell, 47 Miss. 4; Hitchcock v. Hunt, 28 Conn. 343; Timmons v. Dunn, 4 Ohio St. 680.

³ Blanchard v. Ely, 21 Wend. 342; Tinsley v. Tinsley, 15 B. Mon. 454; Rogers v. Ostram, 35 Barb. 523; Stoddard v. Treadwell, 26 Cal. 294; Satchwell v. Williams, 40 Conn. 371; Cook v. Soule, 56 N. Y. 420; Warfield v. Booth, 33 Md. 63; Bradley v. Rea, 14 Allen, 20; Harralson v. Stein, 50 Ala. 347; Haven v. Wakefield, 39 Ill. 509; Dounce v. Dow, 57 N. Y. 16; Aultman & T. Co. v. Hetherington, 42 Wis. 623; Van Epps v. Harrison, 5 Hill, 63; Overton v. Phelan, 2 Head, 445; Timmons v. Dunn, 4 Ohio St.

680; Rotan v. Nichols, 22 Ark. 244; Harris v. Rathbun, 2 Keyes, 312; Railroad Co. v. Smith, 21 Wall. 255.

⁴ Allaire Works v. Guion, 10 Barb. 55. This case has sometimes been cited as holding that special damages are not the subject of recoupment (Benkard v. Babcock, 2 Robt. 175); and Dorwin v. Potter, 5 Denio, 306, has also been cited as holding the same. Neither case advances any such doctrine. In the latter case a landlord's action for rent was defended by way of recoupment for his neglect to put the barns on the demised premises in that state of repair required by his agreement. The court say, Whittlesey, J.: "The material question here is as to the proper rule of damages for such neglect to repair. We do not know what the referees adopted, but the questions put to the witnesses after objection would only be admissible upon the ground that the defendant was enti-

§ 189. A cross-claim used in defense cannot be sued upon. When a cross-claim is submitted as a defense by way of recoupment the judgment will be a bar to another action or recoupment. A defendant has an election to avail himself of a cross-claim by way of recoupment, or under the code as a counter-claim, or to bring an action upon it. This choice, however, is only final when submitted for adjudication, and is so to prevent a second recovery. Neither pleading it in defense nor bringing an action upon it will determine the election.¹ Where it appeared in a suit in which a cross-claim was set up by way of recoupment that the defendants had previously brought an action for the same damages, which was still pending, and the trial court had rejected the defense, the appellate court said: "The court [below] seemed to have regarded the pendency of the other action as a sort of abatement of the defendants' plea, or to have deemed the bringing of the suit (by the defendants) . . . as a conclusive election to prosecute a cross-action, and not to recoup or use the claim as a defense under any circumstances while that action should continue. There is in this holding a misapprehension of the defendants' position. They are not prosecuting two actions, one of which abates the other. In an endeavor to recover their damages they find themselves prosecuted by their adversary. They may defend by setting up any matter which [299] the law recognizes as a defense, whether it be a cause of action, or whether it be a judgment actually recovered therein — the only difference being that after judgment it must be used

tled to all the damages which he might have sustained by the injuries to the cows and young cattle, the increase of food required, and the decrease of produce by reason of the state of the barns in question. It strikes me that such damages are altogether too remote and contingent, and that the true rule of damages is the sum necessary to place the barns in that state of repair in which they were to be put according to the agreement, with interest thereon, if the referees thought proper to allow interest." There is no hint that this

rule was adopted because the plaintiff's breach of contract was set up by way of recoupment; but it is laid down as "the proper rule of damages for such neglect to repair;" and on that subject see *Myers v. Burns*, 35 N. Y. 269; *Hexter v. Knox*, 63 N. Y. 561.

¹ *McDonald v. Christie*, 42 Barb. 38; *Fabbricotti v. Launitz*, 3 Sandf. 743; *Rankin v. Barnes*, 5 Bush, 20; *Gilmore v. Reed*, 76 Pa. St. 462. See *Cook v. Castner*, 9 Cush. 266; *Miller v. Freeborn*, 4 Robt. 608.

as a judgment and by way of set-off. The election made by the defendants was not an election not to recoup. At that time it was an election between prosecuting to establish their claim, or suffering the injury without seeking any redress. And when the plaintiff forced them into court, . . . their opportunity to use their claim by way of defense first arose, and they had a right to embrace it. Until judgment in one of the suits, the right to press the claim in the other continued."¹ But after a judgment in a separate action upon the claim it is merged in the judgment; or, if rejected, barred; if the issue embraces it, the judgment is conclusive.²

¹ Naylor v. Schenck, 3 E. D. Smith, 135; Lindsay v. Taylor, 72 Cal. 540.

If the matter pleaded in recoupment can be set up in defense to a suit upon the contract out of which it arose and which is pending it will not be proper to plead it in another suit in the same court. Jefferson Lumber Co. v. Williams, 78 Texas, 656.

A plaintiff is not estopped from prosecuting a suit for work and labor by reason of the payment of a judgment recovered against him by the defendant pending such suit for damages for the improper performance of the work and labor sued for; the claim is not *res judicata* because one suit sounded in tort and the other in *assumpsit*. Mimnaugh v. Partlin, 67 Mich. 391.

² Davis v. Tallcot, 12 N. Y. 184; Kane v. Fisher, 2 Watts, 246; Grant v. Button, 14 Johns. 377; O'Connor v. Varney, 10 Gray, 231; Burnett v. Smith, 4 Gray, 50; Salem India R. Co. v. Adams, 23 Pick. 256; Stevens v. Miller, 13 Gray, 283; Huff v. Broyles, 26 Gratt. 283; Beall v. Pearre, 12 Md. 550; McLane v. Miller, 10 Ala. 856; Britton v. Turner, 6 N. H. 481, 495.

In Davis v. Talcott, *supra*, it was held that a recovery in a suit upon an agreement, wherein the right to

recover depended by the pleadings upon the truth of the allegation made in the complaint and denied by the answer, that the plaintiff had fully performed the agreement, is a bar to an action brought subsequently by the defendant in the first suit against the plaintiff therein to recover damages for the alleged non-performance of the same agreement. The record of the recovery estops the defendant from controverting that the plaintiff therein fully performed the contract. The rule is not otherwise, although in the first suit the defendant, in addition to the allegation of performance, alleged breaches by the plaintiff, and claimed to recoup damages, and at the trial expressly withdrew the claim for damages, gave no evidence touching the alleged breaches, and the second suit was to recover damages for such breaches.

Gardiner, C. J., said: "The defendants in that (the former) action, the present plaintiffs, insisted upon the non-performance of the agreement upon the part of Tallcot and Canfield, the manufacturers of the machinery, for two purposes entirely distinct in their nature and objects. First, as a complete defense to the action, by a denial of that which the makers of the machinery had averred and must prove before they could

[300] In an action for breach of warranty in the sale of personal property these facts appeared: A note given for the purchase-money had been collected by suit; to that the now plaintiff had pleaded *non assumpsit*, and it was agreed

recover anything. Second, as a foundation for a claim in the nature of a cross-action for damages to be deducted from the amount which the then plaintiff might otherwise recover. It is obvious that, by withdrawing their claim to damages, the then defendants did not waive the right to insist upon their defense. The plaintiffs, notwithstanding, must have established their title to the price stipulated, by proof that the machinery was made within the time and in the manner called for by the agreement; and the vendees were at liberty to meet and combat these proofs by counter evidence on their part. Now, this was precisely what was done, or rather the necessity for introducing evidence to sustain the action was superseded by the admission of the then defendants in open court 'that they were indebted to the manufacturers for the causes of action mentioned in their complaint.' As the cause of action and the indebtedness of the defendants were, by the complaint made dependent upon a full performance of the contract by the parties who instituted the suit, the concession of the defendants was equivalent to an admission on the record to that effect; and the report of the referee followed by the judgment of the court consequently estops the parties to that suit from ever after questioning that fact in any controversy upon the same agreement (2 Cow. & H. N. 843; 10 Wend. 80; 3 Comst. 173). In the suit now pending, however, the vendees bring their suit upon the same contract against the manufacturers, and aver a non-performance by the

defendants as the sole cause of action. They have succeeded in the court below, notwithstanding the objection we have considered; and there are, consequently, two records in the same court between the same parties, each importing absolute verity, one of which affirms that the manufacturers 'faithfully performed said agreement in every respect on or before the 7th of June, 1850; the other, that they did not perform it in any respect at any time.' This flat contradiction is attempted to be reconciled by the assertion that the record in the first suit only shows that this point might have been, not that it was, litigated. The answer is that the record in that case proves that that question of performance was directly in issue and must have been litigated; that a recovery without establishing the fact of performance was a legal impossibility. Again, the parol evidence, if admissible, only proves that the vendees did not rely upon a breach of the contract upon the part of the makers of the machinery to support their claim to recoup. This is the course they would naturally adopt if their damages, in their opinion, exceeded the sum to be paid for the machinery. Their only remedy for the excess would depend upon defeating the action then pending, and subsequently suing on the agreement. That this was really the object of their legal adviser is evidenced by the fact that while the manufacturers recovered in their suit less than \$650, the present plaintiffs have obtained judgment in the case under review for upwards of \$900. The withdrawal of their claim

that under that plea he might offer the special matter in evidence as fully as if he had specially pleaded the same or given notice thereof; the breach of warranty now sued for the then defendant offered to prove as a defense, but it was rejected by the court because it did not tend to show a total failure of consideration. On these facts the judgment in the former action was held to be a bar.¹ The defense being [301] admissible in the former action and erroneously rejected, the judgment had the same effect as though the claim had been admitted. The error of its rejection should have been corrected by proceedings taken in that case; therefore the exclusion of the defense by the court had the same effect as a disallowance by a jury.² Where notwithstanding the cross-claim is pleaded, the judgment is afterwards taken by default by the plaintiff, and so appears by the record, such claim is not barred.³ The fact that the judgment was upon default makes it as certain that the counter-claim was not passed upon by an actual adjudication as though the plea had been formally withdrawn. If several notes have been given for a chattel and they become due at different times, and the defendant in an action upon the one which matures first counter-claims for damages arising from the breach of the warranty, judgment in his favor estops him from pleading such defense in an action subsequently brought upon the other notes.⁴

§ 190. Notice of cross-claim. This defense being a substitute for an action and to avoid the necessity of another suit, some pleading must be adopted by which the defendant evinces his election to insist on his cross-claim as a defense. It must make the necessary allegations and inform the plaintiff so that he may not be taken by surprise. And it must be

to recoup was therefore not only consistent with the determination to insist upon a breach of the contract on the part of the manufacturers in order to defeat the suit then pending, but this was indispensable to the ultimate recovery of their full damages in a subsequent action." See *Merriam v. Woodcock*, 104 Mass. 326.

¹ *Beall v. Pearre*, 12 Md. 550.

² *Grant v. Button*, 14 Johns. 377; *Smith v. Whiting*, 11 Mass. 445.

³ *Bascom v. Manning*, 52 N. H. 132; *Bodurtha v. Phelon*, 13 Gray, 413.

⁴ *Geiser Threshing M. Co. v. Farmer*, 27 Minn. 428; *Minneapolis Harvester Works v. Bonnallie*, 29 id. 873. Compare *Aultman & T. Co. v. Hetherington*, 42 Wis. 622; *Aultman & T. Co. v. Jett*, id. 488.

set up in the answer under the code.¹ The defendant is as much concluded by the amount of damages he claims in his counter-claim as the plaintiff is by his complaint.² Recoupment cannot extend beyond the specific matters sued upon unless the notice or pleading informs the plaintiff that the defendant will go into others.³ The notice must be sufficiently certain to apprise the plaintiff of the nature of the defendant's claim, and in case of a suit upon contract it must specify the breach complained of.⁴ An averment in a cross-bill claiming a recoupment of special damages for the breach of a contract, the general damages for which appear to be only nominal, should be special; if it only alleges that the defendant has been damnified to a specified amount it is insufficient.⁵ A reduction of damages by way of recoupment cannot be shown under a special plea in bar, but may be obtained under the general issue.⁶ Statutes concerning notice will be liberally construed; the rules in relation to a variance between the pleadings and the proof will not be applied to the notice, which is good if it states the ground and substance of the defense, though it is defective in matters of form.⁷ The only way to make the objection that a cause of action pleaded as a counter-claim is not such in the particular case because it is in no way connected with the subject of plaintiff's action is by demurrer. If there is no demurrer on that ground and issue is taken on the facts alleged, the right to object is waived.⁸

¹ *Trowbridge v. Mayor*, 7 Hill, 429; *Lure v. Hart*, 19 Ark. 119; *Hill v. Burton v. Stewart*, 3 Wend. 236; *Austin*, id. 230.

Barber v. Rose, 5 Hill, 76; *Crane v. Hardman*, 4 E. D. Smith, 448; *Lamson & Goodnow M. Co. v. Russell*, 112 Mass. 387; *Lansing v. Van Alstyne*, 2 Wend. 561; *Steamboat Wellsville v. Geisse*, 3 Ohio St. 333; *Young v. Plumeau*, Harp. 543; *Maverick v. Gibbs*, 3 McCord, 315; *Mc-*

² *Annis v. Upton*, 66 Barb. 370.

³ *McKevitte v. Feige*, 57 Mich. 374.

⁴ *Sinker v. Diggins*, 76 Mich. 557.

⁵ *Hooper v. Armstrong*, 69 Ala. 343.

⁶ *Wadhams v. Swan*, 109 Ill. 46.

⁷ *Merrill v. Everett*, 38 Conn. 40.

⁸ *Ayres v. O'Farrell*, 10 Bosw. 143; *Hammond v. Terry*, 3 Lans. 186; *Walker v. Johnson*, 28 Minn. 147.

SECTION 5.

MARSHALING AND DISTRIBUTION.

§ 191. Definition. Marshaling is the setting of debts [302] or assets in a certain order; distribution the application of funds to the payment of debts marshaled. There are therefore two kinds of marshaling, one of assets and the other of debts. Marshaling is resorted to whenever it becomes necessary practically to answer either the question in what order certain distinct funds or properties shall bear the burden of paying or contributing to pay a debt which is directly or indirectly a charge upon all; or, secondly, when there are several debts directly or indirectly charged upon one fund or property which is insufficient to pay them in full, to determine in what order such fund shall be applied as far as it will go. In answering the first, the court settles the order of liability among the funds that must pay; the second, the priorities of the claims to be paid. Under the first inquiry two classes of persons are liable to be affected: first, those having proprietary interests in the fund or property marshaled; and second, creditors having liens thereon.

§ 192. Sales of incumbered property in parcels to different purchasers. For the protection of purchasers this rule obtains: if the creditor's lien be upon several parcels of land for the payment of the same debt, and some of these parcels belong to the person who in equity and justice owes or ought to pay the debt, and other parcels have been transferred by him to third persons, his part, as between himself and them, shall be primarily chargeable with the debt.¹ And if [303]

¹ 2 Story's Eq., § 1283; *Clowes v. Dickenson*, 5 Johns. Ch. 235; S. C., 9 Cow. 403; *Cowden's Estate*, 1 Pa. St. 267, 274; *Mason v. Payne*, Walk. Ch. 459; *Cooper v. Bigly*, 18 Mich. 463; *Barnes' Appeal*, 46 Pa. St. 350; *Ammerman v. Jennings*, 12 B. Mon. 135. In *Clowes v. Dickenson*, 9 Cow. 403, it was held that if the creditor or any other person having control of his judgment cause a sale of the aliened part before resorting to that retained by the judgment debtor, the latter part being sufficient to pay his debt, though no order or decree be obtained directing the remaining portion to be first sold, such creditor will be required to restore the real estate so sold; or, if sold to a *bona fide* purchaser, to account to the alienee for the value of the real estate so sold, if the other part would

there have been successive alienations by him of parts of the incumbered property, and the portion retained is insufficient to discharge the entire incumbrance, the parcels transferred will be subject to sale in the inverse order of alienation.¹ The operation of this rule may be waived, limited or modified by the instrument executed to the earlier grantee, which will bind all who claim under him.²

have satisfied the judgment; or, if not, to restore or account for the value beyond what would, with the other, have satisfied the judgment. That such alienee, having stood by and allowed the legal estate to pass from him, shall not be allowed the land itself, with improvements made subsequent to the execution sale and before he asserted his claim. The true value of the aliened estate in market at the time of the execution sale, not the price bid for it, is the measure of compensation.

¹ Id.; *Wieting v. Bellinger*, 50 Hun, 324; *Gage v. McGregor*, 61 N. H. 47; *Vogle v. Brown*, 120 Ill. 838; *Gill v. Lyon*, 1 Johns. Ch. 447; *Stevens v. Cooper*, id. 425; *James v. Hubbard*, 1 Paige, 228; *Gouverneur v. Lynch*, 2 id. 300; *Guion v. Knapp*, 6 id. 35; *Skeel v. Spraker*, 8 id. 182; *Patty v. Pease*, id. 277; *Schryver v. Teller*, 9 id. 173; *New York Life, etc. Co. v. Cutler*, 3 Sandf. Ch. 176; *Commercial Bank v. Western Reserve Bank*, 11 Ohio, 444; *Green v. Ramage*, 18 id. 428; *Stuyvesant v. Hone*, 1 Sandf. Ch. 419; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Averall v. Wade, Lloyd & Gould*, 252; *Lyman v. Lyman*, 32 Vt. 79; *Hurd v. Eaton*, 28 Ill. 122; *Carter v. Neal*, 24 Ga. 846; *Root v. Collins*, 34 Vt. 173; *Brown v. Simons*, 44 N. H. 475; *Jenkins v. Freyer*, 4 Paige, 58; *Howard Ins. Co. v. Halsey*, 4 Sandf. 565; *La Farge Ins. Co. v. Bell*, 22 Barb. 54; *Gates v. Adams*, 24 Vt. 71; *Chase v. Wood-*

bury, 6 Cush. 143; *Black v. Morse*, 7 N. J. Eq. 509; *Shannon v. Marselis*, 1 id. 413; *Henkle v. Allstadt*, 4 Gratt. 284; *Jones v. Myrick*, 8 Gratt. 179; *Britton v. Updike*, 3 N. J. Eq. 125; *Wikoff v. Davis*, 4 id. 224.

Judge Story (2 Story's Eq., § 1233b) doubts whether this last position is maintainable upon principle; for as between the subsequent purchasers or incumbrancers, each trusting to his own security upon the separate estates mortgaged to him, it is difficult to perceive that either has, in consequence thereof, any superiority of right or equity over the other. On the contrary there seems strong ground to contend that the original incumbrance or lien ought to be borne ratably between them, according to the relative value of the estates. And so the doctrine has been asserted in the ancient as well as modern English cases on the subject (*Harbert's Case*, 3 Co. 12; *Barnes v. Racster*, 1 Y. & C. New Cas. 401; *Lanoy v. Duchess of Athol*, 2 Atk. 448; *Aldrich v. Cooper*, 8 Ves. 391; *Averall v. Wade, Lloyd & Gould*, 252; *Bugden v. Bignold*, 2 Y. & C. New Cas. 377; *Green v. Ramage*, 18 Ohio, 428); and the law is so settled in Kentucky. *Dickey v. Thompson*, 8 B. Mon. 312; *Morrison v. Beckwith*, 4 T. B. Mon. 76; *Hughes v. Graves*, 1 Litt. 319; *Burk v. Chrisman*, 3 B. Mon. 50.

² *Vogel v. Shurtliff*, 26 Ill. App. 516; *Briscoe v. Powers*, 47 Ill. 447.

§ 193. **Sale subject to incumbrance.** If a portion [304] of the land covered by a mortgage is conveyed subject to the payment of the entire mortgage by the grantee the subsequent purchaser of another parcel,¹ or the mortgagor,² has a right to insist that the parcel so conveyed shall be first sold to satisfy the mortgage. The lot so sold becomes as to the parties to the conveyance the primary fund for the payment of the mortgage,³ and the grantee thereby becomes the party who in justice ought to pay the debt. The mortgagor becomes then a *quasi-surety*, and has the right to insist upon the collection of the debt first out of the land.⁴

The rule being intended for the benefit of parties having separate interests in the property or fund on which the debt is a lien, their relation between themselves is considered in determining whether the burden rests upon them equally, or if unequally, in what order their several properties may be resorted to for payment. Where there are several heirs, or where several persons join in a recognizance, one heir, or one conusor, should not be charged exclusively, for their relations and duties are equal.⁵ And the same principle would apply between several purchasers of the same date. But the property of the party who is in equity bound to pay the debt, as between him and the owner of other property bound for the same debt, is the primary fund; and the court will establish the order, between any number of persons whose property is subject to the debt, in which resort may be had to properties so separated in ownership. Thus, in an action of foreclosure against G. and L. as mortgagors, where it appears that G. is possessed of a portion of the premises in his own right, and L. of another portion, and that a third portion is held jointly, and it also appears that L. personally owes the mortgage debt, or is equitably bound to pay it, the judgment should be so entered that the interest of L. be first sold; secondly, the joint interest; and lastly, the interest of G.⁶

¹ Caruthers v. Hall, 10 Mich. 40.

² Mason v. Payne, Walker's Ch. 461.

³ Cox v. Wheeler, 7 Paige, 248; Jumel v. Jumel, id. 591.

⁴ Harris v. Jex, 66 Barb. 232.

⁵ Harvey v. Woodhouse, Select Cas. in Ch. 80. See Clowes v. Dickenson, 5 Johns. Ch. 235, 241.

⁶ Ogden v. Glidden, 9 Wis. 46; Warren v. Boynton, 2 Barb. 18; Cornell v. Prescott, id. 16.

[305] But these equities between co-debtors, by which one part of incumbered premises becomes the primary fund for the payment of the mortgage, may be defeated by the *bona fide* purchase of that part by one without notice of the facts which raise these equities. Where A. and B. owning lands in severalty joined in mortgaging them to secure the payment of a joint debt, and A. afterwards executed a bond of indemnity to B. agreeing to pay the whole mortgage debt, but subsequently executed on his lands other mortgages for a valuable consideration, to parties who had no notice of the bond or agreement between him and B., it was held on the foreclosure of the mortgage that B. could not, as against the subsequent mortgagees, compel the collection of the whole of the original mortgage debt from the land of A. to their prejudice, and that half of it was collectible from B.'s land.¹

§ 194. **Effect of creditor releasing part.** A creditor having notice of such equities between several parties owning property subject to his debt cannot defeat them by releasing the property first liable. A release by the mortgagee of a portion of the land mortgaged, with knowledge of a prior sale of another portion, will operate as to such prior purchaser as a discharge *pro tanto* of the mortgage debt.² But a release without such knowledge will not be a discharge.³

§ 195. **Rights where one creditor may resort to two funds and another to only one.** A rule for the protection of creditors having junior liens exists. If one creditor can resort to two funds and another to but one of those funds, the former will be compelled to seek satisfaction out of the fund which the other cannot reach, if adequate,⁴ and it can be done

¹ Hoyt v. Doughty, 4 Sandf. 462; Pullen, 6 Bush, 346; Wise v. Shepherd, 18 Ill. 41; Marshall v. Moore, 36 Root v. Collins, 34 Vt. 173.

² Brown v. Simons, 44 N. H. 475; Ill. 321; Hurd v. Eaton, 28 Ill. 122; Guion v. Knapp, 6 Paige, 43; Patty v. Pease, 8 id. 277; La Farge Ins. Co. v. Bell, 22 Barb. 54; Taylor v. Maris, 5 Rawle, 51. See Cooper v. Bigly, 18 Mich. 463; James v. Brown, 11 Mich. 25; Howard Ins. Co. v. Halsey, 4 Sandf. 565.

³ Id.

⁴ Ball v. Setzer, 33 W. Va. 444; Hall v. Stevenson, 19 Ore. 153; Glass v. of Ky. v. Vance's Adm'r, 5 Litt. 168.

without prejudice to such double fund creditor.¹ The [306] rule is founded in social duty and is never enforced to the prejudice of such creditor;² nor where it will work injustice to other parties. Thus where a firm creditor has secu- [307]

¹ *Logan v. Anderson*, 18 B. Mon. 111; *Jervis v. Smith*, 7 Abb. (N. S.) 217; *Wise v. Shepherd*, 18 Ill. 41; *Cannon v. Hudson*, 5 Del. Ch. 112; *Hudkins v. Ward*, 80 W. Va. 204; *Leib v. Stribling*, 51 Md. 285; *Marr v. Lewis*, 31 Ark. 203; *McArthur v. Martin*, 23 Minn. 75; *Gilliam v. McCormack*, 85 Tenn. 597.

² *Id.* In *Worth v. Hill*, 14 Wis. 559, the mortgage being foreclosed covered two distinct tracts in different towns. The defendant Buck, who was the appellant, held a mortgage next to this in point of time, covering one of the tracts contained in this mortgage, and other land not covered by this, in the same town. Defendant Mowry held a mortgage next to Buck's in point of time, but upon the land in the other town covered by the mortgage, and also upon another tract. Hence the Mowry mortgage did not cover any of the land mortgaged to Buck, but their interests conflicted by reason of the mortgage which was being foreclosed, and which was prior to both, covering a part of the land contained in each of them. It further appeared that there was a mortgage prior to all of these, covering the tract in the Buck mortgage, and the parcel in the Mowry mortgage which was not contained in the mortgage being foreclosed; that that mortgage had been foreclosed, and that part which was covered by the Mowry mortgage adjudged to be sold before the part covered by Buck's. It was further proved that the other tract covered by Buck's mortgage was ample security for the amount of the debt secured by that mortgage. Upon this

state of facts it had been decreed below that the portion covered by Buck's mortgage should be sold in this foreclosure before that covered by Mowry's, and from that part of the decree Buck appealed.

Referring to the equitable rule that in foreclosure cases where the land has been subsequently conveyed by the mortgagor it shall be sold in the inverse order of alienation, Paine, J., says: "The justice of this rule has been sometimes questioned, but we regard it as not only well settled, but correct upon principle, and have repeatedly enforced it. But at the same time we think it may be controlled by other established equitable principles, where the facts render them applicable; and such we think was the case here. It is a familiar principle that where one creditor has security upon two funds, and another has security upon one of them only, the latter may compel the former to resort first to that fund which he cannot reach. And although this is not a direct proceeding to accomplish that object, yet it is substantially that, inasmuch as Mowry sets up these facts to rebut the equity Buck would otherwise have as against him. For the result, if the judgment had been otherwise, would have deprived Mowry of his security entirely. The one tract covered by his mortgage having already been adjudged to be sold first for Buck's benefit, now if the other should be adjudged to be sold first, he would have nothing left. Whereas it appears by the testimony that upon the decree as rendered Mowry is protected and Buck left with ample security for his debt.

rity on the separate property of one of its members, such creditor is not for that reason to be excluded from sharing in the proceeds of the company assets until he has exhausted his security, for that would be a detriment to such creditor where it involved delay, and unjust to the creditors of the separate estate which furnished the security.⁴ Where the rule would [308] be applied in favor of a creditor having a right to resort

Suppose A. mortgages a tract to B., then gives a second mortgage on a part of it to C., which mortgage also covers other tracts, and then gives a mortgage on another part to D. On a foreclosure of B.'s mortgage, the ordinary rule, based merely on the order of alienation, would be to sell D.'s part first. But suppose D. could show that the other tracts covered by C.'s mortgage were an ample security for his debt; would not that raise an equity sufficient to overcome the ordinary rule, and require as between C. and D. that C.'s part should be first sold? I think so; and that is substantially the relation which these defendants hold to each other in the present case. I can see no reason why the principle requiring the creditor having two funds to resort first to the one which the other cannot reach is not applicable to such a case. It is true that ordinarily the adequacy of the first fund might be tested by an actual sale, and the creditor who was compelled first to resort to that might still be in a position to resort to the other to supply any deficiency; and here B. may not be left in such a position. I think that is good reason why such a decree as the one made in this case should be made only upon clear proof of the entire adequacy of the remaining security. But I am not prepared to say that courts should not act upon such proof, or that a party so situated has any absolute right to have the adequacy of his remaining security

tested in all cases by an actual sale. It is obvious that such a test could not be had in a case like this, and consequently, if that rule was adopted, it would lead to the injustice of cutting off the last mortgagee entirely, though it might not be necessary for the protection of the second. Courts are constantly adjudicating upon the most important rights of parties upon the theory that human testimony can establish facts with sufficient certainty to justify such adjudication, and I think the question of the adequacy or inadequacy of a security should form no exception."

In *Miller v. Jacobs*, 3 Watts, 477, it was held that one lien creditor can invoke no security taken by another which had not become a lien when he procured his own; hence, a subsequent mortgagee, having taken bonds, but without a warrant to confess judgment, has no equity to call on a prior mortgagee to enter up a judgment on a bond which accompanied his mortgage in order to throw him on another fund; nor can the subsequent mortgagee object to the vacation of judgments subsequently confessed on those bonds, though purposely withdrawn to make way for other judgment creditors whose lien funds are consequently posterior in date to his lien on the mortgaged premises.

⁴*Bell v. Hepworth*, 51 Hun, 616; *Morrison v. Kurtz*, 15 Ill. 198. See *Berry v. Powell*, 18 Ill. 98; *White v. Dougherty*, Mart. & Yerg. 309; *Breedlove v. Stump*, 3 Yerg. 257.

to but one fund or property, it will be equally available to one claiming through a sale under his lien.¹

§ 196. Same when the funds belong to two debtors. The rule, however, does not apply when one of the creditors has a lien for his debt upon two funds belonging to two separate debtors, and the other has a lien upon a fund belonging to one of them, so as to compel the first creditor to make his claim wholly out of that debtor whom the other cannot reach, unless there be some peculiar relations between these debtors which would make it equitable that the debtor having but one creditor should pay the whole demand against him and his co-debtor.² A creditor who has a double security, or a right to go upon more than one fund for payment, may go on all or either one of them for his whole debt. His interest under each is several and independent of the other, and cannot be diminished by reference to the value of the other.³ A creditor who has several securities, neither one of which is sufficient for the payment of his debt, has a right to look to each one of them for its payment in the same manner and to the same extent that he could do if he had no other. It is only when it may happen that a creditor who has more securities than one may not require for the payment of his debt the entire proceeds of all his securities that any marshaling of them can take place for the benefit of other creditors who are only subsequently entitled to a lien on a part of the same fund or property.⁴ If, for example, property sufficient for the payment of fifty cents on the dollar be mortgaged to two or more creditors, and the mortgagor afterwards mortgages other property to the same and other creditors to secure the payment of the same debts, and also the debts due to the other creditors, and the fund arising from the last mortgage is [309] also sufficient to pay fifty cents on the dollar of all the debts therein named, the creditors in the first mortgage have a right to their full proportion thereof on the whole amount of their debts without regard to what has been or may be received by

¹ Marshall v. Moore, 86 Ill. 321. See W. & S. 327. See Ex parte Kendall, 17 Ves. 520.

Dodds v. Snyder, 44 Ill. 53; McCormick's Appeal, 55 Pa. St. 252.

² Gwynne v. Edwards, 2 Russ. 289.

³ Wise v. Shepherd, 18 Ill. 41; Dorr v. Shaw, 4 Johns. Ch. 17, 20; 1 Story's

See Kendall v. New England Carpet Co., 18 Conn. 883.

Eq., § 642; Ebenhardt's Appeal, 8

⁴ Logan v. Anderson, 18 B. Mon. 114.

them on the first mortgage. The two securities are sufficient for the payment of those creditors who are entitled to the benefit of both; and yet, if the other creditors in the second mortgage have a right to reduce their debts by applying as a credit thereon the amount of their dividend under the first mortgage, and to restrict them to a *pro rata* of the proceeds of the last mortgage on the balance of their debt, when thus reduced, one-fourth part of it would still remain unpaid, although either security taken separately was sufficient for the payment of one-half of the debt.¹ Whenever, ther, a mortgage or assignment is executed to secure the payment of certain specified debts and it contains nothing to show that it was intended only to secure the payment of a part of the debt of some of the creditors, and not the whole amount thereof, the mortgagees or beneficiaries under the assignment have each a right to a full ratable share of the fund on the whole amount of their respective debts. This share cannot be diminished by the existence of another security, where both securities are necessary for the payment of the debt. Equity refuses to interfere or to marshal the securities to the prejudice of the creditor entitled to a double fund. And it makes no difference in such a case whether the benefit of one of the funds has been realized or still remains as a mere security for the payment of the debt.²

¹ Logan v. Anderson, *supra*.

² Id.; Morris v. Olwine, 22 Pa. St. 441; Shunk's Appeal, 2 id. 309; Kittera's Estate, 17 id. 416; Miller's Appeal, 35 id. 481; Jervis v. Smith, 7 Abb. (N. S.) 217; Graeff's Appeal, 79 Pa. St. 146; Patten's Appeal, 45 Pa. St. 152; Keim's Appeal, 27 Pa. St. 42; Hess' Estate, 69 Pa. St. 272; Brough's Estate, 71 Pa. St. 460.

In Patten's Appeal, *supra*, it was held that the detention by vendors of goods sold, on the insolvency and assignment for the benefit of creditors by the vendees, does not rescind the contract of sale; and the vendors are entitled to a *pro rata* distribution out of the assigned estate; and that where a part of the goods had been delivered and the balance which had

been detained was sold by the vendors, who applied the proceeds to the payment of the notes given upon the sale, leaving a balance still due, they were entitled to a dividend upon the whole amount of their claim at the date of the assignment. See Midgeley v. Slocomb, 2 Abb. (N. S.) 275. In Bridenbecker v. Lowell, 32 Barb. 9, it was held that where an arrangement was made between debtor and creditor, by which the former gives a new security upon property exceeding in value the amount of the debt, and receives back the evidence of his indebtedness, there being at the time a general fund or security by mortgage upon real estate embracing all the debts of the debtor, but insufficient to pay the whole, the

§ 197. Principle on which priority determined. [310]

The principle is believed to be universal that a prior lien gives a prior claim which is entitled to prior satisfaction out of the subject which it binds unless the lien be intrinsically defective or be displaced by some act of the party holding it which should postpone him in a court of law or equity to a subsequent claimant.¹ Where surplus moneys arose upon the foreclosure of several mortgages and were thus claimed: by judgment creditors having the first lien upon two such funds; by a mortgage creditor having a later lien on only one such fund, and by other judgment creditors having still later liens upon all, the prior judgment was ordered paid out of the fund not subject to the mortgage, but if it were not sufficient, any deficiency was to be paid prior to the mortgage out of the fund on which the mortgage was a lien; then the mortgage was to be paid out of the surplus on which it was a lien, and the subsequent creditors were entitled to payment only after satisfaction in this manner of the prior judgment and mortgage creditors.²

effect of such an arrangement was to make the specified security the primary fund for the payment of the debt specifically secured by it, and to postpone the right of that creditor to participate in the general fund until the specific fund had been exhausted.

¹Rankin v. Scott, 12 Wheat. 177; Broom's Max. 236; 9 Paige. 61, note; Weaver v. Toogood, 1 Barb. 238; Embree v. Hanna, 5 Johns. 101; Muir v. Schenck, 3 Hill, 228; Watson v. Le Row, 6 Barb. 481; Lynch v. Utica Ins. Co., 18 Wend. 236; Poillon v. Martin, 1 Sandf. Ch. 569; Berry v. Mutual Ins. Co., 2 Johns. Ch. 603.

It is held in Gilliam v. McCormack, 85 Tenn. 597, that marshaling is a pure equity and does not rest at all upon contract. The equity to marshal assets is not one which fastens itself upon the situation at the time the successive securities are taken, but is to be determined at the time the marshaling is invoked. The equity

does not become a fixed right until the proper steps are taken to have it enforced; until then it is subject to displacement and defeat by subsequently acquired liens upon the funds. The facts were that the owner of three lots gave six mortgages thereon to different persons at various dates; the first mortgage covered the entire property, and the subsequent ones parcels thereof less than the whole. All the lots were sold, and their proceeds were insufficient to pay all the mortgage debts. A controversy arose among the junior mortgagees as to the application of the proceeds of the sale after the senior mortgages were discharged. It was held that the several mortgages should be paid *pro rata* in the order of their priority out of the amount realized from the parcel or parcels covered by each.

²New York L. Ins. & F. Co. v. Vanderbilt, 12 Abb. 458.

SECTION 6.

SET-OFF OF JUDGMENTS.

[311] § 198. **Power to direct set-off inherent.** Courts of law or equity have power to order mutual judgments to be set off against each other on motion made for that purpose. It is not derived from or exercised in pursuance of the statutes which allow parties to set off mutual debts. It follows the general jurisdiction of a court over its suitors: it is an equitable part of such jurisdiction, and has been frequently exercised.¹ Courts proceed upon the equity of the statute of set-offs; but as their power consists in the authority they have over their suitors rather than any express or delegated authority, their action in such cases has been termed the exertion of the law of the court. Suitors may ask their interference in effecting such set-offs, not *ex debito justitiæ*, but only *ex gratia curiæ*.²

§ 199. **When it will or will not be granted.** One judgment will not be ordered to be set off against another, on motion, unless it is a judgment which is conclusive on the party against whom it is rendered, and which the party recovering and claiming the right to offset has a clear right to enforce; it must have been rendered by a court which had jurisdiction³ and must be final; this right of set-off cannot be asserted pending an appeal from the judgment.⁴ An appeal,

¹ Chase v. Woodward, 61 N. H. 79; Rhyne, 11 Rich. 631; Benjamin v. Hovey v. Morrill, id. 9; Brown v. Benjamin, 17 Conn. 110; Cooper v. Hendrickson, 39 N. J. L. 239; Matson Bigalow, 1 Cow. 206. See Zogbaum v. Oberne, 25 Ill. Ap. 213; Alexander v. Parker, 55 N. Y. 120.

² Simson v. Hart, 14 Johns. 63, 757.

³ Harris v. Palmer, 5 Barb. 105.

⁴ Pierce v. Tuttle, 51 How. Pr. 193; Hardt v. Schulting, 24 Hun, 345; De Figanieri v. Young, 2 Robert. (N. Y.) 670.

If a writ of error does not operate as a *supersedeas* an intention to obtain a review of a judgment will not interfere with the allowance of a set-off. Sowles v. Witters, 40 Fed. Rep. v. Robinson, 4 Ohio, 90; Meador v. 418.

however, only suspends the right to set-off, and the [312] court may stay proceedings on the other judgment for the protection of that right until the appeal is determined.¹ In the exercise of this jurisdiction courts will act upon the equitable as well as legal interests and relations of the parties. Applications for such set-off, not being founded on any statute or governed by any fixed or arbitrary rule, are addressed to the discretion of the court, and its discretion will be so exercised as to do equity and not to sanction fraud² or oppression.³

¹ *Pierce v. Tuttle*, *supra*; *Terry v. Roberts*, 15 How. Pr. 65.

In *Irvine v. Myers*, 6 Minn. 562, it was held that where the right of set-off was suspended by appeal after a motion made, it might remain undecided until the final determination of the appeal.

In *Blackburn v. Reilly*, 48 N. J. L. 82, it is held that after the affirmance of a judgment by the appellate court and the return of the record to the trial court, the latter may stay the execution of such judgment for the purpose of setting it off against a counter judgment.

² *Tolbert v. Harrison*, 1 Bailey, 599; *Meador v. Rhyne*, 11 Rich. 631.

³ *Williams v. Evans*, 2 McCord, 203. Williams had obtained judgment against Evans for \$188; subsequently E. obtained a judgment in trover against W. for \$240. W., instead of moving to have his judgment set off against the larger one which had been recovered against him, issued a *ca. sa.* against E. and then assigned his judgment to a third person for value. E. was imprisoned on the *ca. sa.*, and so remained until he died. At the next term, W., who seems to have repossessed himself of the judgment recovered by him, moved to have it set off against that obtained by E. On a motion to rescind an order allowing such set-off, Nott, J., said: "There is no doubt but that

the court has the power to order mutual judgments to be set off against each other. This is a common-law power, and is not derived from the act authorizing parties to set off mutual debts. . . . If it constitute a part of the equitable jurisdiction of the court, it ought to be so exercised as to do equity and not to sanction fraud; and a person who wishes to have the benefit of it ought to avail himself of the earliest opportunity to make his application, and not to delay until the interests of third persons have become involved. If the party in this case had made his application at the court when his judgment was obtained, it ought to have been granted. He had three methods of proceeding: one, that which he is now endeavoring to pursue; another by *fi. fa.* against the goods of the defendant; and the third by taking his body in execution. He chose the latter, and after having made his election (and particularly under the circumstances of this case), he ought to be bound by it; at least he can have no high claim to the assistance of the court to relieve him from the difficulty of his own voluntary creation. It is true a judgment is not a negotiable instrument; nevertheless, an assignment conveys an equitable interest to the assignee, such as a court of law will notice and respect in all cases of appeal to its discretion.

The discretion of a court in acting upon a motion to set off judgments will not be reviewed if the motion is denied.¹ In exercising their power courts will consider the rights of persons who are not parties to the action.² If a party who is entitled to a set-off has a special fund which is primarily applicable to the satisfaction of his judgment or decree he will not be permitted to avail himself of his right against the holder of an opposing judgment or decree until such fund is exhausted, and then only for any balance of his demand which is unsatisfied.³ A set-off of judgments will not be allowed if it will result in depriving a debtor of property which is exempt from execution.⁴ Were it otherwise A. might get judgment against B., seize and sell his exempt horse and obtain partial satisfaction of the judgment from the proceeds of such

Newman v. Crocker, 1 Bay, 246. A bond is not negotiable, and yet this court would so far respect the assignee of one as not to permit a judgment recovered upon it to be set off against one recovered against the obligee. The plaintiff, by taking the body of the defendant, had voluntarily relinquished every other claim upon him; and the claim which he now has upon his property is revived only by the accidental circumstance of his death. Suppose the assignee of this judgment had enforced an execution against W. in the life-time of E. and during the time he had his body in execution, could W. have required that money, while in the hands of the sheriff, to be paid over to him? Certainly not; because, having taken the body in execution, he must have been contented with it; he could not have double satisfaction. A release of E. from custody would have been a release of the debt. He had a mild and easy method of enforcing the payment of his debt, if he had chosen to make use of it. Instead of which he resorted to the most rigorous and unfeeling known to the law; like an-

other Shylock, he would have nothing short of his flesh; and having no longer the means of gratifying his vengeance, he now comes and asks this court to take from a humane and merciful creditor a vested right, to satisfy a debt which he had it in his power to receive, and which he voluntarily relinquished to gratify a vindictive passion. The motion must be granted." See *Cooper v. Bigalow*, 1 Cow. 206.

¹ *Chipman v. Fowle*, 180 Mass. 352.

² *Meador v. Rhyne*, 11 Rich. (S. C.) 631; *Simmons v. Reid*, 31 S. C. 389.

³ *Nuzum v. Morris*, 25 W. Va. 559. See *Payne v. Webb*, 29 id. 627.

⁴ *Butner v. Bowser*, 104 Ind. 255; *Puett v. Beard*, 86 id. 172; *Junker v. Hustes*, 113 id. 524; *Beckman v. Manlove*, 18 Cal. 388; *Duff v. Wells*, 7 Heisk. (Tenn.) 17; *Collett v. Jones*, 7 B. Mon. (Ky.) 586; *Johnson v. Hall*, 84 Mo. 210. *Contra*, *Temple v. Scott*, 3 Minn. 419, ruled by a divided court, and on the theory that exemption statutes are to be strictly construed; a rule of construction opposed to the great weight of authority. *Sutherland's Stat. Const.*, §§ 420-422. See *Mallory v. Morton*, 21 Barb. 424.

sale. If B. should then recover a judgment for damages against A. the latter might set off the unsatisfied portion of his judgment against it. Thus B. would lose his horse, and A., by a violation of the law, would collect a portion of his judgment against an insolvent debtor. B.'s judgment ought to take the place of his horse. But this exemption from liability to set-off is not to be extended to judgments in favor of the owner of exempt property for damages for its wrongful taking in attachment proceedings, the property being in his possession.¹ A court of equity may set off judgments when courts of law cannot because they are not between the same parties. But this will not be done unless the moving party shows equitable ground for it; he must make it appear that his rights are superior to any equitable right in favor of the other party.²

§ 200. Interest of the real parties considered. The [313] parties beneficially interested may assert their right, and a set-off between the nominal parties will be refused where it would be prejudicial to those having equitable interests.³ Thus, a court will not order a judgment against an executor in his own right to be set off against a judgment in his favor on a promissory note taken for goods of his testator sold by him if it appear that the creditors or legatees of the testator will be thereby prejudiced.⁴ It will not be allowed in favor [314]

¹ Johnson v. Hall, 84 Mo. 210.

² Howe Machine Co. v. Hickox, 106 Ill. 461.

³ Daniels v. Bush, 80 Ga. 218.

⁴ Tolbert v. Harrison, 1 Bailey, 599. In this case the court say: "The note given to the executor for a contract made with him must be treated and considered as his own. In a legal point of view it was the note of Sterling Harrison to Jos. S. Tolbert. It is, however, unquestionable that in fact it was a part of the assets of the estate of his testator; and the executor might and ought to have treated it as such. He, on the present occasion, claims that it should be considered as the assets of the estate. This is the equity of the case; and the

court of equity, in the exercise of the jurisdiction which legitimately belongs to it over trustees, will follow a note of hand as the property of an estate if really taken for assets of the estate sold by the administrator, though the note be taken in the private name of the administrator. Glass v. Baxter, 4 Desaus. 153. The question is whether this court is bound by legal rules to set off judgments in all cases where they are in the same right. It is clear that it is not."

In Ames v. Bates, 119 Mass. 397, W. purchased of A. a claim against B. pending an action by A. upon the claim. B. had previously purchased a claim against A. and had given no-

of the nominal judgment creditor where it appears that before the judgment was obtained the cause of action had been [315] assigned to a third person.¹ But if the right exists at the time of the assignment of a judgment, the assignee will

tice thereof to A. Suit was brought thereon by B. in which W. appeared as adverse claimant of funds in the hands of B. summoned as trustee. At the time of his purchase of the first claim W. had no knowledge of the claim against A. Held, that judgment for the plaintiff in the second action could not be set off against judgment for the plaintiff in the first action. The court say: "While there is no express statute authority for setting off judgments where the creditor in one action is the debtor in another, except in a limited number of cases (Gen. Stats., ch. 126, §§ 2, 3, 5), yet this power has been frequently exercised by courts of law, and rests upon their jurisdiction over suitors in them and their general superintendence of proceedings before them. *Makepeace v. Coates*, 8 Mass. 451; *Greene v. Hatch*, 12 Mass. 195. Such a power is only to be exercised upon careful consideration of all the circumstances of the transactions out of which the judgments arise, and in order to protect the just rights of parties. In the present case the nominal parties to the judgments are not the same, nor is the equitable owner of the judgment recovered in the name of Ames the defendant in the suit of which Bates is the equitable owner. But even if Ames had continued to be the owner of the judgment recovered in his name, it might well be questioned whether Bates should be permitted to set off against it the judgment recovered by him in the name of Freeman and another, when he could not have set off the claim upon which

the judgment was founded. The reason why a party is not permitted by the statute to set off such claims may fairly be presumed to be, that it is not just that one should be encouraged, instead of paying his own debt, to seek out claims against his creditor in order thus to change the position of parties *pendente lite*; and this reason is equally applicable to judgments which may afterwards be obtained upon such claims. However this might be as to Ames himself, it is clear that as to the assignee of Ames, Bates should not be allowed to effect this change. When the equitable rights of third parties would be affected by an offset of this character it is not to be made to the injury of intervening rights honestly acquired. *Greene v. Hatch*, *ubi supra*; *Zogbaum v. Parker*, 55 N. Y. 120; *Gay v. Gay*, 10 Paige, 369; *Ramsey's Appeal*, 2 Watts, 228."

In *Carter v. Compton*, 79 Ind. 37, T. obtained judgment against the estate of S. on a note. The executors of S. held a note of a later date against T., which was executed to them in their representative capacity. Judgment upon it was set off against the first mentioned judgment.

¹*Swift v. Prouty*, 64 N. Y. 545; *Perry v. Chester*, 53 N. Y. 240; *Mackey v. Mackey*, 43 Barb. 58; *Turner v. Satterlee*, 7 Cow. 480; *Nash v. Hamilton*, 8 Abb. 35.

It is held in *Williams v. Taylor*, 69 Ind. 48, that if at the time a judgment is pleaded in set-off the equitable title to it is in one person and the legal title in another, the latter will prevail.

stand only in the shoes of the assignor.¹ The assignee of a judgment is not affected by equities which arise between the parties to it subsequent to the assignment.² Nor is the assignee of all rights and demands under a contract charged with notice of such of its stipulations as are wholly distinct from that portion of it which he is concerned with; as where an instrument provides for closing up an existing, and also for carrying on a new, business. The subject-matters are so dissociated that they are several contracts. Hence the assignee of rights under the clause relating to prosecuting a new business is not charged with knowledge of the existence of a judgment against his assignor on account of a breach of the other provision, and such judgment cannot be set off against one subsequently rendered in his favor.³ As between two persons who hold judgments by assignments the one prior in time has the right to be paid first by the judgment he holds, and such judgment is not subject to set-off by the assignor of it who subsequently purchased an assignment of a judgment against the holder.⁴

§ 201. Set-off not granted before judgment. The right does not attach on the recovery of a verdict merely, and if

¹ *Lammers v. Goodeman*, 69 Ind. 76; *McBride v. Fallon*, 65 Cal. 301; *Peirce v. Bent*, 69 Me. 381; *Wells v. Clarkson*, 5 Mont. 336; *Brown v. Hendrickson*, 39 N. J. L. 239; *Chamberlin v. Day*, 3 Cow. 353; *Ferguson v. Bassett*, 4 How. Pr. 168; *Noxon v. Gregory*, 5 id. 339; *Cooper v. Bigalow*, 1 Cow. 56, 206; *Turner v. Crawford*, 14 Kan. 499. See *Duncan v. Bloomstock*, 2 McCord, 318; *Ramsey's Appeal*, 2 Watts, 228.

"Cases often occur in which the set-off of one judgment against another is allowed regardless of a prior assignment of one to a third person. Such cases are, where the assignee has taken the judgment charged with notice of the right of set-off as an existing defense (*Rowe v. Langley*, 49 N. H. 395); where, through insolvency of the assignor at the time of the assignment, the party claiming

the right of set-off had no other means of collecting his debt (*Gay v. Gay*, 10 Paige, 369, 375); and where, in anticipation of an application to make the set-off, the assignment was made for the purpose of defeating the right. *Duncan v. Bloomstock*, 2 McCord, 318. In all cases where the assignment is without consideration, not in good faith, or fraudulently made to defeat the application, the court will direct the set-off to be made. *Cross v. Brown*, 51 N. H. 486; *Hurst v. Sheets*, 14 Iowa, 322; *Russell v. Conway*, 11 Cal. 93; *Morris v. Hollis*, 2 Harr. (Del.) 4; *Duncan v. Bloomstock*, *supra*." *Hovey v. Morrill*, 61 N. H. 9.

² *Wyvell v. Barwise*, 43 Minn. 171.

³ *Howe Machine Co. v. Hickox*, 106 Ill. 461.

⁴ *McAdams v. Randolph*, 42 N. J. L. 332.

that be assigned before judgment thereon is rendered it is not subject to a set-off of a judgment against the assignor.¹

§ 202. Assignee must make an absolute purchase. The assignee of a judgment, to be entitled to assert this right of set-off, must acquire the judgment absolutely.² If the purchase is made on the condition that the motion for set-off is successful, and otherwise to be void, the ownership is not acquired with sufficient absoluteness to enable the assignee to use it as a set-off.³ An assignment upon condition of a rescission of the transfer in case the assignee cannot avoid a set-off is not sufficiently absolute.⁴ Nor will an assignment of a judgment to be collected for the assignor, less compensation for collecting, confer the requisite ownership.⁵ A party seeking to set off a judgment in his favor against one recovered against him should be the owner of the judgment in his own [316] right.⁶ The mutual judgments should be in the same right.⁷ It is immaterial in whose names they were respectively recovered; the right of set-off exists between the several beneficial owners and is confined to them. It is no objection that the mutual judgments are not nominally due to and from the same number of persons;⁸ if the equitable

¹ Graves v. Woodbury, 4 Hill, 559; Baggett v. Jefferson C. P., 10 Wend. 615; People v. Judges, etc., 6 Cow. 598; Garrick v. Jones, 2 Dowl. P. C. 157; Wood v. Merritt, 45 How. Pr. 471. See McAdams v. Randolph, 42 N. J. L. 332.

² Jones v. Chalfant, 55 Cal. 505.

³ Butler v. Niles, 26 How. Pr. 61; S. C., 35 id. 329.

⁴ Gilman v. Van Slyck, 7 Cow. 469.

⁵ Porter v. Davis, 2 How. Pr. 30. It was held in Butler v. Niles, *supra*, that even if a plaintiff, in an action to procure a set-off of a judgment, be entitled to set off the judgment assigned to him against one recovered against himself, he cannot make use of such assigned judgment to defeat the incident claims for costs growing out of proceedings instituted before the assignment, if properly commenced. Such proceedings

may have been legitimate and necessary consequences of the judgment when taken; and he has no right to take away the foundation of such proceeding, if still pending, by satisfying the judgment with those held by him. It is not equivalent to payment and acceptance in satisfaction *pendente lite*.

⁶ Mason v. Knowlson, 1 Hill, 218.

⁷ Holmes v. Robinson, 4 Ohio, 90.

Although where one of the parties in two cross-actions has assigned his interest to a third party there may be no right to set off the judgments, yet, where the assignee, being the real plaintiff in one action, is also the real defendant in the other, there is such right of set-off. Standeven v. Murgatroyd, 27 L. J. (Exch.) 425.

⁸ Id.; Simson v. Hart, 14 Johns. 63, 75; Peirce v. Bent, 69 Me. 381, holding that a judgment in favor of a

claims of many become vested in one, they may be set off against separate demands, and *vice versa*.¹

§ 203. **Nature of action immaterial.** Nor is it material what was the original cause of action, whether in tort or contract; when a final judgment is obtained the original cause is merged, the judgment becomes technically a contract of record, and on motion it may be made to mutually compensate and satisfy another.² Nor is it necessary that both judgments should be recovered in the same court.³ The motion should be made in the court where the judgment against the moving party was obtained.⁴ And the moving papers should be entitled in all the causes, whether in the same court or not.⁵

§ 204. **Liens of attorneys.** In England for a long time there were two conflicting rules as to the right of a judgment debtor to set off a judgment in disregard of the lien of his attorney. Such right was denied by the court of king's bench if the exercise of it affected the attorney's lien for costs.⁶ The common pleas courts held that the equitable rights of the parties were superior to the attorney's lien.⁷ In

principal alone may be applied in satisfaction of one against him and his sureties.

In *Brown v. Hendrickson*, 39 N. J. L. 239, it is said that in testing the right to a set-off it is not necessary that the judgments should be in the same right; it is enough if the judgment prayed to be set off may be enforced at law against the party recovering the judgment to be satisfied by the set-off, provided it is not in a representative capacity.

¹ *Id.*; *Buller's Nisi Prius*, 836.

² *Puett v. Beard*, 86 Ind. 172; *Langston v. Roby*, 68 Ga. 406; *Sowles v. Witters*, 40 Fed. Rep. 413, holding that a decree in equity may be set off against a judgment at law; *Howell v. Shands*, 85 Ga. 66; *King v. Hoare*, 18 M. & W. 494, 504.

³ *Taylor v. Williams*, 14 Wis. 155; *Kimball v. Munger*, 2 Hill, 364; *Barker v. Braham*, 2 W. Black. 869; *Hall v. Ody*, 2 B. & P. 29; *Bridges*

v. Smyth, 8 Bing. 29; *Bristowe v. Needham*, 7 M. & G. 648; *Coxe v. State Bank*, 8 N. J. L. 472; *Noble v. Howard's Ex'r*, 2 Hayw. 14; *Ewen v. Terry*, 8 Cow. 126; *Ross v. Hicks*, 11 Barb. 481; *Irvine v. Myers*, 6 Minn. 562. *Contra*, *Tenant v. Marmaduke*, 5 B. Mon. 76.

In *Schultz v. Kearney*, 47 N. J. L. 56, a decree in admiralty rendered by a federal court was set off against a judgment recovered in a state court.

⁴ *Brookfield v. Hughson*, 44 N. J. L. 285; *Taylor v. Williams*, 14 Wis. 155; *Dunkin v. Vandenberg*, 1 Paige. 622; *Cooke v. Smith*, 7 Hill, 186; *Ross v. Hicks*, 11 Barb. 481; *Russell v. Conway*, 11 Cal. 93.

⁵ *Alcott v. Davison*, 2 How. Pr. 44. In North Carolina the practice has been to set off judgment by *scire facias*. *Noble v. Howard's Ex'r*, 2 Hayw. 14.

⁶ *Mitchell v. Oldfield*, 4 T. R. 123.

⁷ *Schoole v. Noble*, 1 H. Black. 28.

1853 the rules adopted made the practice in the king's bench applicable to all the courts, while the judicature act of 1873 adopted the other rule. The rule of the common pleas has been adopted in many jurisdictions in this country;¹ while others follow that of the king's bench.² But where the equitable power of a court is invoked by motion the statute of set-off is not the obligatory guide, and the court proceeding upon [317] its own discretion will sustain the attorney's lien and give it preference.³ An attorney has a lien for his costs upon money recovered by his client or awarded him in a cause in which the attorney was employed, in case the money has come into his hands; or he may stop it *in transitu* by giving notice to the opposite party not to pay it until his claim for costs is satisfied, and then moving the court to have the amount thereof paid to him in the first instance. And if, notwithstanding such notice, the other party pay the money to the client, he is still liable to the attorney for the amount of his lien; and the latter in such case will not be prejudiced by any collusive release given by his client. But unless such notice is given the client may compromise with the opposite party, and give him a release without the intervention of his attorney; and he in that event can afterwards look to his client only for

¹ Benjamin v. Benjamin, 17 Conn. 110; Turner v. Crawford, 14 Kan. 499; Sanders v. Gillett, 8 Daly, 183; Nicoll v. Nicoll, 16 Wend. 446; Roberts v. Carter, 24 How. Pr. 44; Brooks v. Hanford, 15 Abb. Pr. 342; Hayden v. McDermott, 9 id. 14; People v. New York C. P. C., 13 Wend. 649; Hovey v. Rubber Tip P. Co., 14 Abb. (N. S.) 66; Watson v. Smith, 63 Iowa, 228; Mosely v. Norman, 74 Ala. 422; Wright v. Treadwell, 43 Md. 212; Fairbanks v. Devereux, 58 Vt. 359; Bosworth v. Tallman, 66 Wis. 533.

In New York, since the enactment of 1879, no set-off is allowed as against the lien of an attorney. Ennis v. Curry, 22 Hun, 584; Naylor v. Lane, 66 How. Pr. 400; S. C., 18 J. & S. 97.

² Currier v. Boston & M. R. Co., 37

N. H. 223; Stratton v. Hussey, 62 Me. 286; Puett v. Beard, 86 Ind. 172; Dunklee v. Locke, 13 Mass. 525; Boyer v. Clark, 3 Neb. 161; Robertson v. Shutt, 9 Bush, 659; Carter v. Davis, 8 Fla. 183; Caudle v. Rice, 78 Ga. 81. See Langston v. Roby, 68 id. 406.

³ Simmons v. Reid, 31 S. C. 389; Diehl v. Friester, 37 Ohio St. 473; Ward v. Wordsworth, 1 E. D. Smith, 598; Haight v. Holcomb, 16 How. Pr. 163; Peckham v. Barcalow, Lallor's Supp. 112; Smith v. Lowden, 1 Sandf. 696; Gihon v. Fryatt, 2 id. 638; Sweet v. Bartlett, 4 id. 661; Roberts v. Carter, 17 How. Pr. 341; S. C., 24 id. 44; Martin v. Kanouse, 17 id. 146; De Figaniere v. Young, 2 Robt. 670; Hovey v. Rubber Tip P. Co. 14 Abb. (N. S.) 66; Bishop v. Garcia, id. 69.

payment.¹ This lien has sometimes been supposed to be confined to some fixed and certain amount allowed to an attorney by statute, and that it does not extend to a *quantum meruit* claim for his services.²

¹Graham Pr. 61; Ex parte Kyle, 1 Cal. 332; Mansfield v. Dorland, 2 Cal. 507; Russell v. Conway, 11 Cal. 93; Wilkins v. Batterman, 4 Barb. 47; Ten Broeck v. De Witt, 10 Wend. 617; Bradt v. Koon, 4 Cow. 416; Martin v. Hawks, 15 Johns. 405; Chapman v. Haw, 1 Taunt. 341; Omerod v. Tate, 1 East, 464; Turwin v. Gibson, 3 Afk. 720; Read v. Dupper, 6 T. R. 361; Wilkins v. Carmichael, 1 Doug. 101; Schoole v. Noble, 1 H. Black. 28; Ackerman v. Ackerman, 14 Abb. Pr. 229; Bishop v. Garcia, 14 Abb. (N. S.) 69.

²Ex parte Kyle, 1 Cal. 332; Daven-

port v. Ludlow, 4 How. Pr. 337; Benedict v. Harlow, 5 id. 347. But a more reasonable view, in the writer's judgment, is to be found in the able opinion of Daly, J., in Ward v. Wordsworth, 1 E. D. Smith, 598, where it is held that the abolition by the code of all statutes regulating the fees of attorneys, and of all rules or provisions of law preventing an attorney from agreeing with his client for his compensation, and leaving the measure thereof to the contract of the parties, has not affected the right of the attorney to his lien.

CHAPTER VI.

PECUNIARY REPRESENTATIVE OF VALUE.

SECTION 1.

MONEY.

- § 205. Characteristics of money.
- 206. Payment to be made in money of country of performance.
- 207. Payment in currency.
- 208. Effect of changes in the value of money.
- 209. Value of money at time of contracting.
- 210. The legal tender act.
- 211. Effect of fluctuations in currency.

SECTION 2.

PAR AND RATE OF EXCHANGE.

- 212. Par of exchange.
- 213. Rate of exchange.

SECTION 1.

MONEY.

[318] § 205. Characteristics of money. All civilized nations have some method or system of pecuniary remuneration, based upon an arbitrary unit of value sanctioned by law. By it accounts are kept, the amounts of debts and judgments expressed, and wealth computed. They have, also, gold and silver coins, either representing that unit or some multiple of it, or other value estimated with reference to it. These are of intrinsic value, and being made and issued by the sovereign power are acceptable to everybody and therefore have a universal currency as a convenient and necessary medium of exchange and payment. They are money in the strict sense.

[319] All pecuniary obligations are measured by and expressed in the value they represent, and are solvable by them. Nor can such obligations be otherwise liquidated or paid, except by agreement, unless the state which has the power to coin money prescribes some other form of legal money. The precious metals, being valued according to a uniform and fixed standard, are the only proper measure of value. Their

value is determined by weight and purity, and the impress on the coins is a certificate so generally relied upon that the pieces readily pass for their nominal value by count.

Money is cosmopolitan. A contract which is a money contract where it is entered into and to be performed is a money contract everywhere. To this extent the money of one nation is treated as money by another, as distinguished from a mere chattel or a commodity. Thus, money lent in India in *pagodas*, and sued for in England as money lent, was held recoverable in that form. It was contended that the averment that the defendant was indebted for "lawful money of Great Britain" was not supported; but Gibbs, J., said, "the doctrine contended for has been exploded these thirty [320] years."¹ The real meaning of such a count was afterwards explained to be that the defendant is indebted for money of such a value or amount in English money.² So a contract made and to be performed in the same country, for the payment of what is money at the time of contracting will be held a money contract after that currency has been abolished and another entirely different has been substituted.

§ 206. Payment to be made in money of country of performance. Contracts for the payment of money are deemed payable in the legal money of the country where payment is to be made, unless a contrary intention appears; that [321] is, a contract for the payment within the United States of dollars is presumptively payable in dollars of our decimal currency. If a contract be made here, and even not within the law merchant, and between citizens of the United States, and to be performed here, for the payment of a sum stated in the denominations of a foreign currency, it is undoubtedly to be treated as a money contract, the same as if made and to be performed in the country where such currency is the legal money.³ Debts have no *situs*; they are payable everywhere; and in every country where payment may be either tendered

¹ *Harrington v. Macmorris*, 5 Taunt. 228.

glazure, Sneed (Ky.), 2; *Sheehan v. Dalrymple*, 19 Mich. 239.

² *Ehrensperger v. Anderson*, 3 Exch. 148. But see *McLachlan v. Evans*, 1 Y. & J. 380; *Pollock v. Col-*

³ See *Mervine v. Sailor*, 52 Pa. St. 18; *Christ Church Hospital v. Fuechsel*, 54 id. 71; *Mather v. Kinike*, 51 id. 425; *Sears v. Dewing*, 14 Allen, 418.

or demanded, they are strictly payable in the legal currency or money of that country, and in no other currency unless strictly at maturity. A sterling debt contracted or incurred in England, a debt payable in francs incurred in France, or a contract payable in pistoles entered into in Spain, when sought to be enforced or paid in the United States, is a contract for an equivalent amount payable only in the lawful money of the United States. The very currency in which the contract by its terms was payable, if tendered in this country after maturity, would be no legal offer of payment; it would not be a tender which would stop interest. Contracts made abroad, or payable in foreign currency, are treated as money contracts; but the money specified therein, if not tendered when due, is no longer the money in which the damages due would be computed, except within the jurisdiction where such money is the lawful currency.

§ 207. **Payment in currency.** Bank bills and other paper currency circulate as money. It is not strictly such, for no debtor has a legal right to discharge a money obligation with such currency unless it is made legal tender by law; the creditor may refuse to receive it; but when it is paid and received, it is paid and received as money. The receipt of bank bills, dollar for dollar, upon a debt, is not conditional payment, depending on diligence of the payee in presenting the bills to [322] the bank and obtaining legal-tender funds; nor is it accord and satisfaction.¹ A contract payable in currency or in

¹ *Solomon v. Bank of England*, 13 East, 135; *Pickard v. Bankes*, id. 20; *Corbit v. Bank of Smyrna*, 2 Harr. 235; *Ware v. Street*, 2 Head, 609; *Magee v. Carmack*, 13 Ill. 289; *Lightbody v. Ontario Bank*, 11 Wend. 1; *Ontario Bank v. Lightbody*, 18 id. 101; *Wainwright v. Webster*, 11 Vt. 576; *Fogg v. Sawyer*, 9 N. H. 365; *Frontier Bank v. Morse*, 22 Me. 88; *Westfall v. Braley*, 10 Ohio St. 188; *Harley v. Thornton*, 2 Hill (S. C.), 509, n.

In *Maynard v. Newman*, 1 Nev. 271, Beatty, J., said: "Money means anything which passes current as the

common medium of exchange and measure of value for other articles, whether it be the bills of private or incorporated banks, government bills of credit, treasury notes or pieces of coined metal. Money is anything which by law, usage or common consent becomes a general medium by which the value of other commodities is measured and denominated. Paper money is distinguishable from other negotiable paper, such as notes, bills of exchange, etc., because it is always, after once put in circulation, payable to bearer, not to order; because it is made to represent con-

funds, qualified by any term which imports money, is a money contract. A check for "current funds" calls for current money — par funds, money circulating without discount.¹ This term, as well as "currency," is held in Illinois to exclude depreciated paper money.² A note payable in "current Florida money" is payable in good funds.³ "Canada currency" is equivalent to lawful money of Canada.⁴

§ 208. **Effect of changes in the value of money.** The amount due by contract is sometimes subject to question by reason of fluctuations in the value of the money in [323] which the contract was made payable. These fluctuations may be caused by the state debasing the coins which represented that money, or by arbitrary changes in the value of

venient amounts for the ordinary transaction of business, is printed and written on paper not easily worn out, and therefore capable of being passed from hand to hand for a long time without destruction. By general consent it is used and treated as money and not as negotiable paper. If one indorses his name on such a note he does not thereby become responsible for the insolvency of the bank, but merely guaranties that the note is not a counterfeit. Neither the courts of law, nor the community, treat such paper as negotiable securities, but as *money*, something which is used as a general representative and measure of values." *Woodruff v. Mississippi*, 66 Miss. 298; 6 South. Rep. 335.

A genuine silver coin worn smooth by use, not appreciably diminished in weight and identifiable, is a legal tender. *Jersey City & B. R. Co. v. Morgan*, 52 N. J. L. 60. See *United States v. Lissner*, 12 Fed. Rep. 840.

¹*Klauber v. Biggerstaff*, 47 Wis. 551; *Mare v. Kupper*, 34 Ill. 286. *Contra*, *Huse v. Hamblin*, 29 Iowa, 501.

That term was held to have a specific, legal and well known meaning

which cannot be contradicted or explained by parol. See *Moore v. Morris*, 20 Ill. 255. In *Phoenix Ins. Co. v. Allen*, 11 Mich. 501, it was held that a note payable in "current funds," in the absence of all evidence showing that anything else is current at the place of payment, must be regarded as payable only in such funds as are current by law.

"Current money" means "currency of the country," whatever is intended to and does actually circulate as money; every species of coin or currency; the specification of dollars in connection with those words serves only to measure the quantity of the notes or currency, not their value, which may be ascertained by proof. There is no distinction between a note for so many dollars in currency and one for so many dollars "payable in currency." *Miller v. McKinney*, 5 Lea (Tenn.), 98; *Commissioners v. McCormick*, 4 Mont. 115, 133.

²*Springfield M. & F. Ins. Co. v. Tincher*, 30 Ill. 399; *Webster v. Pierce*, 35 Ill. 158.

³*Williams v. Moseley*, 2 Fla. 304.

⁴*Black v. Ward*, 27 Mich. 191.

existing denominations of the legal currency; and so the value of paper money will rise and fall with the fluctuations in the credit of its maker. Suppose a contract for the payment of \$100 made while the present decimal system is in force; and while that contract is pending congress revises that system and retains a dollar as a unit of value representing only fifty cents. Uninfluenced by any provision that the new dollar shall be a legal tender for all debts at their nominal value would a hundred of these dollars discharge the principal of the debt under the supposed contract? The injustice of holding the affirmative is apparent. The new dollars would not be those of the contract; by paying a hundred of them the promisor does not pay the value which he undertook to pay, and which was expressed by the contract. He, of course, would be entitled to pay in the money which was lawful and current when the contract required payment to be made; but as the word dollar is but a representative of value, that value should be ascertained by the legal sense of the term when the contract was made. Though the parties contracted with a knowledge of the power of congress to make the subsequent changes, it does not follow that they impliedly agreed that the value stipulated to be paid, as fitly expressed in the contract, should be modified by an arbitrary change in the meaning of the terms which had been employed to express their intention. This view is so obviously just that it is a matter of surprise it should ever have been questioned.¹

¹ See 2 Daniel on Neg. Inst., § 1214; Story's Confl. Laws, §§ 813, 813a. The case of Mixed Moneys, Davis, 28, rests on a contrary view. A bond was given for "£100 sterling current and lawful money of England," to be paid in Dublin, Ireland. Between the time of making the bond and its becoming due, Queen Elizabeth recalled the existing currency in Ireland and issued a new debased coinage called mixed money, declaring it to be lawful currency in Ireland. Of this debased coin a tender was made in Dublin, and it was held good. In a note to § 813a of Story's Confl. Laws, it is said: "The court do not seem to have considered that the true value of the English current money might, if that was required by the bond, have been paid in Irish currency, though debased, by adding so much more as would bring it to the par. And it is extremely difficult to conceive how a payment of current lawful money of England could be interpreted to mean current or lawful money of Ireland, when the currency of each kingdom was different, and the royal proclamation made a distinction between them, the mixed money being declared the

§ 209. Value of money at time of contracting. When [324] a bill is drawn in one country payable in and in the coin of another, the value of which, intermediate the drawing [325] and payment, is reduced by the government, it has been held that payment should be made according to the value of the money at the time the bill was drawn.¹ The common law cannot be deemed settled on this point; nor are the writers on

lawful currency of Ireland only. Perhaps the desire to yield to the royal prerogative of the queen a submissive obedience as to all payments in Ireland may account for a decision so little consonant with the principles of law in modern times. Sir William Grant, quoting Vinnius, in *Pilkington v. Commissioner for Claims*, 2 Knapp, 18 to 21, affirms the better doctrine. 'He (Vinnius) takes the distinction, that if, between the time of contracting the debt and the time of its payment, the currency of the country is depreciated by the state, that is to say, lowered in its intrinsic goodness, as if there were a greater proportion of alloy put into a guinea or a shilling, the debtor should not liberate himself by paying the nominal amount of his debt in the debased money; that is, he may pay in the debased money, being the current coin, but he must pay so much more as will make it equal to the sum he borrowed.' But he says (and this seems contradictory of the foregoing), if the nominal value of the currency, leaving it unadulterated, were to be increased, as if they were to make the guinea pass for 30s., the debtor may liberate himself from a debt of £1 10s. by paying a guinea, although he borrowed the guinea when it was but 21s." And the case of *Reynolds v. Lyne's Ex'r*, 3 Bibb, 840, is in accord with that principle. A contract was made when a dollar was 5s. 9d. for the payment of a sum at a future day on the

performance of a concurrent act of the payee. Before the money became payable, the state where the contract was made enhanced the value of the dollar to 6s. Subsequently payments were made and a dispute arose whether the money paid should be estimated at the rate of currency when the money was paid, or when the contract was made. Finally, the obligation in question was given for a balance of the original debt remaining by estimating the payment according to the value of a dollar at the date of the contract, viz., 5s. 9d., for which judgment at law had been rendered. The question arose on a bill in equity for relief on the ground of mistake against that obligation and the judgment founded upon it. Judge Owsley said; "When the original obligation . . . was made the legislature of Virginia had the power to regulate the currency of their coin within the limits of that state; and as the contract . . . was made within the limits of that state, the promise . . . to pay in current money of Virginia must have been agreed on with a knowledge of the state sovereignty, and subject to its control in regulating the currency. We are of the opinion, therefore, that the original obligation . . . might have been satisfied by payment in current money at its value when Lyne became entitled to demand payment;" and that relief was granted against the judgment.

¹ *Du Costa v. Cole*, Skin. 272; *Chitty*

the civil law in accord upon it. The opposite view is apparently based on the assumption that in money we do not regard the coins which constitute it, but only the value which the sovereignty has been pleased that they shall signify.¹ But coins have, in the world's exchanges, an intrinsic value which no sovereignty can affect by arbitrary regulation. And if by a regulation concurrently adopted by all nations, the coins of each were uniformly either debased or enhanced in value without a corresponding change of their intrinsic value, the change would be immediately followed by an equal advance or decline in the price of property. If the change were made in the value of the coins of one country only, it would be at once succeeded by a fluctuation in prices of property measured by it, showing that their purchasing power had undergone no essential modification; and the same conclusion would result from a comparison of the value of such coins with the coined money of other nations. When a contract is made for the payment at a future day of a given amount of money in specified legal denominations, having at the date of the contract a fixed legal value, are not the intention and legal obligation of the parties to be ascertained by the import at that time of the terms used? Undoubtedly a debt created by contract which can be paid with money can be satisfied by whatever medium of payment is legal tender at the time it is due and payable,² if paid then; and it may be added, that at all times afterwards it will be solvable in any money which for the time being is legal tender at the place where payment may be demanded or tendered, whether it be the place of contract or elsewhere.³

on Bills, *399. See Anonymous, 1 Hayw. Law and Eq. by Batt. 354.

A will speaks from the time of the testator's death, and a legacy of a certain number of dollars is payable in such dollars as were then standard. *Graveley v. Graveley*, 25 S. C. 1.

If at the time a contract which provides for its discharge in lawful silver money is made silver coins of all denominations are legal tender, the fact that subsequently such coins are a legal tender for only a small

proportion of the amount due does not prevent the payment of the obligation in the manner stipulated. *Parrish v. Kohler*, 11 Phila. 346.

Damages are assessable in the same kind of money as the contract calls for. *Martin v. Evans*, 14 Phila. 122.

¹ See Story Conf. Laws, § 318b.

² *Higgins v. Bear River, etc. Co.*, 27 Cal. 153; *Wilson v. Morgan*, 4 Robt. 58.

³ *Downman v. Downman*, 1 Wash. (Va.) 26.

The legal currency which may be applicable at the place of contract, when the debt becomes due and is actually demanded, or sought by tender to be paid, may be as unlike that [326] mentioned in the contract as though the demand of payment or tender were made in another country. Upon general principles and legal analogies the value should be ascertained by the legal reading of the contract at the time it was made, and this is payable in any currency which is legal tender when payment is actually made.¹ If when and where payment is made the currency consists of coins of the same or a different name, and represent different values from those named in the contract, or the same values, but have been either debased or the contrary, the par should be ascertained of the money of the contract, and that par should be the measure of the amount due. This question may be precluded by the new currency, or that which is offered in payment being made a lawful tender for the particular debt at the nominal value of such currency. Under such legislation, these general views have but a subordinate influence; the practical question then being what is the effect of the statute.

§ 210. **The legal tender act.** Under the legal tender law of 1862 the value of the dollar was not changed, but a new legal representative of it was introduced as a medium of payment. Paper money in the form of the government's promise to pay was issued and declared to be legal tender for all debts, public and private, with certain exceptions of the former. The coinage, which had previously been the exclusive legal tender, was, however, still retained as money. During the first years after the issue of this paper currency, owing to the situation of the country, and doubtless to the circumstance that no time was fixed for its redemption in specie, it became depreciated; that is, gold and silver money was largely at a premium. As greenbacks were a legal tender for all debts payable in money generally they became, of course, the ordinary currency, and were thereby made the legal, as they were the nominal, equivalent, dollar for dollar, for the payment not only of all subsequent but also all antecedent debts.² The difference in [327]

¹ *Bronson v. Rodes*, 7 Wall. 229. *Waller*, 14 id. 297; *Bowen v. Clark*,

² *Legal Tender Cases*, 12 Wall. 457; 46 Ind. 405; *Reynolds v. Bank*, etc., *Dooley v. Smith*, 18 id. 604; *Bigler v.* 18 id. 467; *Thayer v. Hedges*, 28

market value could not be recognized when the paper dollar was offered in payment of any debts to which it was applicable by law. The court said: "A court cannot say judicially that one kind of money made a legal tender is of greater or less value than another; nor can evidence be received to prove a difference."¹ The legal equivalence in value of coined money and greenbacks is more absolutely asserted by the early than by the later decisions.² In an action for specific performance

id. 141; *Brown v. Welch*, 26 id. 116; *Bank v. Burton*, 27 id. 426; *McInhill v. Odell*, 62 Ill. 169; *Black v. Lusk*, 69 id. 70; *Morrow v. Rainey*, 58 id. 357; *Chamblin v. Blair*, id. 385; *Longworth v. Mitchell*, 26 Ohio St. 334; *Belloc v. Davis*, 88 Cal. 243.

¹ *Carpentier v. Atherton*, 25 Cal. 564; *Reese v. Stearns*, 29 id. 278; *Spencer v. Prindle*, 28 id. 276; *Poett v. Stearnes*, 31 id. 78.

² In *Buchegger v. Shultz*, 18 Mich. 420 (1865), it was held that the act of congress making treasury notes a legal tender in payment of private debts was not designed to confer a personal privilege upon debtors, but was based upon principles of state policy; and an agreement between parties waiving its provisions, and requiring a debt to be paid in gold, is illegal, and cannot be sustained. See *Linn v. Minor*, 4 Nev. 462 (1868).

In *Kimpton v. Bronson*, 45 Barb. 618, *Daniels, J.*, said: "The law has impressed them (treasury notes) with a legal value precisely equal to that of gold and silver of the same denominations for the purpose of paying individual debts with them, and it cannot permit a discrimination against them in favor of gold and silver, without allowing its authority to be substantially annulled. However the fact may be as to their value as a mere commodity, for the purpose of paying individual debts a treasury note is as completely a

legal dollar as a piece of metal of a certain weight and quality, impressed as the law directs, is a legal dollar. The one is no more so than the other for those purposes that the laws have declared them to be of equal value. Where these laws are supreme, that value must be observed and secured by courts of justice. If the obligation in this case had been such as required the delivery of one thousand eight hundred gold dollars, and not as it was, one thousand eight hundred dollars in gold or silver coin, its construction must have been different. Further, it would have been in no sense a debt within the contemplation of these statutes, and could not be affected by their provisions declaring treasury notes a lawful tender for the payment of debts." Such was the general current of decisions; namely, that all debts, whether payable in terms in gold and silver as money, or in dollars generally, were solvable in greenbacks. *Shollenberger v. Brinton*, 52 Pa. St. 1; *Appel v. Woltmann*, 38 Mo. 194; *Riddlesbarger v. McDaniel*, id. 138; *Wilson v. Morgan*, 4 Robt. 58; S. C., 1 Abb. Pr. (N. S.) 174; 30 How. Pr. 386; *Murray v. Gale*, 5 Abb. Pr. (N. S.) 236; S. C., 52 Barb. 427; *Whetstone v. Colley*, 36 Ill. 328; *Humphrey v. Clement*, 44 Ill. 299; *Galliano v. Pierre*, 18 La. Ann. 10; *Munter v. Rogers*, 50 Ala. 283.

the plaintiff had a verdict; and in September, 1860, deposited the purchase-money in court in gold to be taken out by the defendant on filing his deed. The prothonotary deposited the money with reliable bankers to his own credit. They employed the money as they did other deposits, without profit as coin; it was always subject to the prothonotary's draft. The defendant filed his deed after the passage of the legal tender law, and the prothonotary offered to pay him the money in court in legal tenders, which he refused and [328] brought trover for the gold; held, that he could not recover.¹

The earlier cases proceeded on the construction that "*all debts*" in the legal tender law of 1862 included all pecuniary liabilities, whether originating in contracts expressly to pay in gold and silver, or in "dollars" generally. But the subject received a different treatment when it came to be considered in the national supreme court. That court said congress must have had in contemplation debts originating in contract, or demands carried into judgment, and only debts of this character. And the term did not include taxes levied under state laws;² nor obligations payable expressly in coined money. Referring to a tender of United States notes in 1865 on a debt contracted in 1851, payable by the language of the contract in gold and silver coin, Chase, C. J., said there were two descriptions of money in use at the time the tender was made, both authorized by law, and both made legal tender in payments. The statute denomination of both descriptions was dollars; but they were essentially unlike in nature. The coined dollar was a piece of gold or silver of a prescribed degree of purity, weighing a prescribed number of grains. The note dollar was a promise to pay a coined dollar; but it was not a promise to pay on demand, nor at any fixed time, nor was it in fact convertible into a coined dollar. It was impossible, in the nature of things, that these two dollars should be actual equivalents of each other, nor was there anything in the currency acts purporting to make them such.³

¹ Aurentz v. Porter, 50 Pa. St. 115. loss of property according to its value

² Lane Co. v. Oregon, 7 Wall. 71. at the time and place of shipment.

³ Bronson v. Rodes, 7 Wall. 229; The place of shipment being in Canada, the value in dollars was stated
Legal Tender Cases, 12 Wall. 457.

In The Vaughan and Telegraph, 14 in the currency of Canada, which
Wall. 258, which was a collision case, was equivalent to the gold currency
there was a right to recover for the of the United States, but being stated

[329-333] Except for the payment of debts, in the sense of the legal tender law, there was no conclusive presumption that the two currencies were of equal value. Parties may by their

in dollars, the district court refused to recognize any difference between the value of a dollar of that currency and the dollar of the currency in which the judgment of the court would be payable; in other words, would allow nothing to be added to the amount stated in the dollars of Canada currency, to give the equivalent when paid in legal tender notes — holding that the loss in this way was an incident of the suit in the forum where it was brought, and was unavoidable. In the circuit court the same rule of damages was applied, but the decree gave the value of the Canada currency in legal tender notes. "These notes," said Swayne, J., "have since largely appreciated, so that while the libelants would, under the decree of the district court, if it had been paid when rendered, have received much less than the estimated value of the barley, they will now, if the circuit court be affirmed, receive much more. . . . Upon the rule of damages applied by both courts as respects the kind of currency in which the value of the barley was estimated, the libelants were entitled, on the plainest principles of justice, to be paid in specie or its equivalent. The hardship arising from the decree before us is due entirely to the delay in its payment which has since occurred, and the change which time and circumstances have wrought in the value of the legal tender currency. The decree was right when rendered, and being so, cannot now be disturbed." A minority of the court dissented, on the ground that the original decree should have been rendered for the Canada value in

gold to avoid the loss incident to the fluctuations in the value of greenbacks. See *Edmondson v. Hyde*, 2 Sawyer, 205; *Kellogg v. Sweeney*, 46 N. Y. 291.

In *Simpkins v. Low*, 54 N. Y. 179, it was held that the legal tender acts of congress relate to the effect of the notes issued thereunder as a tender in the payment of debts arising on contract; they do not forbid the recognition in other relations of the difference between coin and currency. The action was brought for the conversion of certain bonds issued by a California company, and though not in terms payable in gold, still as they were by the custom of business treated as such, recovery was permitted on a gold basis.

In *Luling v. Atlantic Mut. Ins. Co.*, 80 How. Pr. 69, it was held that where there is a specific agreement made between any *policy-holders* of a mutual insurance company and the *company* that the premiums of the former shall be paid in *gold* and the losses shall be paid by the latter in *gold*, the company on declaring its *dividends* are bound to allow such *policy-holders* a certificate of their share of the profits in accordance with a *gold standard* as compared with currency. A *notice* issued by the company to the effect that the dealers making insurances payable in gold were to participate with others in the earnings, and that these would be computed and made payable *in currency*, and the delivery by the company and acceptance of the certificates of such earnings by such *policy-holders* under said notice does not affect the legal bearing of the contract, nor make the certificates a bar to an ac-

contracts recognize not only the actual, but any estimated, difference, incur obligations on the basis of it as a considera-

tion by the policy-holders against the company to correct the account upon which these were based and for a proper readjustment. The certificates were good to the extent which they provided for only. *Baltimore & O. R. Co. v. State*, 86 Md. 519; *Bank of Prince E. I. v. Turnbull*, 85 How. Pr. 8; *Lane v. Gluckauf*, 28 Cal. 288; *Vilhac v. Biven*, id. 410; *Rankin v. Demott*, 61 Pa. St. 263.

A debt payable "in gold or its equivalent in lawful money of the U. S." requires payment to be made at the commercial value of gold when due. *Baker's Appeal*, 59 Pa. St. 318. The defendants in 1866 bought goods from plaintiffs, "Liverpool tests, monthly shipments from Liverpool to Philadelphia, . . . at three and one-fourth cents per pound, cash, gold coin, on vessel at Philadelphia;" held to be payable in gold or its equivalent. Parties could take themselves out of the operation of the legal tender law after its passage by contracting for payment in coin alone. *Frank v. Colhoun*, 59 Pa. St. 381. See Governor, Opinion in Response to, 49 Mo. 216; *The Emily B. Souder*, 8 Blatchf. 337.

In *Glass v. Abbott*, 6 Bush, 622, it was held that the difference in value between gold and greenbacks is sufficient to make usury, where there would be none if no such difference existed. But see *Reinback v. Crabtree*, 77 Ill. 182.

Money had and received maintainable for proceeds of a gold bond sold, and recovery may be had of such proceeds at its value in paper money. *Hancock v. Franklin Ins. Co.*, 114 Mass. 155.

In *Carpenter v. Atherton*, 28 How. Pr. 503, a California contract pay-

able in gold was in question; being such as under the statutes of that state, called the specific contract act, would be there enforced by requiring payment in gold, it was held proper to decree in New York that it be specifically performed, and a tender of greenbacks was held no defense. This remedy was afforded while the courts of the latter state held that legal tender notes were applicable to debts payable expressly in coined money. But in Massachusetts the courts held that the benefits of the California specific contract act could not be allowed. *Tufts v. Plymouth Gold M. Co.*, 14 Allen, 407.

In *Cooke v. Davis*, 53 N. Y. 818, it was held that a contract to deliver or receive either of the two recognized kinds of currency at a price expressed in dollars and fractions of a dollar, or at a specified percentage, is to be construed as meaning that the price is payable in the other currency. The defendant contracted to deliver to the plaintiff's assignor "\$10,000 current funds of the United States" at fifteen cents on the dollar ten months after date. It was held that the contract was to deliver \$10,000 legal tender notes for \$1,500 in coin; that it was valid, and for a breach thereof the defendant was liable. The contract was so construed, because otherwise it would be meaningless. The court below construed the promise of fifteen per cent. as payable also in legal tenders, and nonsuited the plaintiff on the ground that the contract was void for want of consideration. See *Smith v. McKinney*, 22 Ohio St. 200; also, *Caldwell v. Craig*, 22 Gratt. 340; *Turpin v. Sledd's Ex'r*, 23 id. 238.

The subject of the comparative

tion;¹ obtain damages for torts in respect to it, or recover for the loss of it as an element of damage;² and by that standard where there have been dealings on a gold basis resulting in an indebtedness,³ or an indebtedness payable in a foreign coin currency.⁴ And to insure the full benefit of the gold value of the debt or liability, judgment in coined money is authorized and required to be rendered.⁵

§ 211. **Effect of fluctuations in currency.** Where there are fluctuations in the value of the money of account, or of the currency in which the commercial business of a country is transacted, allowances have sometimes been made. These fluctuations have been very great, and are always liable to occur when the currency is paper. A promisor has a right to [334] pay in the currency of the contract at par, although depreciated, if he pays when it is due; but if he does not, and that currency is money, is the subsequent depreciation an item of legal damages to the creditor; or if it subsequently appreciates, is the increase of value an item for which allowance can be made against him? In an early case in North Carolina the court say: "Where the currency in which the judgment is to be given is equal, sum for sum, to the money mentioned in the

value of treasury notes and coin is discussed in a practical way by Beatty, C. J., in *State v. Knittschnecht*, 4 Nev. 178 (1868). See *Fabri v. Kalbfleisch*, 52 N. Y. 28; *Kupfer v. Bank of Galena*, 34 Ill. 328; *Trebilcock v. Wilson*, 12 Wall. 687; *People v. Cook*, 44 Cal. 638.

¹ *Cooke v. Davis*, 53 N. Y. 318; *Smith v. McKinney*, 23 Ohio St. 200; *Luling v. Atlantic M. Ins. Co.*, 80 How. Pr. 69.

² *Simpkins v. Low*, 54 N. Y. 179; *Kellogg v. Sweeney*, 46 id. 291; *The Vaughan and Telegraph*, 14 Wall. 258; *Fabbri v. Kalbfleisch*, 52 N. Y. 28.

³ *Hancock v. Franklin Ins. Co.*, 114 Mass. 155. But see *Wright v. Jacobs*, 61 Mo. 19.

⁴ *Christ Church Hospital v. Fuechsel*, 54 Pa. St. 71; *Mather v. Kinike*,

51 id. 425; *The Emily B. Souder*, 8 Blatchf. 337; S. C., 17 Wall. 666; *Sheehan v. Dalrymple*, 19 Mich. 239; *Colton v. Dunham*, 2 Paige, 267; *Black v. Ward*, 27 Mich. 191; *Oliver v. Shoemaker*, 35 Mich. 464.

⁵ *Bronson v. Rodes*, 7 Wall. 229; *The Emily B. Souder*, 17 id. 666; *Trebilcock v. Wilson*, 12 id. 687; *Dewing v. Sears*, 11 id. 379; *Quinn v. Lloyd*, 1 Sweeney, 253; *Currier v. Davis*, 111 Mass. 480; *Independent Ins. Co. v. Thomas*, 104 id. 192; *Chisholm v. Arrington*, 43 Ala. 610; *Kellogg v. Sweeney*, 46 N. Y. 291; *Phillips v. Dugan*, 21 Ohio St. 466; *Chesapeake Bank v. Swain*, 29 Md. 488; *Atkinson v. Clark*, 69 Ga. 460. See *Gist v. Alexander*, 15 Rich. 50; *Townsend v. Jennison*, 44 Vt. 315; *Grund v. Pendergast*, 58 Barb. 216.

bond, the jury assess damages usually for the detention to the amount of the interest accrued, but they are not obliged to assess damages to that amount only. If upon inquiry, for instance, they find that one pound of the present currency of this country is not equal to one pound of the money payable by the obligation, whether this inequality be occasioned by depreciation or any other cause, and though the money mentioned in the obligation be not foreign money, they may, in the assessment of damages, increase them beyond the amount of the interest so as to make the damages and principal equal in value to the principal and interest mentioned in the bond.”¹ But whatever may be the rule in respect to a mere conventional money, a debt or liability payable in a legal tender currency may always be discharged in that currency at par, and no allowance is made for fluctuations in its value.²

More than once in the history of this country there has been a conventional and fluctuating paper currency in general use as a substitute for and purporting to represent the denominations of an otherwise ideal legal money. During the prevalence of such currency values have been estimated and dealt with as though this depreciated money were their legal standard and measure. Questions of amount have arisen out of such transactions after this vicious currency had passed away, and [335] sums agreed to be paid while it was the general medium of exchange, and magnified in consequence of its depreciation, have been demanded when payment could be exacted in the pure, legal currency. Scaling laws have then been enacted as the only relief against the injustice and inequality of interpreting the inflated language of value which a depreciated currency had popularized by the actual legal standard subsequently

¹ Anonymous, 1 Hayw. L. and Eq. by Batt. 854. In a note to this case it is stated that there were at the same term several cases of *assumpsit* for currency more depreciated at the time of the contract than it is now, and according to the direction of the court the plaintiff recovered only the real value in the present currency, the sum demanded being reduced one-sixth,— twelve shillings having been equal to one dollar when the contract was made, and one dollar now being equal to ten shillings. See *Taliaferro v. Minor*, 1 Call, 456; *Massachusetts Hospital v. Provincial Ins. Co.*, 25 Up. Can. Q. B. 613.

² See *Faw v. Marsteller*, 2 Cranch, 10, 29; *Downman v. Downman*, 1 Wash. (Va.) 26; *Higgins v. Bear River, etc. Co.*, 27 Cal. 153; *Metropolitan Bank v. Van Dyck*, 27 N. Y. 400.

brought into practical use. This mode of relief was resorted to in the late insurgent states after the rebellion where the notes of the confederacy had necessarily been the only circulating medium; and until the subject was considered in the supreme court of the United States scaling acts were, by the decisions of several of the state courts, regarded as essential to protect debtors from the enforcement of contracts made with reference to the depreciated currency from liability to pay an equal sum in the lawful currency of the United States.¹

¹In *Omohundro v. Crump*, 18 Gratt. 703, Jaynes, J., said, in respect to notes made in Virginia in November, 1861, payable in one, two and three years: "The act of March 8, 1866, provides that in any action founded on any contract, express or implied, made and entered into between the 1st day of January, 1862, and the 10th day of April, 1865, it shall be lawful for either party to show by parol or other relevant evidence what was the true understanding and agreement of the parties, either expressed or to be implied, as to the kind of currency in which it was to be fulfilled or performed, or in reference to which as a standard of value it was made and entered into. This case does not come within the provisions of that act, because the note was made before the 1st day of January, 1862. It is doubtful, to say the least, whether parol evidence of the actual understanding and agreement of the parties as to the kind of currency in which a contract is to be fulfilled, which is expressed to be payable in 'dollars' generally, would be admissible, independently of the provisions of that act. The word 'dollars' has a definite signification fixed by law, and it is laid down that 'when the words have a known legal meaning, such for example as measures of quantity fixed

by statute, parol evidence that the parties intended to use them in a sense different from their meaning, though it was still the customary and popular meaning, is not admissible.' 1 Greenleaf Ev. § 280. See also *Smith v. Walker*, 1 Call, 24; *Commonwealth v. Beaumarchais*, 3 Call, 107. We need not decide whether such evidence could have been received in this case, because it is expressly stated in the facts agreed that there was no actual agreement.

"It is contended, however, that the law will imply an agreement under the circumstances of this case to accept confederate money in payment of the note on which the action is founded. The argument is that the note, having been made after the establishment of the confederate states, must be considered as made with reference to the actual currency of those states; and that as confederate notes were the actual currency in those states at the time the note became payable it was payable in that currency. It must be remembered, however, that confederate notes were never made a legal tender. They were never the lawful money of the country, but only a substitute for money like bank notes. Gold and silver were the lawful money of the confederate states at the time this note was made, and also at the time

In 1868 a case from Alabama brought this subject [336] before the federal court of last resort. The question was, "Whether evidence can be received to prove that a promise, made in one of the insurgent states, and expressed to be for the payment of dollars, without qualifying words, was in fact made for the payment of any other than lawful dollars of the United States?" "It is quite clear," said Chase, C. J., delivering the opinion of the court, "that a contract to pay dollars, made between citizens of any state of the Union, while maintaining its constitutional relations with the national government, is a contract to pay lawful money of the United States, and cannot be modified or explained by parol evidence. But it is equally clear, if in any other country, coins or notes denominated dollars should be authorized of different value from the coins or notes which are current here under that name, that, in a suit upon a contract to pay dollars, made in that country, evidence would be admitted to prove what kind of dollars were intended; and, if it should turn out that foreign dollars were meant, to prove their equivalent value in lawful money of the United States. Such evidence [337] does not alter or modify the contract. It simply explains an ambiguity, which, under the general rules of evidence, may be removed by parol evidence. We have already seen that the people in the insurgent states, under the confederate government, were, in legal contemplation, substantially in the same condition as inhabitants of districts of a country occu-

it became payable, according to the provisions of the act of the congress of the United States, expressly adopted by the congress of the confederate states. The principle of public law relied on by the counsel for the appellant, and quoted from Story, *Confl.*, § 242, presumes, in the absence of evidence to the contrary, that every contract is made with reference to the lawful currency of the country in which it is entered into. It does not presume it to be made with reference to any substitute for any currency which may happen to circulate. A contract made in Richmond before the war for the payment of so many dollars would not have been deemed payable in bank notes, though bank notes were then the common and practically the exclusive currency. And so in this case, if we apply to the confederate states the principle relied on, the note must be deemed payable in specie, which was the lawful money of the confederate states at the time it became payable." *Boulware v. Newton*, 18 Gratt. 708; *Hansbrough v. Utz*, 75 Va. 959.

pied and controlled by an invading belligerent. The rules which would apply in the former case would apply in the latter; and as, in the former case, the people would be regarded as subjects of a foreign power, and contracts among them be interpreted and enforced with reference to the conditions imposed by the conqueror, so in the latter case, the inhabitants must be regarded as under the authority of the insurgent belligerent power actually established as the government of the country, and contracts made with them must be interpreted and enforced with reference to the condition of things created by the acts of the governing power. It is said, indeed, that under the insurgent government the word dollar had the same meaning as under the government of the United States; that the confederate notes were never made a legal tender; and, therefore, that no evidence can be received to show any other meaning of the word when used in a contract. But, it must be remembered that the whole condition of things in the insurgent states was matter of fact rather than matter of law, and as matter of fact, these notes, payable at a future and contingent day, which has not arrived and can never arrive, were forced into circulation as dollars, if not directly by the legislation, yet indirectly and quite as effectually by the acts of the insurgent government. Considered in themselves, and in the light of subsequent events, these notes had no real value, but they were made current as dollars by irresistible force. They were the only measure of value which the people had, and their use was a matter of almost absolute necessity. And this gave them a sort of value, insignificant and precarious enough, it is true, but always having a sufficiently definite relation to gold and silver, the universal measures of value, so that it was always easy to ascertain how much gold and silver was the real equivalent of a sum expressed in this currency. In the light of these facts, it seems hardly less than absurd to say that these dollars must [338] be regarded as identical in kind and value with the dollars which constitute the money of the United States. We cannot shut our eyes to the fact that they were essentially different in both respects; and it seems to us that no rule of evidence properly understood requires us to refuse, under the

circumstances, to admit proof of the sense in which the word dollar is used in the contract before us.”¹

The presumption from the promise to pay dollars was [339] that dollars of lawful money were meant.² But this presumption was reversed by the provisions of the scaling laws enacted in some states. Payments actually received by the creditor in confederate notes were held valid.³ But it was held in some of the southern states that payments received by an agent or trustee in such currency would not have effect as such.⁴ In Tennessee, North Carolina and Georgia, however, it was held that a sheriff is authorized to receive, in the absence of instructions to the contrary, whatever kind of money is passing currently in the payment of debts of the same character as that which he has to collect, subject to the limitation that he would not be warranted in receiving any currency so depreciated as to amount to notice that the creditor would not accept it.⁵

¹Thorington v. Smith, 8 Wall. 1. See Hanauer v. Woodruff, 15 id. 448; Confederate Note Case, 19 id. 548; Gavinkel v. Crump, 22 id. 308; Effinger v. Kenney, 115 U. S. 566, and cases cited; Bailey v. Stroud, 26 W. Va. 614; Chalmers v. Jones, 28 S. C. 463.

If payment is made in a depreciated currency which is not legal tender a promise to make good the depreciation is founded on a valuable consideration; but it is otherwise where payment is made in what the law designates as money. McElderry v. Jones, 67 Ala. 203.

²Id.; Wilcoxon v. Reynolds, 46 Ala. 529; Taunton v. McInnish, id. 619; Neeley v. McFadden, 2 S. C. 169; Williamson v. Smith, 1 Cold. 1.

³Ponder v. Scott, 44 Ala. 241.

⁴Scruggs v. Luster, 1 Heisk. (Tenn.) 150; Whitley v. Moseley, 46 Ala. 480. See Williams v. Campbell, 46 Miss. 57; Powell v. Knighton, 43 Ala. 626; Fretz v. Stover, 22 Wall. 198; also

Robinson v. International L. Ass. Society, etc., 42 N. Y. 54; Bank of Old Dominion v. McVeigh, 20 Gratt. 457; Alley v. Rogers, 19 id. 366.

Executors or administrators and other trustees who were clothed with the legal title to claims due the estates they represented discharged debtors thereto by receiving payment in confederate currency in the absence of fraud or collusion. Trustees of Howard College v. Turner, 71 Ala. 429, and cases cited; Hyatt v. McBurney, 18 S. C. 199. But it was not so in the case of one whose authority was special, as an agent or attorney. Ferguson v. Morris, 67 Ala. 389.

⁵Atkin v. Mooney, Phil. (N. C. L.) 32; Emerson v. Mallett, Phil. Eq. 236; Turner v. Collier, 4 Heisk. (Tenn.) 89; Boyd v. Sales, 39 Ga. 74; King v. King, 37 id. 205; Campbell v. Miller, 38 id. 304; Hutchins v. Hullman, 34 Ga. 346; Neely v. Woodward, 7 Heisk. (Tenn.) 495. See Van Vacter v. Brewster, 1 Sm. & M. 400.

SECTION 2.

PAR AND RATE OF EXCHANGE.

§ 212. **Par of exchange.** There is no common or international unit of value; hence the business and commerce of the world are conducted in many kinds of money. It often becomes necessary, therefore, to enforce the collection of debts incurred or contracted in one currency by resort to courts whose judgments are rendered in another; and the gold and silver coins of one country often circulate as money in other countries and are current at their value, which is [340] capable of equivalent expression in the local currency. Whatever the coinage, a like amount of these precious metals will, in all forms of coined money, be of like intrinsic value, depending for its equality on weight and fineness. An amount stated in one currency which is an equivalent for the same value expressed in another is the par of exchange; it is a literal translation of the language of value in one country or currency into that of equal value in another. The true par of exchange between two countries is the equivalent of a certain amount of the currency of one in the currency of the other, supposing the currency of both to be at the precise weight and purity fixed by their respective mints;¹ or in other words, it is the amount which the standard coin of either country would produce when coined at the mint of the other.²

¹ McCulloch's Com. Dic., tit. Par of Exchange.

² Commonwealth v. Haupt, 10 Allen, 88. In a work of much merit on Negotiable Instruments, by Mr. Daniel, the par of exchange is thus explained, vol. 2, §§ 1442, 1443: "By the par of exchange is meant the precise equality of any given sum of money in the coin or currency of one country and the like sum in the coin or currency of another country into which it is to be exchanged, regard being had to the fineness and weight of the coins as fixed by the mint

standard of the respective countries. Cunningham on Bills, 417; Story on Bills, § 80. Marius says: '*Pair*,' as the French call it, 'is to equalize, match or make even the money of exchange from one place with that of another place; when I take up so much money for exchange in one place to pay the just value thereof in another kind of money in another place, without having respect to the current of exchange for the same, but only to what the moneys are worth.' Marius on Bills, 4. It is necessary to this purpose to ascer-

The par of exchange is the measure of damages only [341] when the sum for which it is substituted as an equivalent would be such if judgment could be taken in the same currency as that in which the debt exists. It is the measure where there is no question of the rate of exchange, and the

tain the intrinsic values of the different coins; and then it is a matter of arithmetical computation to arrive at the amount of one which will be the exact equivalent of a certain amount of the other into which it is to be exchanged. When this has been accomplished and the exact equivalent of a certain amount in one currency has been ascertained in another, should it be desired to transmit such amount from one country to another, the rate of exchange between the countries will be added to or subtracted from such amount, accordingly as the course of exchange is in favor of the one country or the other. So the par of exchange is the equivalency of amounts in different currencies, while the rate of exchange is the difference between these amounts at different places. Gilbert remarks on this subject, in his *Treatise on Banking*: 'The real par of exchange between two countries is that by which an ounce of gold in one country can be replaced by an ounce of gold of equal fineness in the other country. In England gold is the legal tender, and its price is fixed at £3 17s. 10½d. per ounce. In France silver is the currency, and gold, like other commodities, fluctuates in price according to supply and demand. Usually it bears a premium or *agio*.' In the above quotation the premium is stated to be 7 per *mille*; that is, it would require 1,007 francs in silver to purchase 1,000 francs in gold. At this price the natural exchange, or that

at which an ounce of gold in England would purchase an ounce of gold in France, is 25.81½. But the commercial exchange—that is, the price at which bills on London would sell on the Paris exchange—is 25 francs, 25 cents, showing that gold is 0.80 per cent. dearer in Paris than in London. Tables have been constructed to show the results of each fluctuation in the premium of gold in Paris and Amsterdam (Gilbert on Banking, 424); and in Cunningham on Bills it is said: By the par of exchange is meant the precise equality between any sum or quantity of English money and the money of a foreign country into which it is to be exchanged, regard being had to the fineness as well as to the weight of each. When Sir Isaac Newton had the inspection of the English mint he made, by order of council, assays of a great number of foreign coins to know their intrinsic values and to calculate thereby the par of exchange between England and other countries, of which a table is given by Dr. Arbuthnot. And he says you may thereby judge the balance of trade, as well as the distemper of a patient by the pulse. And this, it seems, induced Mons. Datol, in a late book, entitled *Reflections Politique sur les Finances*, to follow the same path in calculating the par of exchange, and to say that the balance of trade may be thereby as well judged of as the weather by a barometer." Gilbert on Banking, 417.

only inquiry is what is the equivalent amount in our currency to that found due in a foreign currency.

The nominal par based on the equality in value of gold or silver, whether in foreign or domestic coins, by the universal standard, may not be the real par if the money of the former be not gold and silver of the standard value, or if it be some depreciated substitute. Then it may be a question whether the creditor is entitled to judgment for an equivalent according to the real par, or whether he must accept as an equivalent the nominal par. Judge Story says, "if a note were made in England for £100 sterling, payable in Boston, if a suit were brought in Massachusetts, the party would be entitled to recover . . . the established par of exchange [342] by our laws. But if our currency had become depreciated by a debasement of our coinage, then the depreciation ought to be allowed for, so as to bring the sum to the real par, instead of the nominal par."¹ And for the same reason, if the money in which the debt was incurred were depreciated, an allowance by way of deduction should be made in ascertaining the equivalent in a currency of gold and silver of standard value. There being no statute fixing for general purposes a legal par of exchange, the rule which is established by the best authorities is that in rendering judgment in a different currency it should be given for such sum as approximates most nearly to the value of the amount contracted for.²

§ 213. Rate of exchange. Where the debt is not only payable in the currency of a foreign country, but is expressly or by implication also payable there, and not having been paid is sued in this country, the creditor is entitled to the money of the forum to a sum equal to the value of the debt at the place where it should have been paid. Where the creditor sues the law ought to give him just as much as he would have had if the contract had been performed, just what he must pay

¹ Story's Conf. Laws, § 310.

Cary v. Courtenay, 108 Mass. 316;

² Benners v. Clemens, 58 Pa. St. 24; Swanson v. Cooke, 30 How. Pr. 385; Robinson v. Hall, 28 How. Pr. 342; S. C., 45 Barb. 574; 3 Kent's Com. Pollock v. Colglazure, Sneed (Ky.), 116, note; The Vaughan and Telegraph, 14 Wall. 258; Story's Conf. Laws, §§ 310, 311; Scott v. Bevan, 2 Reiser v. Parker, 1 Lowell, 262; Hawes v. Woolcock, 26 Wis. 629; Jelison v. Lee, 3 Woodb. & M. 368;

to remit the amount of the debt to the country where it was payable. Hence he is entitled to recover according to the rate of exchange between the two countries at the time of the trial.¹

¹Marburg v. Marburg, 26 Md. 8; Watson v. Brewster, 1 Pa. St. 881; Hawes v. Woolcock, 26 Wis. 629; Allshouse v. Ramsay, 6 Whart. 131; Jelison v. Lee, 3 Woodb. & M. 368; Nickerson v. Soesman, 98 Mass. 364; Capron v. Adams, 28 Md. 529; Cushing v. Wells, 98 Mass. 550; Smith v. Shaw, 2 Wash. C. C. 167; Stringer v. Coomba, 62 Me. 160; Grant v. Healey, 8 Sumn. 523; Benners v. Clemens, 58 Pa. St. 24; Woodhull v. Wagner, 1 Baldw. 296; Wood v. Watson, 58 Me. 300; Delegal v. Naylor, 7 Bing. 460; Cash v. Kennion, 11 Ves. 314; Lee v. Wilcocks, 5 S. & R. 48; Scott v. Bevan, 2 B. & Ad. 78, and note; Ekins v. East India Co., 1 P. Wms. 395; Lanusse v. Barker, 3 Wheat. 101. [343] In Grant v. Healey, *supra*, the opinion places the law on this subject in a clear light, and answers with great force the contrary decisions in Massachusetts and New York which are cited in the discussion. "I take the general doctrine to be clear," said the learned judge, "that whenever a debt is made payable in one country, and is afterwards sued for in another country, the creditor is entitled to receive the full sum necessary to replace the money in the country where it ought to have been paid, with interest for the delay; for then and then only is he fully indemnified for the violation of the contract. In every such case the plaintiff is therefore entitled to have the debt due to him first ascertained at the par of exchange between the two countries, and then to have the rate of exchange between these countries added to or subtracted from the amount, as the case may require, in order to replace the money in the country where it ought to be paid. It seems to me that this doctrine is founded on the true principles of reciprocal justice. The question, therefore, in all cases of this sort, where there is not a known and settled commercial usage to govern them, seems to me to be rather a question of fact than of law. In cases of accounts and of advances, the object is to ascertain where, according to the intention of the parties, the balance is to be repaid — in the country of the creditor or of the debtor. In Lanusse v. Baker, 3 Wheat. 101, 147, the supreme court of the United States seem to have thought that where money is advanced for a person in another state, the implied undertaking is to replace it in the country where it is advanced, unless that conclusion is repelled by the agreement of the parties or by other controlling circumstances. . . . In relation to mere balances of account between a foreign factor and a home merchant, there may be more difficulty in ascertaining where the balance is reimbursable, whether where the creditor resides or where the debtor resides. Perhaps it will be found, in the absence of all controlling circumstances, the truest rule and the easiest in its application is that advances ought to be deemed reimbursable at the place where they are made, and sales of goods accounted for at the place where they are made or authorized to be made. . . . (Consequa v. Fanning, 3 Johns. Ch. 587, 610; S. C., 17 Johns. 511.) . . . I am aware that a different rule, in respect to balances of account and debts due and payable in a foreign country, was laid down in Martin v.

Franklin, 4 Johns. 125, and Scofield v. Day, 20 Johns. 102, and that it has been followed by the supreme court of Massachusetts in *Adams v. Cordis*, 8 Pick. 260. It is with unaffected diffidence that I venture to express a doubt as to the correctness of the decisions of these learned courts upon this point. It appears to me that the reasoning in the 4 Johns. 125, which constitutes the basis of the other decisions, is far from being satisfactory. It states very properly that the court have nothing to do with inquiries into the disposition which the creditor may make of his debt after the money has reached his hands; and the court are not to award damages upon such uncertain calculations as to the future disposition of it. But that is not, it is respectfully submitted, the point in controversy. The question is whether, if a man has undertaken to pay a debt in one country, and the creditor is compelled to sue him for it in another [344] country, where the money is of less value, the loss is to be borne by the creditor, who is in no fault, or by the debtor, who by the breach of his contract has occasioned the loss. The loss of which we here speak is not a future contingent loss. It is positive, direct, immediate. The very rate of exchange shows that the very sum of money paid in one country is not an indemnity or equivalent for it when paid in another country, to which by the default of the debtor the creditor is bound to resort. Suppose a man undertakes to pay another \$10,000 in China, and violates his contract, and then he is sued therefor in Boston, when the money if duly paid in China would be worth at the very moment twenty per cent. more than it is in Boston; what compensation is it to the creditor to pay him the \$10,000 at par in Boston? Indeed I do not perceive any just

foundation for the rule that interest is payable according to the law of the place where the contract is to be performed, except it be the very same on which a like claim may be made as to the principal, viz., that the debtor undertakes to pay there, and therefore is bound to put the creditor in the same situation as if he had punctually complied with his contract there. It is suggested that the case of bills of exchange stands upon a distinct ground, that of usage, and is an exception from the general doctrine. I think otherwise. The usage has done nothing more than ascertain what should be the rate of damages for a violation of the contract generally, a matter of convenience and daily occurrence in business, rather than to have a fluctuating standard dependent upon the daily rates of exchange; exactly for the same reason that the rule of deducting one-third new for old is applied to cases of repairs of ships, and the deduction of one-third from the gross freight is applied in cases of general average. It cuts off all minute calculations and inquiries into evidence. But in cases of bills of exchange drawn between countries where no such fixed rate of damages exists, the doctrine of damages applied to the contract is precisely that which is sought to be applied to the case of a common debt due and payable in another country; that is to say, to pay the creditor the exact sum which he ought to have received in that country. That is sufficiently clear from the case of *Mellish v. Simeon*, 2 H. Black. 878, and the whole theory of re-exchange." See *Lodge v. Spooner*, 8 Gray, 166; *Hussey v. Farlow*, 9 Allen, 263; *Bush v. Baldrey*, 11 id. 367; *Weed v. Miller*, 1 McLean, 423; *Grutacup v. Woul-luise*, 2 id. 581.

CHAPTER VII.

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SECTION 1.

PAYMENT.

§ 214. **What is; modes of making.** Payment is the [345] actual performance of an agreement or duty to pay money.¹ It is distinguishable from accord and satisfaction, and from release; it is strict performance in respect to a debt, according to the literal and substantial import of the contract by virtue of which it was incurred; accord and satisfaction is the adoption by mutual consent and the doing of some other act as a substitute; release is a renunciation of the contract or liability, whereby performance is waived. But accord and satisfaction is a payment *sub modo*; and a release, as it must be founded on an actual consideration shown or implied, is to the extent of such consideration a payment or satisfaction.²

Payment includes the transfer by the debtor to the creditor and the receipt by the latter of money or something else of value accepted by him as representing money. Ordinarily the debtor must seek the creditor to pay him.³ If there is no agreement on the subject the purchase-price of property is payable at the office of the vendors, to their agents or to them in person.⁴ But if the place of payment is designated and the presence of the payee is necessary, he must attend; and if either of two places is agreed upon he must select, and there is no default until he has done so.⁵ If the creditor refuses to receive payment at the place appointed by him and does not inform his debtor of a purpose to require it to be made elsewhere, he waives the right to payment at another than the

¹ "Originally payment was the performance of a promise to pay money at the time and in the manner required by the terms of the contract; but it has been extended to include the delivery of money in satisfaction of a debt after a default has been made in payment according to the terms of the contract." *Ulsch v. Muller*, 143 Mass. 879.

A cross-demand is not payment and cannot be treated as such unless by agreement of the parties. *Mc-*

Curdy v. Middleton, 82 Ala. 131; *Wharton v. King*, 69 id. 365.

² See *Bottomley v. Nuttall*, 5 C. B. (N. S.) 122, 134, 135.

³ *Cranley v. Hillary*, 2 M. & S. 120; *Soward v. Palmer*, 2 Moore, 276.

⁴ *Greenawalt v. Este*, 40 Kan. 418; *Baker v. Holt*, 56 Wis. 100; *Northwestern Iron Co. v. Meade*, 21 id. 480.

⁵ *Thorn v. City Rice Mills*, 40 Ch. Div. 357.

designated place and cannot reap any benefit from his act.¹ The duty of the debtor to seek his creditor does not require that he should do so beyond the limits of the state or country in which the debt was contracted, and by implication or express agreement was to be paid. But as nothing but actual payment will discharge the debt, this duty of seeking the creditor will more properly be considered in connection with the subject of tender.² It may, however, be added here that if the debtor is a municipality, county, state or government the obligation is not dischargeable at any other place than its treasury.³

If a debtor is directed by his creditor to remit money by mail, or if that be the usual mode of remitting it, and the remittance be lost, the creditor must sustain the loss.⁴ In such case compliance with the direction in respect to the mode of remittance fulfills all the requisites of payment — tender and acceptance, — both of which are essential. To constitute a payment, money or some other valuable thing must be delivered by the debtor to the creditor for the purpose of extinguishing the debt, and the creditor must receive it for that purpose.⁵ It is, however, competent for parties to agree

¹ Union Mut. L. Ins. Co. v. Union Mills P. Co., 37 Fed. Rep. 286.

² Post, §§ 260-270.

³ Pekin v. Reynolds, 31 Ill. 529; People v. Tazewell Co., 22 id. 147; Johnson v. Stark Co., 24 id. 75; South Park Com'rs v. Dunlevy, 91 id. 49; Friend v. Pittsburgh, 131 Pa. St. 305.

⁴ Jung v. Second Ward Savings Bank, 55 Wis. 364; Warwicke v. Noakes, Peake, 67. See Parker v. Gordon, 7 East, 385.

If no mode of remitting is indicated by the creditor a remittance made in the customary way as a prudent man would do in his own affairs relieves an agent from responsibility. Underwriters' W. Co. v. Board of Underwriters, 85 La. Ann. 803.

In the absence of an express direction to remit by mail or a usage

or course of dealing from which authority to so remit may be inferred, a remittance of money so made is at the risk of the party mailing it. Burr v. Sickles, 17 Ark. 428.

There is no evidence of payment when the instrument remitted describes the payee by a wrong christian name, though he keeps it and might have obtained the money by signing it in the name used. Gordon v. Strange, 1 Exch. 477.

⁵ Holdsworth v. De Belaunzaran, 106 N. Y. 119; Robinson v. Robinson, 20 S. C. 567; Steiner v. Erie Dime S. & L. Co., 98 Pa. St. 591; Ryan v. O'Neil, 49 Mich. 281; Kingston Bank v. Gay, 19 Barb. 459. See Collins v. Adams, 53 Vt. 433.

A promise by a creditor to cover a check signed by a third person in favor of the debtor does not prevent

that payments shall be made in something else of value than money.¹ The defendants forwarded to plaintiffs sufficient funds to pay a note held by the latter against the former, but the plaintiffs refused to receive it, and informed the defendants that the money was subject to their order; and it was held not a payment; and it was also held that if the defendants would protect themselves against costs, they should have withdrawn the deposit and made a tender.² The weight of authority is, as will be seen in the section on accord and satisfaction, that the payment of a less sum than is due does not discharge a liquidated demand unless a sealed acquittal is given as evidence of the fact.³ But this principle does not apply if something else of value than money is received, though the security accepted is of inferior rank to that which it is

the check on its transfer to the creditor and appropriation by him from operating as payment. *Tiddy v. Harris*, 101 N. C. 589.

Payment implies a voluntary act of the debtor looking to the satisfaction, in whole or in part, of the demand against him. A creditor cannot lawfully pay himself with the debtor's money without the latter's consent, express or implied; and when the debtor delivers him money for a purpose which negatives the idea of payment, the creditor's control of it is limited to the purpose declared. *Detroit, etc. R. Co. v. Smith*, 50 Mich. 112.

Monthly payments made on a chattel mortgage in consideration, as stated in receipts therefor, of the extension of the time for payment of the mortgage debt from month to month will be applied in extinguishment of such debt. *Bateman v. Blake*, 81 Mich. 227.

¹ *Weir v. Hudnutt*, 115 Ind. 525; *Sharp v. Carroll*, 66 Wis. 62; *Phillips v. Ocmulgee Mills*, 55 Ga. 683. See § 215.

Payment is made "at the time" within the meaning of the statute

of frauds where the vendor accepts as payment a check which is then good and which is subsequently paid, though the time of payment is not shown. *Hunter v. Wetsell*, 84 N. Y. 549; *Elwell v. Jackson*, 1 Cab. & Ellis, 362.

² *Kingston Bank v. Gay*, 19 Barb. 459; *Greenough v. Walker*, 5 Mass. 214; *Clark v. Wells*, 5 Gray, 69.

After the commencement of an action upon a note by the indorsee against the maker its payment by the payee and indorser does not constitute a defense so as to affect the costs. *Concord Granite Co. v. French*, 12 Daly, 228.

An answer by a surety alleged that plaintiff had been fully paid by money received from the principal debtor's estate and with the administrator's consent; held to show that the latter agreed that the money so received should be payment. *Johnson v. Breedlove*, 104 Ind. 521.

³ *Grinnell v. Spink*, 128 Mass. 25; *Tuttle v. Tuttle*, 12 Met. 551; *Harriman v. Harriman*, 12 Gray, 341; *Baldwin v. United States*, 15 Ct. of Cla. 297; *Bostwick v. Same*, 94 U. S. 53.

received in lieu of,¹ or is less in amount,² if the parties agree that it shall be payment.

§ 215. **Same subject.** The creditor may assent in advance to a mode of payment which reserves no subsequent election by excluding any concurrent act on his part in accomplishing it, or by making any such act obligatory. Thus, an award made against a party in pursuance of a submission in which he agreed to indorse it on a note is a payment *pro tanto*.³ So money paid by a debtor to a third person on the prior request of the creditor is a payment,⁴ and so is the transfer of a credit if all the parties are agreed.⁵ The tender of bonds, etc., of a banking association to them in payment of a debt, in pursuance of their agreement to receive them in payment;⁶ or work done for the payee of a note by the maker under an agreement that the proceeds are to be applied to discharge the note, is a payment.⁷ Where it is agreed between debtor and creditor that the former shall do some collateral act for a stipulated price or a price which may be made certain, and that such act shall be deemed a payment or part payment of the debt, the amount so stipulated becomes at once a payment [347] when the act has been performed. In case of mutual connected debts it is not necessary that the formality should be gone through of each party handing the amount he owes over to the other, whether the sums they are mutually enti-

¹ *Peters v. Barnhill*, 1 Hill (S. C.), 236; *Dogan v. Ashbey*, 1 Rich. 36.

² *Fensler v. Prather*, 43 Ind. 119; *Wells v. Morrison*, 91 id. 51; *Sibree v. Tripp*, 15 M. & W. 28; *Thomas v. Heathorn*, 2 B. & C. 477.

It is said in *Bolt v. Dawkins*, 16 S. C. 198, 214, that the old artificial rule which has no foundation in reason and ought not to be extended, but which has prevailed ever since *Pinnell's Case* (5 Coke, 117), that the payment of a less sum than the whole amount due, on the day when the debt matures or afterwards, cannot be a satisfaction of the debt, applies only to a payment in money, and, therefore, when something other than money is accepted in satisfac-

tion of the debt it will be discharged, even though the value of the thing so accepted should be far less than the amount of the debt.

³ *Flint v. Clark*, 12 Johns. 374.

⁴ *Brady v. Durbrow*, 2 E. D. Smith, 78; *Storey v. Menzies*, 3 Pin. (Wis.) 329.

⁵ *Eyles v. Ellis*, 4 Bing. 112; *Shryer v. Morgan*, 77 Ind. 479.

⁶ *Leavitt v. Beers*, Hill & Denio, 221. See *Northampton Bank v. Balliet*, 8 W. & S. 811; *Woodruff v. Trapnall*, 12 Ark. 811; S. C., 10 How. (U. S.) 190; *Exchange Bank v. Knox*, 19 Gratt. 739; *Mann v. Curtis*, 6 Robt. 128.

⁷ *Moore v. Stadden*, Wright (Ohio), 88; *Hall v. Holmes*, 4 Pa. St. 251.

tled to be equal or not. If they are equal they wholly cancel each other; if not equal the lesser is to be deducted from the greater. These compensations, when they fairly and properly occur, are reciprocal payments.¹ An agreement between parties having mutual demands to set off one against the other would seem on principle and the weight of authority to take effect also as reciprocal payments; and the same result follows in all cases of connected accounts.² Thus, if A. [348]

¹ Rutherford v. Schattman, 119 N. Y. 604; Iron Cliffs Co. v. Gingrass, 42 Mich. 80; Roberts v. Wilkinson, 34 Mich. 129; Connecticut Mut. Ins. Co. v. State Treasurer, 81 Mich. 6. See Sword v. Keith, id. 247; Jewett v. Winship, 42 Vt. 205; Slasson v. Davis, 1 Aik. 73; Strong v. McConnell, 10 Vt. 231; Chellis v. Woods, 11 Vt. 466; Robinson v. Hurlburt, 34 Vt. 115; Bronson v. Rugg, 39 Vt. 241; Downer v. Sinclair, 15 Vt. 495; Huffmans v. Walker, 26 Gratt. 314; Eaves v. Henderson, 17 Wend. 190.

² In Davis v. Spencer, 24 N. Y. 386, it was held that an agreement between the payee of a note and the maker, made with the assent of the latter's partner, to apply the indebtedness of the payee to such maker and his partner in payment of the note, operates *in presenti* as a satisfaction of the note *pro tanto*. Allen, J., said: "Formerly there appears to have been a doubt whether an agreement to set off precedent debts operated as payment, satisfaction or extinguishment. An accord that each of the parties should be quit of actions against the other was said not to be good because it was not any satisfaction. Bac. Abr., Accord, A. But there is no difference in principle between an agreement concerning debts, one of which is to be contracted in the future, as in Eaves v. Henderson, 17 Wend. 190, and an agreement concerning debts already existing; and it has been decided

that an agreement to discontinue and a discontinuance of cross-actions for false imprisonment constitute an accord and satisfaction, and bar another action by either. Foster v. Trull, 12 Johns. 456. Whenever a valid new contract is substituted in the place of the old, . . . an action will not lie on the old contract, but the remedy of the parties is on the new or substituted agreement although the transaction may not amount to a technical accord and satisfaction. Good v. Cheesman, 2 B. & Ad. 328. Where two brothers, A. and B., principal and surety in an annuity, had, in an agreement between them and a third brother for the settlement of their affairs, declared that the bond was the debt of B., the surety, it was held that this agreement, whether subsequently acted upon or not, was a binding accord between A. and B. Cartwright v. Cooke, 3 B. & Ad. 701. Hills v. Mesnard, 10 Q. B. 266, is in principle not unlike Eaves v. Henderson, *supra*. The action was by payees against acceptors of a bill. The defendants became acceptors for the accommodation of one Hundle, and the plaintiffs, the payees, agreed to appropriate certain moneys which they expected to receive in discharge of the bill. They subsequently received the money, and the court held it a payment of the bill *pro tanto*. Lord Denman, C. J., says: It was competent for the parties to agree

has a valid and subsisting demand against B. for goods, services or cash, constituting proper items of an account upon which he has a present right of action, and before commencing suit thereon credits on such account a demand B. has against him for services at their fair and full value, such credit by A. so far operates as payment that B. cannot maintain an action for his demand brought while such other suit is pending.¹ But where A. owes B. by promissory note payable in instalments, and at the same time holds a note against B. for a larger amount, on which he indorses as part payment

beforehand that the money should be specifically applied to the discharge of the liability on the bill *pro tanto*. 'And it seems to be the good sense of the transaction to treat it as so much money paid to the plaintiffs by Hundle on their account and as their agent.' *Gardiner v. Callender*, 12 Pick. 374, is in point, and decides that when E. H. R., one of the executors of A. S., gave to the executors of W. P. a memorandum as follows: 'It is agreed that the sum \$3,235, due from E. H. R. to the estate of W. P., shall be applied on a certain note of \$6,000 now held by the representatives of A. S.' the memorandum amounted to a payment on the note and was not merely an executor's agreement. The fact that a memorandum in writing was made of the agreement does not vary its legal effect. It was not required by law to be in writing. The court, as in *Hills v. Meenard*, sought the good sense of the transaction, and to give effect to the sensible arrangement of the parties, holding that it could not be necessary, in order to connect the one debt with the other by an agreement *in presenti*, that there should be the vain formality of passing the money from one party to the other and returning it again to the party from whom it just came, or that a formal release or receipt should be executed.

This case is not cited by counsel or alluded to by the court in the subsequent case of *Cary v. Bancroft*, 14 Pick. 315, but the latter was decided upon a ground which distinguished it from the former case; the court holding that in the case last cited the agreement was executory and not executed, requiring some further act to be done before the one note would operate as payment or extinguishment *pro tanto* of the other. *Dehon v. Stetson*, 9 Met. 341, followed *Cary v. Bancroft* and was decided upon the same ground. Another point was in the case, to wit: that one of the parties interested in the debt which it was sought to apply in payment as the individual debt of one of his partners had not been consulted, and had no knowledge of the contemplated arrangement." See *Peabody v. Peters*, 5 Pick. 1; *Dudley v. Stiles*, 32 Wis. 371; *Ely v. McNight*, 30 How. Pr. 97; *Hawkes v. Dodge Co. Mut. Ins. Co.*, 11 Wis. 183; *Shinkle v. First Nat. Bank*, 22 Ohio St. 516; *Heaton v. Angier*, 7 N. H. 397; *Fatlock v. Harris*, 4 D. & E. 180; *Wilson v. Coupland*, 5 B. & Ald. 228; *Wharton v. Walker*, 4 B. & C. 163; *Cuxon v. Chadley*, 3 B. & C. 591.

¹ *Briggs v. Richmond*, 10 Pick. 391; *Allen v. Carman*, 1 E. D. Smith. 692; *Means v. Smith*, Tappan (Ohio), 60.

the amount of the instalments of his own note as they fall due, but without B.'s consent, this is not a payment of the instalments.¹ A payment by credit occurs where a bank receives a check drawn on itself and credits the holder the amount,² or where the bank is the creditor and receives the debtor's check drawn on itself.³ There is a distinction between the acceptance by a creditor from his debtor of a new security for an old debt, and the acceptance by a bank of a check drawn upon itself in payment of a note. The former is a mere substitution of one executory agreement to pay for another, or a commutation of securities; there is no extinguishment of the precedent debt unless there is an agreement to accept the new obligation or security as a satisfaction of the old. But when a bank receives upon a debt a check drawn upon itself by one of its customers and charges it in account, it thereby admits that it has funds of the drawer sufficient to meet the check, and the acceptance is *per se* an appropriation of the funds to pay it. The transaction operates directly as a payment of the debt.⁴ By a valid new agreement the debtor may obtain the right to pay otherwise than in money; and the acceptance by the creditor of any chose in action or property will operate as payment.⁵ The receipt by the creditor of bank bills or treasury notes in payment of a gold debt, although under protest and with an express reservation of a claim for the differ-

¹ *Greenough v. Walker*, 5 Mass.

²¹⁴ See *Clark v. Wells*, 5 Gray, 69.

³ *Watkins v. Parsons*, 18 Kan. 426; *Weedsport Bank v. Park Bank*, 2 Keyes, 561.

⁴ *Pratt v. Foote*, 9 N. Y. 463; *Rozet v. McClellan*, 48 Ill. 345.

If the guarantor of a note owned and held by a bank has on deposit in it a sum nearly equal to the amount called for by the note, a tender of his check for such sum and the necessary amount of cash to the assignee of the bank satisfies the note. *Lionberger v. Kinealy*, 13 Mo. App. 41. See *Shipp v. Stacker*, 8 Mo. 145.

⁵ *Id.*; *Commercial Bank v. Union Bank*, 11 N. Y. 208.

If a sight draft is indorsed for collection to the debtor's bankers and

by his direction the amount it calls for is charged against him, the banker drawing his check for the amount to the order of the creditor and transmitting it to him, the debt is paid, although the bank which so draws fails and its check is made valueless. *Welge v. Batty*, 11 Ill. App. 461.

⁶ *Inman v. Griswold*, 1 Cow. 199; *Sword v. Keith*, 81 Mich. 247; *Block v. Dorman*, 51 Mo. 31; *Casey v. Harris*, 2 Litt. 172; *Allegheny R. Co. v. Casey*, 79 Pa. St. 84; *Eaves v. Henderson*, 17 Wend. 190; *Perkins v. Cady*, 111 Mass. 318; *Locke v. Andres*, 7 Ired. 159; *Perit v. Pittfield*, 5 Rawle, 166; *Cramer v. Willetts*, 61 Ill. 481; *Brown v. Feeter*, 7 Wend. 301; *Burchard v. Frazer*, 23 Mich. 224.

ence, will be payment dollar for dollar.¹ So gold dollars, if applied towards the payment of a debt without any special [350] contract as to the value at which they are to be taken, cannot be treated as having any greater value than any other currency which is a legal tender for the payment of debts.²

§ 216. Same subject. On foreclosure of a mortgage on real estate by entry the land inures as payment to the extent of its value.³ So taking possession of chattels mortgaged or forfeited is also payment to the amount of their value;⁴ and the proceeds of sale realized by foreclosure are *pro tanto* payment.⁵ Taking the debtor's body is a satisfaction unless he escape.⁶ It has this effect though the creditor consented to his being set at liberty under an agreement which the debtor has failed to perform;⁷ or on his giving a warrant of attorney which turned out to be void for informality.⁸ It is not, however, an absolute satisfaction like payment, for it will not discharge a guarantor,⁹ nor prevent the creditor from pursuing his remedy against other parties.¹⁰

A levy on sufficient personal property by execution is presumably a satisfaction of the debt; it is a means of payment, and requires only the performance of a ministerial duty by an officer to accomplish it. The levy is not of itself satisfaction, and anything which subsequently, without the fault of the officer or creditor, prevents actual satisfaction, as if the debtor has not been deprived of property levied upon, will destroy its effect as evidence of that result.¹¹ So long as the [351] property remains in legal custody the other remedies of the creditor will be suspended. He cannot have a new

¹ *Gilman v. County of Douglas*, 6 Nev. 27. *v. Storrs*, 4 Conn. 440. See *Sheldon v. Kibbe*, 3 Conn. 214.

² *Bush v. Baldrey*, 11 Allen, 367.

⁹ *Terrell v. Smith*, 8 Conn. 426.

³ *Hedge v. Holmes*, 10 Pick. 381; *Briggs v. Richmond*, id. 391.

¹⁰ *Porter v. Ingraham*, 10 Mass. 88.

⁴ *Case v. Boughton*, 11 Wend. 106; *Charter v. Stevens*, 3 Denio, 33.

¹¹ *Starr v. Moore*, 3 McLean, 354; *Clerk v. Withers*, 2 Ld. Raym. 1072; *S. C.*, 1 Salk. 323; 6 Mod. 290; *Mountney v. Andrews*, Cro. Eliz. 237; *Atkinson v. Atkinson*, id. 391; *Ladd v. Blunt*, 4 Mass. 402; *Bayley v. French*, 2 Pick. 590; *Denton v. Livingston*, 9 Johns. 98; *Hoyt v. Hudson*, 12 id. 207; *Troup v. Wood*, 4 Johns. Ch. 228; *Ex parte Lawrence*, 4 Cow. 417; *Jackson v. Bowen*, 7 id. 13, 21; *Cor-*

⁵ *Lansing v. Goelet*, 9 Cow. 346; *Globe Ins. Co. v. Lansing*, 5 id. 380.

⁶ *Jaques v. Witby*, 1 T. R. 557; *Williams v. Evans*, 2 McCord, 203.

⁷ *Vigers v. Aldrich*, 4 Burr. 2482; *Blackburn v. Stupart*, 3 East, 243; *Tanner v. Hague*, 7 T. R. 420.

⁸ *Jaques v. Witby*, *supra*; *Loomis*

execution against the person or property of the debtor, nor maintain an action on the judgment, nor use it for the purpose of becoming a redeeming creditor.¹ The levy does not divest title; it only creates a lien on the property. It often happens that the levy is overreached by some other lien, is abandoned for the benefit of the debtor or defeated by his misconduct. In such cases there is no color for saying that the judgment is gone. The judgment is satisfied when the execution has been so used as to change the title or in some other way to deprive the debtor of his property. This includes the case of a levy and sale, and also of a loss or destruction of the goods after they have been taken out of the debtor's possession by virtue of the process.² In admiralty where a *res* is seized by a judicial process for a debt which carries with it a *jus in re* as between debtor and creditor, the maxim *domino perit res* means that the destruction of the seized property, without fault of the debtor, works a payment of the debt to the extent of its value. Where third parties voluntarily join the seizing creditor in his proceeding and unite, so to speak, in the seizure, also asserting claims which carry with them liens, the destruction of the property, without fault of the debtor, works a payment of their respective claims, to the extent of the value of the property destroyed, in the order of the priority of their claims, and operates as a payment up to its value precisely as would its sale and the application of its proceeds.³

A sufficient tender, made and kept good by bringing the money into court, is equivalent to a payment, and is such of the date of the tender to prevent costs and interest. The debtor pleading it cannot withdraw the money whatever may be the verdict; the money must be paid to the plaintiff.⁴

nell v. Cook, id. 812; Wood v. Torrey, & S. 252; Ex parte King, 2 Dev. 341;
 6 Wend. 562; Cass v. Adams, 8 Ohio, Binford v. Alston, 4 Dev. 854.
 223; Webb v. Bumpass, 9 Port. 201; ¹ People v. Hopson, 1 Denio, 577.
 Green v. Burke, 23 Wend. 490; ² Id.
 Browning v. Hanford, 5 Hill, 583; ³ Per Billings, D. J., in Gill v.
 Duncan v. Harris, 17 S. & R. 436; Packard, 4 Woods, 270.
 Farmers' & M. Bank v. Kingley, 2 ⁴ Reed v. Armstrong, 18 Ind. 446;
 Doug. (Mich.) 879; Churchill v. Warren, 2 N. H. 298; Ordinary v. Spann, Taylor v. Brooklyn E. R. Co., 119
 1 Rich. 429; Porter v. Boone, 1 W. N. Y. 561.

§ 217. **What is not payment.** The deposit of money in a bank where a note is payable is not of itself a payment, but simply a tender;¹ unless in some way appropriated to the note.² Nor is the surrender of a check at the clearing-house.³ A note held by an administrator and payable to him is not paid because he charges himself with the amount it represents in settling his accounts with the estate.⁴ So charging a note supposing the maker had funds in bank, when in fact he had not, the charge being canceled the next day on discovery of the mistake, will not amount to payment.⁵ And where the president of a bank having his notes lying therein under protest indorsed for his accommodation procured the cashier to make a new note, which the president indorsed and exchanged for those protested, delivering the latter to the cashier for his security, it was held that the original notes were not thereby paid, although the president entered them as paid and all new notes as discounted.⁶ A clerk of a bank stole from the drawer [352] of another clerk bills belonging to the bank, which he delivered over to the cashier, and which the latter, not knowing to have been thus stolen, accepted in discharge of the balance due from such clerk to the bank. The transaction did not work a payment.⁷ The mutilation of a note by a stranger to it with intent to cancel and extinguish it raises no presumption of its payment.⁸ The receipt of part of the amount due is not a waiver of the right to recover the balance, nor does it work an estoppel.⁹ Thus it appears that unless there is an actual payment and receipt of money, or something else accepted in its place as payment, a debt is not satisfied; any ceremony by which payment is nominally made or acknowledged may be avoided for mistake or fraud, and so where the actual or authorized assent of the creditor is wanting.

§ 218. **Effect of payment.** Whether a payment made by a guarantor or surety or a volunteer will operate as a purchase or as an extinguishment depends on the intention with which

¹ Hill v. Place, 36 How. Pr. 26.

⁵ Troy City Bank v. Grant, Hill &

² See Sutherland v. First Nat. Bank, D. 119.

31 Mich. 230.

⁶ Highland Bank v. Dubois, 5

³ Merchants' Nat. Bank v. Procter, Denio, 558.

1 Cin. Super. Ct. 1.

⁷ State Bank v. Wells, 3 Pick. 394.

⁴ Robinson v. Robinson, 20 S. C. 567.

⁸ Whitlock v. Manciet, 10 Ore. 166.

⁹ Whiting v. Plumas Co., 64 Cal. 65.

it is made.¹ But a debtor cannot himself become the owner,² nor pay his debt without discharging it, though he may wish and intend to keep it on foot;³ and any assignment to a third person with a view to keeping it alive will be void.⁴ A payment actually made upon a debt, whether of the whole or a part, is a total or partial discharge, and cannot afterwards be changed except by mutual consent, and if other parties are interested, by their consent also.⁵

After a judgment recovered upon a paid debt, or without deducting payments, the sum paid cannot be recovered; payment in a strict sense is a defense, and if not used as such is lost.⁶ The payments must be strictly such or definitely appropriated to the debt to have that effect.⁷ Where a sum of money [353]

¹ *Fogarty v. Wilson*, 80 Minn. 289; *Swope v. Leffingwell*, 72 Mo. 348; *Lucas v. Wilkinson*, 1 Hurl. & N. 423; *Morris v. Oakford*, 9 Pa. St. 498; *Kinley v. Hill*, 4 W. & S. 426; *Elkinton v. Newman*, 20 Pa. St. 281; *Carter v. Jones*, 5 Ired. Eq. 196; *Mathews v. Aiken*, 1 N. Y. 595; 1 Lead. Cas. in Eq. 88; id. pt. 1, 167 (2d Am. ed.); *Low v. Blodgett*, 21 N. H. 121; *Ex parte Balch*, 2 Lowell, 440; *Harbeck v. Vanderbilt*, 20 N. Y. 395; *Mechanics' Bank v. Hazard*, 13 Johns. 853. See *Gillett v. Gillett*, 9 Wis. 194.

² *Gordon v. Wansey*, 21 Cal. 77.

³ *Champney v. Coope*, 34 Barb. 589; *Collins v. Adams*, 53 Vt. 433; *Hammatt v. Wyman*, 9 Mass. 188; *Brackett v. Winslow*, 17 id. 153; *Adams v. Drake*, 11 Cush. 504; *Tuckerman v. Newhall*, 17 Mass. 581; *Chapman v. Collins*, 12 Cush. 163; *Pray v. Maine*, 7 id. 253; *Harbeck v. Vanderbilt*, 20 N. Y. 395, 398. See *Shaw v. Clark*, 6 Vt. 507.

If payment is made at the request of the maker the obligation is extinguished and an indorsement of it subsequently made by the payee is ineffectual. *Moran v. Abbey*, 63 Cal. 56; *Pearce v. Bryant Coal Co.*, 121 Ill. 590.

⁴ Id.; *Moran v. Abbey*, 58 Cal. 167; *Gordon v. Wansey*, 21 id. 78; *Citizens' Bank v. Lay*, 80 Va. 436; *Rolf v. Wooster*, 58 N. H. 526.

It makes no difference that an attempt to transfer was made at the time of payment, and as a part of that transaction. *Wright v. Mix*, 76 Cal. 465.

If a note is deposited in a bank for collection a payment made by a guarantor, surety or the maker will discharge it. *Citizens' Bank v. Lay*, 80 Va. 436; *Lancey v. Clark*, 64 N. Y. 209; *Eastman v. Palmer*, 32 id. 238; *Dooley v. Virginia F. & M. Ins. Co.*, 3 Hughes, 221.

⁵ *Mead v. York*, 6 N. Y. 449; *Marvin v. Vedder*, 5 Cow. 671; *Hawkins v. Stark*, 19 Johns. 305; *Frost v. Martin*, 26 N. H. 422; *Miller v. Montgomery*, 31 Ill. 350.

⁶ *Loring v. Mansfield*, 17 Mass. 394; *Marriot v. Hampton*, 7 T. R. 269; *De Sylva v. Henry*, 3 Port. 132; *Eggleson v. Knickerbacker*, 6 Barb. 458; *Adams v. Barnes*, 17 Mass. 365; *Job v. Collier*, 11 Ohio, 422; *Seymour v. Lewis*, 19 Wend. 512.

⁷ See *Hazen v. Reed*, 80 Mich. 331; *Judd v. Littlejohn*, 11 Wis. 176.

was delivered by the obligor to the obligee to be credited by the latter upon the bond as part payment, and the obligee neglected to indorse or apply it and obtained judgment for the whole amount of the bond, the obligor was allowed to re-[354] cover the money paid.¹ There was a special trust reposed in the defendant to credit the money on the bond and he had violated it. Where, however, there is a direct payment on a debt which is not evidenced by note, bond or writing of any kind; where no act beyond payment and receipt of it is necessary or contemplated to give effect to the payment, and the money is passed from the debtor to the creditor as payment at once, and not simply to become such on the doing of some act to evidence it, it is strict payment and cannot be recovered, though the debt is afterwards sued upon and judgment rendered for it without deducting the sum paid.²

§ 219. **Payment before debt due.** The creditor is not obliged to receive a part payment;³ but if he does so it has the effect of partial satisfaction. Payment before the money is due is a payment at maturity.⁴ If a creditor, however, receives money before it is due on a demand drawing interest, such payment, in the absence of an agreement to the contrary, should be applied to the extinguishment of the principal.⁵ And even when received upon the understanding that it was not to draw interest until the balance of the debt should be paid because the creditor used the money as his own it was held that it should be applied at the date of payment.⁶

§ 220. **Payment by legacy.** A devise or legacy will operate as payment when it is intended by the testator and accepted by the creditor as such.⁷ A legacy to a creditor which is equal to or greater than his debt, and which is not contin-

¹ Woodward v. Hill, 6 Wis. 147; Fowler v. Shearer, 7 Mass. 14. See Wheeler v. Harrison, 28 Mich. 265.

² Driscoll v. Damp, 17 Wis. 419; Bronson v. Rugg, 39 Vt. 241.

³ Jennings v. Shriver, 5 Blackf. 37.

⁴ Patten v. Fullerton, 27 Me. 58; Holmes v. Broket, Cro. Jac. 434. See Roberts v. Wilkinson, 84 Mich. 129.

⁵ Starr v. Richmond, 30 Ill. 276.

⁶ Toll v. Hiller, 11 Paige, 228.

⁷ Scheerer v. Scheerer, 109 Ill. 11; Rose v. Rose, 7 Barb. 174; Clarke v. Bogardus, 12 Wend. 67; Mulheran's Ex'r v. Gillespie, id. 349; Courtenay v. Williams, 3 Hare, 539; Voorhees v. Voorhees, 18 N. J. Eq. 227; Brokaw v. Hudson, 27 id. 135; Blair v. White, 61 Vt. 110; Brunn v. Schuett, 59 Wis. 260.

gent or uncertain, is presumed to be a satisfaction of the debt.¹ Courts, however, have given effect to slight circumstances appearing on the face of the will or otherwise, by way of repelling the presumption of satisfaction.² And the rule is [355] not allowed to prevail where the legacy is of less amount than the debt, even as a satisfaction *pro tanto*; nor where there is a difference in the time of payment of the debt and the legacy; nor where they are of different natures as to subject-matter; nor where there is an express direction in the will for the payment of debts.³ When a legacy is made by a creditor to a debtor and the debt is less in amount than the legacy, the legatee is considered as having so much of the assets in his hands as the debt amounts to and consequently to be satisfied *pro tanto*; and when the debt exceeds the legacy, the executors of the testator are entitled to retain the legacy in part discharge of the debt.⁴

§ 221. Payment by gift *inter vivos*. A creditor may extinguish a debt gratuitously by such acts as are equivalent to a gift consummated. Thus indorsements made in consideration of kindness, by direction and in the presence of a mortgagee, of part payments upon a mortgage against his granddaughter and her husband, with whom he was living at the time, and which were to accord with his deliberate and expressed intention to make a gift or donation of his property to her, have been sustained as an extinguishment or forgiving of the mortgage debt to that extent. It was objected that, this being a gift *inter vivos*, delivery and acceptance were essential to its validity, and as there was in such a case no delivery it could not take effect. Christianity, J., said: "Doubtless such is the rule where the gift consists of tangible personal property which admits of actual delivery; and the same rule would probably apply where the note or bond of a third person is the subject of the gift. Whether if the whole of the

¹ Wesco's Appeal, 52 Pa. St. 195; Strong v. Williams, 12 Mass. 392; Eaton v. Benton, 2 Hill, 576; Cloud v. Willis v. Dun, Wright (Ohio), 133.

Clinkinbeard, 8 B. Mon. 398; Strong v. Williams, 12 Mass. 392; Williams 398; Cloud v. Clinkinbeard, 8 B. Mon. 398; Fort v. Gooding, 9 Barb. 371.

v. Crary 5 Cow. 368; 2 Story's Eq., § 1100. Tinkham v. Smith, 56 Vt. 187; Clarke v. Bogardus, 12 Wend. 67. See

² Id. See Story's Eq., §§ 1100, 1101; Close v. Van Husen, 19 Barb. 505.

mortgage debt in the present case had been the subject, delivery of the note and mortgage, or one of them, would not have been essential we need not inquire. In the present case it was but a part of the sum secured by the note and mortgage; and the attempted donation was to the debtors themselves. And it is difficult to conceive how any delivery could have been made. But it is said that there must have been a delivery of the papers or of a release or receipt for the portion of the debt intended to be given; because without something of this kind it would have been in the power of the donor to retract, and this he might doubtless have done if this had been an executory agreement or undertaking to make this gift. But here the purpose and intention of making the gift was fully executed, and by one of the donees actually accepted at the time; and the acceptance by the other of the extinguishment of a part of the debt against himself may be very safely presumed. And if it remained in the power of the donor to retract, it would have been equally so, if purely a gift, had a receipt been given, and equally, for aught we can discover, had a release been given, there being no consideration and under our statute¹ which makes the seal no more than *prima facie* evidence of a consideration. The want of consideration could, therefore, in either case, have been shown. As the debt which was the subject of the gift, when considered with reference to the fact that the donee was the debtor, and that only part of the debt was attempted to be given, did not admit of actual delivery, and as all was done that could well be done under the circumstances to make the gift effectual, we do not think the act and intention of the donor should be defeated merely because the subject did not admit of an actual or technical delivery.”²

A delivery is so essential to the validity of a gift that its place cannot be supplied by a formal declaration of the donor's executory intention, although in writing.³ The intention to discharge by gift a debt in the form of a note, bond or the

¹ Comp. L. of Mich. 1871, § 5947.

Noble v. Smith, 2 Johns. 52; Cook v.

² Green v. Langdon, 28 Mich. 221.

Husted, 12 id. 188; Davis v. Boyd, 6

³ Plumstead's Appeal, 4 S. & R. 545; Jones, 249; Brunn v. Schuett, 59 Wis. Wheatley v. Abbott, 32 Miss. 848; 260.

Hunter v. Hunter, 19 Barb. 681;

like should be executed by an actual surrender of the instrument or by a release delivered to the donee.¹

§ 222. **Payment by retainer.** Payment or satisfaction [357] of a debt may result as the legal effect of the debtor having conferred on him in some character the duty or right to receive payment. This conclusion rests upon the ground that when the same hand is to pay and receive the money, that which the law requires to be done shall be deemed to be done; and, therefore, that such debt when due from an administrator, for instance, shall be assets *de facto* to be accounted for in the probate account.² When a testator makes his debtor executor it is a release at law, but the former may reserve the debt, and payment be enforced by the party to whom it is bequeathed under the fiction of a promise to him.³ Such appointment does not extinguish the debt, nor a mortgage security for it,⁴ but it becomes assets in his hands,⁵ especially if there is a deficiency, to pay debts.⁶ An executor or other trustee for the distribution of moneys to pay debts, legacies, etc., may retain for a debt owing him from the trust funds, and may also retain for the benefit of the trust any sum due from a beneficiary. A personal representative may retain for his debt by withholding within the period allowed by the statute of limitations a sufficient amount from the moneys coming to his hands, and is entitled to due credit therefor in the settlement of his accounts,⁷ on such proof as would au-

¹ Kidder v. Kidder, 33 Pa. St. 268; Mass. 255; Kinney v. Ensign, 18 Campbell's Estate, 7 id. 100; Wentz v. Pick. 232; Winship v. Bass, 12 Mass. Dehaven, 1 S. & R. 312; Whitehill 199; Wankford v. Wankford, 1 Salk. v. Wilson, 3 Penn. 405; Duffield v. 299; Cheetham v. Ward, 1 B. & P. Elwes, 1 Bligh (N. S.), 497; Duffield 680; Freakley v. Fox, 9 B. & C. 130; v. Hicks, 1 Dow & Clark, 11; Licey Taylor v. Deblois, 4 Mason, 131; v. Licey, 7 Pa. St. 251; 1 Smith's Lead. Bryant v. Smith, 10 Cush. 169; Hunt v. Nevers, 15 Pick. 500; 15 id. 54; 1 Allen, 153. See Ilsley v. Jewett, 2 Met. 168; Wilson v. Wilson, 17 Ohio St. 150.

² Fishel v. Fishel, 7 Watts, 44.

³ Bacon v. Fairman, 6 Conn. 121; Collard v. Donaldson, 17 Ohio, 264. See Pratt v. Northam, 5 Mason, 95.

⁴ Winship v. Bass, 12 Mass. 198.

⁵ Marvin v. Stone, 2 Cow. 781.

⁶ Batson v. Murrell, 10 Humph.

⁷ In Campbell's Estate, *supra*, Gibson, C. J., said that "the gift of a bond, note or other chattel cannot be made by words *in futuro* or by words *in presenti*, unaccompanied by such delivery of the possession as makes the disposal of the thing irrevocable." Brunn v. Schuett, 59 Wis. 260.

² Ipswich Manuf. Co. v. Story, 5 Met. 310; Stevens v. Gaylord, 11

thorize a recovery upon it.¹ And such retainer will be presumed from sufficient assets coming into his hands which were susceptible of conversion into money.² His debt, how-[358] ever, will not be deemed extinguished by the receipt of assets sufficient to discharge it, but which he fails to reduce to money and turn over to his successor.³ An executor *de son tort* cannot retain for his own debt.⁴

Sureties in a bond who pay it off after the death of the principal are entitled to rank as his specialty creditors, and if they be administrators of his estate may retain whatever they pay on account of such suretyship out of assets that come to their hands as administrators against other specialty creditors.⁵ A retainer may either be pleaded or given in evidence under the plea of *plene administravit*.⁶

§ 223. Payment in counterfeit money, bills of broken banks or forged notes. It accords with principles governing in like cases and certainly with the decided weight of authority to hold that the party paying by legal implication warrants the genuineness of what he pays as money;⁷ unless the character of the transaction or the accompanying circumstances show a different intention.⁸ This rule is now recognized as an exception to that of *caveat emptor*, but it is evident it was not always so.⁹ This warranty of genuineness, how-

801; *Hamner v. Hamner*, 3 Head, 898; *Harrison v. Henderson*, 7 Heisk. 315.

¹ *Kirksey v. Kirksey*, 41 Ala. 626.

² *Glenn v. Glenn*, 41 Ala. 571.

³ *Harrison v. Henderson*, 7 Heisk. 315; *Ross v. Wharton*, 10 Yerg. 190.

⁴ *Turner v. Child*, 1 Dev. 331.

⁵ *Powell's Ex'r v. White*, 11 Leigh, 309. See *Copis v. Middleton*, 1 Turn. & Russ. 224; *Jones v. Davids*, 4 Russ. 277.

⁶ *Evans v. Norris*, Hayw. by Batt. 473.

⁷ *Watson v. Cresap*, 1 B. Mon. 195; *Edmunds v. Digges*, 1 Gratt. 359; *Hargrave v. Dusenbury*, 2 Hawkes, 326; *Fogg v. Sawyer*, 9 N. H. 365; *Buck v. Doyle*, 4 Gill, 478; *Goodrich v. Tracy*, 43 Vt. 314.

⁸ See *Dakin v. Anderson*, 18 Ind. 52.

In *Orchard v. Hughes*, 1 Wall. 78, it was held to be no defense to a suit for debt that the debt arose from the receipt of the bills of a bank chartered illegally, and for fraudulent purposes, and that the bills were void in law, and finally proved worthless in fact; they themselves having been actually current at the time the defendant received them, and not having proved worthless in his hands, and he not being bound to take them back from the person to whom he paid them.

⁹ In *Wade's Case*, 5 Coke, 114a, it was said: "It was adjudged between *Vare* and *Studley* that when the lessor demanded rent of the lessee,

ever, is not absolute; but the general current of author- [359] ity is that the payer warrants the quality to such an extent that he is bound to make it good, if found bad, and is returned within a proper time.¹ It is a special warranty, requiring the return of the thing warranted and involving an obligation of the debtor to pay the amount again in good money; but leaving the creditor, of course, the option, on returning the spurious money, to proceed on the *statu quo* as upon a rescission. The payment in either case, to the extent of the counterfeit money, is treated as a nullity when it has been restored.²

according to the condition of re-entry, and the lessee payeth the rent to his lessor, and he received it and put it in his purse, and afterwards in looking it over again at the same time he found amongst the money that he had received some counterfeit pieces and thereupon refused to carry away the money, but re-entered for the condition broken, it was adjudged the entry was not lawful; for when the lessor had accepted the money it was at his peril, and upon that allowance he shall not take exception to any part of it." And it is said in Shepherd's Touchstone, 140, in respect to mortgages: "If the payment be made, part of it with counterfeit coin, and the party accept and put it up, this is a good payment, and consequently a good performance of the condition."

¹ Atwood v. Cornwall, 28 Mich. 336; Wingate v. Neidlinger, 50 Ind. 520; Samuels v. King, id. 527; Stebbins v. Stebbins, 51 Ind. 595. See Alexander v. Byers, 19 Ind. 801.

² Id.; Markle v. Hatfield, 2 Johns. 453; Gilman v. Peck, 14 Vt. 516; Thomas v. Todd, 6 Hill, 840; Torrey v. Baxter, 18 Vt. 452; Pindall's Ex'r v. Northwestern Bank, 7 Leigh, 617; Raymond v. Baar, 13 S. & R. 318; Bank of St. Albans v. Farmers' & M. Bank, 10 Vt. 141.

In Watson v. Cresap, 1 B. Mon. 195,

Judge Ewing said: "It must be presumed that he who passes a bill as money passes it as genuine, and the law implies an *assumpsit* or warranty that it is so (2 Johns. 458; 15 Johns. 241); and if the bill should be counterfeit and worthless, this implied promise is immediately, upon passing the bill, broken, and an action lies for its breach; nor does it matter whether he who passes it knows that it is counterfeit or not. 2 Johns., *supra*. The action is not an action for fraud, but for breach of promise implied by law. And to sustain this form of declaring it would certainly be unnecessary to prove that the note was tendered back, as it goes for breach of promise, and not for restitution of the consideration upon a disaffirmance of the contract of payment. As the first count in the case under consideration is a count on the implied promise, the proof justified the recovery without any evidence that the bill was tendered back to the defendants before suit brought. We are also satisfied that if money or other bills which pass and are received as money be the consideration given for a counterfeit bill, that it may be recovered back on an *indebitatus* count for so much money had and received. Payment for such a bill must be regarded as a payment by mistake for-

The same principle applies to the notes of individuals. If they are forged in whole or in part, or are void because of the incapacity of their makers, the paper does not discharge the debt it was accepted in payment of.¹ A contract to receive payment in certificates of indebtedness issued by public officers contemplates that the instruments shall be enforceable; that they shall rest upon antecedent proceedings which gave the officers jurisdiction to issue them.²

[360] The tendency of modern decisions is to require reasonable vigilance in the receipt and prompt diligence in the return of counterfeits, or in giving notice to the payer that he may protect himself against prior parties. What is diligence is determined with reference to the facts of each case, but upon analogies drawn from the law of commercial paper. A delay of months or even a few days may be fatal to the right of recourse to the payee.³ Any unnecessary delay beyond

a thing of no value, but which was, at the time it was received, believed to be, and imported on its face to be, of intrinsic worth. 2 Johns. 458.

"But this form of declaring proceeds on the ground of a disaffirmance of the contract and a restitution of the thing given in exchange. It is an equitable remedy, and to entitle the plaintiff to recovery, if anything of value has been received, it must be shown that it was tendered back before the action was brought. A counterfeit bill is certainly of no intrinsic value; it would be as worthless in the hands of the defendants as that of the plaintiffs, and according to the rule laid down, it would seem unnecessary to show that it was tendered back, even in this form of declaring. But whether it was or not it is not now necessary to determine, as the recovery was proper on the first count."

This case, it is respectfully suggested, would not now be regarded as correctly decided, for it proceeds upon a ground fundamentally erroneous; namely, that a counterfeit bill

"would be as worthless in the hand of the defendants as in that of the plaintiffs." An absolute warranty of genuineness is assumed doubtless on that theory. The consideration appears to have been overlooked that where a counterfeit bill has been innocently paid and received, the prompt return of it will enable the party who had paid it to restore it to the person from whom he received it, and thus obtain its nominal amount in good money. The implied warranty requires such restitution.

¹ Godfrey v. Crisler, 123 Ind. 203; First Nat. Bank v. Buchanan, 87 Tenn. 32; Monticello v. Grant, 104 Ind. 168; Gerwig v. Sitterly, 56 N. Y. 214; Stratton v. McMakin, 84 Ky. 641; Ritter v. Singmaster, 78 Pa. St. 400; Graham's Estate, 14 Phila. 280; Emeric v. O'Brien, 36 Ohio St. 491; Guichard v. Brande, 57 Wis. 584; Sandy River Nat. Bank v. Miller, 19 Atl. Rep. 109; 82 Me. 137.

² Catlin v. Munn, 87 Hun, 23.

³ Raymond v. Baar, 13 S. & R. 318; Samuels v. King, 50 Ind. 527;

such reasonable time as would enable the taker to inform himself as to its genuineness operates as a fraud on the payer, and prevents a recovery.¹

§ 224. Same subject. When payment is made in the [361] bills of insolvent banks or in other depreciated conventional currency, the question of who should bear the loss may arise under various circumstances. If both parties deal in [362] the currency in question as uncurrent money it is like dealing in a commodity. And if a debtor pays as money bank notes, knowing the bank to be insolvent, and conceals it from [363] the creditor or payee, it will be deemed a fraud.² But there are various aspects in which an innocent payment of depreciated or worthless currency may be viewed; that is, though both the payer and receiver take for granted it is good, and may be equally ignorant of any fact tending to lessen its value; first, the bank may be in fact insolvent, but had not stopped payment; second, it may have stopped payment, but a knowledge of it not have reached the neighborhood where the payment was made, and the bills may have continued there actually current; third, the currency used may be wholly worthless or only depreciated. Mr. Chitty says: "It should seem that if in discounting a note or bill the promissory note of country bankers be delivered, after they have stopped payment, but unknown to the parties, the person taking, unless guilty of laches, might recover the amount of the discount because it must be implied that at the time of the transfer the notes were capable of being received if duly presented for payment."³ And Mr. Story says of a payment in bills of

Thomas v. Todd, 6 Hill, 340; Lawrenceburgh Nat. Bank v. Stevenson, 51 Ind. 594; Corn Exchange Nat. Bank v. National Bank, 78 Pa. St. 233; Kenny v. First Nat. Bank, 50 Barb. 112; Camidge v. Allenby, 6 B. & C. 878; Bank of St. Albans v. Farmers' & M. Bank, 10 Vt. 141; Pindall's Ex'r v. Northwestern Bank, 7 Leigh, 617; Union Bank v. Baldenwick, 45 Ill. 875; Pumphrey v. Eyre, Tappan (Ohio), 283. See Young v. Adams, 6 Mass. 187; Salem Bank v. Gloucester Bank, 17 id. 1, 28.

¹ Atwood v. Cornwall, 28 Mich. 336. This case is valuable because of the ability and learning with which Judge Campbell discusses the legal relations between the payer and receiver of counterfeit money. See First Nat. Bank v. Ricker, 71 Ill. 439; Simms v. Clark, 11 Ill. 137; United States Bank v. Bank of Georgia, 10 Wheat. 333.

² Story on Prom. Notes, § 118.

³ Chitty on Bills, 247.

an insolvent bank, where both parties are equally innocent, and alike ignorant that the bank had become insolvent, that the weight of reasoning and of authority seem to be in favor of the payer bearing the loss. The decisions in New York,¹ Wisconsin,² Vermont,³ New Hampshire,⁴ Illinois,⁵ Maine,⁶ South Carolina,⁷ and Ohio,⁸ are in accord with that doctrine. But in Pennsylvania,⁹ Tennessee,¹⁰ and Alabama,¹¹ it has been held that such loss should be borne by the receiver.¹²

The failure of a bank has the effect of depriving its bills of the distinctive character of money; it becomes insolvent when it ceases to redeem them with legal tender money.¹³ Bank notes are the representative of money, and circulate as such by general consent and usage. But this consent and usage are based upon the convertibility of such notes into coin at the pleasure of the holder, upon their presentation to the bank for redemption. This fact is the vital principle which sustains their character as money. So long as they are in fact what they purport to be, payable on demand, common consent gives them the attributes of money. But upon the failure of the bank by which they were issued, when its doors are closed and

¹ *Lightbody v. Ontario Bank*, 11 Wend. 9; affirmed, 13 id. 101; *parte Blackburne*, 10 Ves. 204; *Emly v. Lye*, 15 East, 7.

Houghton v. Adams, 18 Barb. 545.

² *Townsend v. Bank of Racine*, 7 Wis. 185.

³ *Gilman v. Peck*, 11 Vt. 516; *Wainwright v. Webster*, id. 576.

⁴ *Fogg v. Sawyer*, 9 N. H. 365.

⁵ *Magee v. Carmack*, 13 Ill. 289.

⁶ *Frontier Bank v. Morse*, 22 Me. 88.

⁷ *Harley v. Thornton*, 2 Hill, 509.

⁸ *Westfall v. Braley*, 10 Ohio St. 188. But see *Imbush v. Mechanics' Bank*, 1 West. L. J. 49.

⁹ *Bayard v. Shunk*, 1 W. & S. 94.

¹⁰ *Scruggs v. Gass*, 8 Yerg. 175. But see *Ware v. Street*, 2 Head, 609.

¹¹ *Lowrey v. Murrell*, 2 Port. 282.

¹² See *Young v. Adams*, 6 Mass. 182; *Edmunds v. Digges*, 1 Gratt. 329; *Phillips v. Blake*, 1 Met. 156; *Camidge v. Allenby*, 6 B. & C. 373; *Owenson v. Morse*, 7 T. R. 64; *Ex*

In *Corbit v. Bank of Smyrna*, 2 Harr. 235, it was held that the receipt by a bank for deposit as money of the bills of a bank that had just suspended, but before either the bank or the depositor was informed of the failure, was at the risk of the bank receiving them. And a distinction was taken between the receipt of bank bills for a contemporaneous debt or consideration and receiving them for a precedent debt. In the former case the bills are supposed to be the thing bargained for, and therefore at the risk of the receiver; but when received for a precedent debt it is not discharged unless the bills are of solvent banks when received.

¹³ *Townsend v. Bank of Racine*, 7 Wis. 185; *Lightbody v. Ontario Bank*, 11 Wend. 9; 13 id. 101.

the inability to redeem its bills is openly averred, they instantly lose that character, their circulation as currency ceases [365] with the usage and consent upon which it rested, and the notes become the mere dishonored and depreciated evidences of debt. When this change in their character takes place the loss must necessarily fall upon him who is the owner of them at the time; and this, too, whether he is aware or unaware of the fact. His ignorance can give him no right to throw the loss he has already incurred upon an innocent third party.¹ Therefore, if such bills, after failure of the bank, are paid out and received as money by persons ignorant of the fact, the receiver is entitled to return them and require their amount in good money on the ground of mistake.² The very time when a bank announces its failure by closing its doors and ceasing to redeem is that at which its failure is deemed to occur, without reference to its antecedent real condition, between parties having no cause to anticipate that event.³ The doctrine that the loss falls upon him in whose hands the [366] bills are at the time of the failure necessarily involves an implied guaranty in every payment of bank bills that at that

¹ Westfall v. Braley, 10 Ohio St. 188.

² Id.; Frontier Bank v. Morse, 22 Me. 88; Roberts v. Fisher, 43 N. Y. 159; Leger v. Bonnaffe, 2 Barb. 475; Baldwin v. Van Deusen, 87 N. Y. 487.

³ Ware v. Street, 2 Head, 609. In this case a payment in bank bills was made on the 12th of July, 1858, late in the evening, and was held good, although the suspension was resolved upon that same evening, because not announced until the next day. The court say: "The loss must fall upon one of two innocent men, and the law must control it. At the time the payment was made the notes were circulating as currency and considered good by the community. But they were in fact of no value at the hour they were paid out, although a few hours before they were convertible into specie. . . . The supposed commercial interest of our country and the general convenience of the

people have produced a course of legislation by which bank paper has become the circulating medium and the standard of value instead of specie. True, it has not been made a lawful tender and cannot be without a change of the constitution. But by almost universal consent it has become the medium of exchange and the representative of property. It has taken the place of the precious metals and is regarded as money. This, however, is by consent and not by law. No man is *bound* to receive it in payment of debts or for property. But if it gets into his hands by consent, and a loss comes by failure of the bank, the misfortune must and should be his in whose hands it happens to be at the time. The risk must follow the paper and not the former owners. It passes from hand to hand without recourse except in cases of fraud or concealment."

time the bank has not suspended or failed, unless a contrary intention is manifested.

On the contrary, in Pennsylvania and some other states, as before stated, where a payment in bank bills is made in good faith their acceptance is not deemed to be upon the faith of any such guaranty, but is governed by the rule of *caveat emptor*, and the maxim of *melior est conditio defendentis*.¹

¹ In *Bayard v. Shunk*, 1 W. & S. 92, Gibson, C. J., expounds and enforces this view with great vigor of language and logic. He says: "Cases in which the bills and notes of a third party were transferred for a debt are not to the purpose; and most of those which have been cited are of that stamp. Where the parties to such a transaction are silent in respect to the terms of it, the rules of interpretation are few and simple. If the securities are transferred for a debt contracted at the time, the presumption is that they were received in satisfaction of it; but if for a precedent debt, it is that they are received as collateral security for it; and in either case it may be rebutted by direct or circumstantial evidence. But by the conventional rules of business, a transfer of bank notes, though they are of the same mould and obligation betwixt the original parties, is regulated by peculiar principles, and stands on a different footing. They are lent by the banks as cash; they are paid away as cash; and the language of Lord Mansfield in *Miller v. Race*, 1 Burr. 452, was not too strong when he said, 'they are treated as money, as cash, in the ordinary course and transaction of business by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes; they are as much money as guineas themselves are, or any other coin that is used in

common payments is money or cash.' If such were their legal character in England, where there was but one bank, how emphatically must it be so here where they have supplanted coin for every purpose but that of small change, and where they have excluded it from circulation almost entirely. It is true, as was remarked in *Young v. Adams*, 6 Mass. 182, that our bank notes are private contracts without a public sanction like that which gives operation to the lawful money of the country; but it is also true that they pass for cash, both here and in England, not by force of any such sanction, but by the legislation of general consent, induced by their great convenience, if not the absolute necessities of mankind. *Miller v. Race* is a leading case which has never been doubted in England, or, except in a case presently to be noticed, in America; and it goes very far to rule the point before us; for if the wheel of commerce is to be stopped or turned backwards in order to repair accidents to it from impurities in the medium which keeps it in motion, except those which, few and far between, are occasioned by forgery, bank notes must cease to be a part of the currency, or the business of the world must stand still. The weight of authority bearing directly on the point is (1841) decisively in favor of the position that *bona fide* payment in the notes of a broken bank discharges the debt. . . .

Where recourse is allowed to the party who paid out [367] the bills it does not depend on their being worthless. Parker, C. J., said: "The case of a payment in bills of a broken bank cannot be distinguished in principle from a payment in coun-

Camidge v. Allenby, 6 B. & C. 373; Scruggs v. Gass, 8 Yerg. 175; Young v. Adams, 6 Mass. 182; against Lightbody v. Ontario Bank, 11 Wend. 9; affirmed, 18 id. 101. . . .

"To assume that the solvency of the bank at the time of the transfer is an inherent condition of it is to assume the whole ground of the argument. The conclusion concurred in by all, however, was that the medium must turn out to have been what the debtor offered it for at the time of payment. How does that consist with the equitable principle that there must be, in every case, a motive for the interference of the law, but that it must be stronger than any to be found on the other side; else the equity being equal, and the balance inclining to neither side, things must be left to stand as they are (Fonb. B. 1, ch. V, § 3; id. ch. IV, § 25); in other words, that the law interferes not to shift a loss from one innocent man to another equally innocent, and a stranger to the cause of it. The self-evident justice of this would be proof, were it necessary, that it is a principle of the common law. But we need go no further in search of authority for it than Miller v. Race, in which one who had received a stolen bank note for full consideration in the course of his business was not compelled to restore it. It was intimated in the Ontario Bank v. Lightbody that there was a preponderance of equity in that case, not on the side of him who had lost the note, but of him who had last given value for it. Why last? The maxim, *prior in tempore potior in jure*, prevails between prior and sub-

sequent purchasers indifferently of a legal or an equitable title. It is for that reason the owner of a stolen horse can reclaim him of a purchaser from the thief; and were not the field of commerce market overt for everything which performs the office of money in it, the owner of a stolen note might follow it into the hands of a *bona fide* holder of it. But general convenience requires that he should not; and it was that principle, not any consideration of the equities betwixt the parties, which ruled the case of Miller v. Race. But a more forcible illustration of the principle, were the case indisputably law, might be had in Levy v. Bank of the United States, 4 Dall. 234; S. C., 1, Bin. 27, in which the placing even a forged check to the credit of a depositor as cash — a transaction really not within any principle of conventional law — was held to conclude the bank; and to this may be added the entire range of cases in which the purchaser of an article from a dealer has been bound to bear a loss from a defect in the quality of it. And for the same reason that the law refuses to interfere between parties mutually innocent, it refuses to interfere between those who are mutually culpable; as in the case of an action for negligence. What is there, then, in the case before us to take it out of this great principle of the common law? The position taken by the courts of New York is that every one who parts with his property is entitled to expect the value of it in coin. Doubtless he is. He may exact payment in precious stones, if such is the bargain. But

terfeit money. From the time of the failure of the bank they cease to be the proper representatives of money, whether [368] they are at the time near to or at a distance from the bank. They may have a greater value than counterfeit bills,

where he has accepted without reserve what the conventional laws of the country declare to be cash, his claim to anything else is at an end. Bills of exchange and promissory notes enter not into the transactions of commerce as money; but it impresses even these with qualities which do not belong to ordinary securities. The holder of one of them, who has taken it in the ordinary course, can recover on it, whether there was a consideration between the original parties or not. . . .

“The assertion that it is always an original and subsisting part of the agreement that a bank note shall turn out to have been good when it was paid away can be conceded no farther than regards its genuineness. That genuine notes are supposed to be equal to coin is disproved by daily experience, which shows that they circulate by the consent of whole communities at their nominal value when notoriously below it. But why hold the payer responsible for the failure of the bank only when it has been ascertained at the time of the payment, and not for insolvency ending in an ascertained failure afterwards? As the bank may have been actually insolvent before it closed to let the world know it, we must carry his responsibility back beyond the time when it ceased to redeem its notes, if we carry it back at all. Were it not for the conventional principle that the purchaser of a chattel takes it with its defects, the purchaser of a horse with the seeds of mortal disease in him might refuse to pay for him though his vigor and usefulness were yet unim-

paired; and if we strip a payment in bank notes of the analogous cash principle, why not treat it as a nullity, by showing that the bank was actually, though not ostensibly insolvent at the time of the transaction. It is no answer that the note of an unbroken bank may be instantly converted into coin by presenting it at the counter. To do that may require a journey from Boston to New Orleans, or between places still further apart, and the bank may have stopped in the meantime, or it may stop at the instant of presentation when situated where the holder resides. And it may do so when it is not insolvent at all, but perfectly able eventually to pay the last shilling. This distinction between previous and subsequent failure evinced by stopping before the time of the transaction or after it is an arbitrary and impracticable one. To such a payment we must apply the cash principle entire, or we must treat it as a transfer of negotiable paper, imposing on the transferee no more than the ordinary mercantile responsibility in regard to presentation and notice of dishonor. There is no middle ground. . . . The case of a counterfeit bank note is entirely different. The laws of trade extend to it only to prohibit the circulation of it. They leave it in all beside to what is the rule both of the common and the civil law, which requires a thing parted with for a price to have an actual or at least a potential existence (2 Kent, 468), and a forged note, destitute as it is of the quality of legitimate being, is a *nonentity*.

but in neither case has the party received what in the contemplation of both parties he was entitled to receive, if the contract was to pay a certain sum. In neither case has he received money or its representative. The sum contracted to be paid has not been paid in money or anything which [369] by usage passes as money, or which was entitled at the time to represent it; and the party has therefore failed to pay what he contracted to pay. Counterfeit coin may contain a portion of good metal and thus have some value, but this would not make it a good medium of payment. Entire worthlessness, or not, is not, therefore, the criterion.”¹ [370] A return of such paper by the receiver is required as a condition of the right to recover from the payer; and the necessity of returning it arises from the same considerations in the case of counterfeit money, to enable the party paying to secure

It is no more a bank note than a dead horse is a living one; and it is an elementary principle, that what has no existence cannot be the subject of a contract. But it cannot be said that the genuine note of an insolvent bank has not an actual and a legitimate existence, though it be little worth; or that the receiver of it has not got the thing he expected. It ceases not to be genuine by the bank's insolvency; its legal obligation as a contract is undissolved, and it remains a promise to pay, though the promisor's ability to perform it be impaired or destroyed. . . . The difference between forgery and insolvency in relation to a bank note is as distinctly marked as the difference between title and quality in relation to the sale of a chattel.

“What then becomes of the boasted principle that a man shall not have parted with his property until he shall have had value, or rather what he expected for it? Like many others of the same school, it would be too refined for our times, even did a semblance of justice lie at the root of it. But nothing de-

vised by human sagacity can do equal and exact justice in the apprehension of all men. The best that can be done, in any case, is no more than an approximation to it; and when the incidental risks of a business are so disposed of as to consist with the general convenience, no injustice will in the end be done to those by whom they are borne. Commerce is a system of dealing in which risk, as well as labor and capital, is to be compensated. But nothing can be more exactly balanced than the equities of parties to a payment in regard to the risk of the medium when its worthlessness was unsuspected by either of them. The difference between them is not the tithe of a hair or any other infinitesimal quantity that can be imagined; and in such a case the common law allows a loss from mutual mistake to rest where it has fallen, rather than to remove it from the shoulders of one innocent man to the shoulders of another equally so.”

¹ Fogg v. Sawyer, 9 N. H. 365; Frontier Bank v. Morse, 22 Me. 88; Magee v. Carmack, 13 Ill. 289.

himself with prior parties. But whether the rule requiring return within a reasonable time is confined to cases in which the payer has recourse does not appear to be decided. If the failure occurred while he was the owner of the bills he has no recourse; and if they are not returned why may not the party receiving and retaining them be charged with their value and the recovery be limited to the depreciation? ¹

§ 225. Payment by note, bill or check. A creditor may receive anything of value as payment.² A debtor, by agreement with his creditor, may pay his contemporaneous or antecedent debt in a note or bill against a third person; but there must be a mutual agreement that it shall be transferred and received as final satisfaction without recourse or condition of being productive.³ Where goods are sold for a particular [371] note it is an exchange or barter, and the note has the effect of payment.⁴ And it has been held that when the note of a third person is taken without recourse, by indorsement or otherwise, for goods sold at the time, the presumption is it is taken in payment.⁵ There is no dissent from the proposition

¹ *Townsend v. Bank of Racine*, 7 Wis. 185; *Ontario Bank v. Lightbody*, 13 Wend. 104.

In *Magee v. Carmack*, 13 Ill. 289, the court remark as to the question of what is a reasonable time: "When from the nature of the subject a general rule can be applied to all cases, then what constitutes reasonable notice may be a question of law for the court, as notice to the indorser of a bill or note. But when, as in this case, the question of what would constitute a reasonable time must depend upon the peculiar circumstances of each case, and cannot reasonably be subjected to any general rule, then it is a question of fact for the jury to be determined from all the circumstances."

² *Louden v. Birt*, 4 Ind. 566; *Reed v. Bartlett*, 19 Pick. 273; *Tilford v. Roberts*, 8 Ind. 254.

³ *St. John v. Purdy*, 1 Sandf. 9; *New York State Bank v. Fletcher*, 5

Wend. 85; *Conkling v. King*, 10 N. Y. 440, affirming 10 Barb. 372; *Roberts v. Fisher*, 53 Barb. 69; *Wright v. First Crockery Ware Co.*, 1 N. H. 281; *Jaffrey v. Cornish*, 10 id. 505; *Elliot v. Sleeper*, 2 id. 527; *Randlet v. Herren*, 20 id. 102; *Brewer v. Branch Bank*, 24 Ala. 440; *Hutchins v. Olcott*, 4 Vt. 549; *Hart v. Boller*, 15 S. & R. 162; *Citizens' Bank v. Carson*, 32 Mo. 191; *Smith v. Owens*, 21 Cal. 11; *Graves v. Friend*, 5 Sandf. 568.

⁴ *Ferdon v. Jones*, 2 E. D. Smith, 106; *Whitbeck v. Van Ness*, 11 Johns. 409; *Breed v. Cook*, 15 id. 241; *Rew v. Barber*, 8 Cow. 272.

⁵ *Hall v. Stevens*, 116 N. Y. 201, reversing 40 Hun, 578; *Gibson v. Tobey*, 46 N. Y. 637; *Corbit v. Bank of Smyrna*, 2 Harr. (Del.) 235, 259; *Torry v. Hadley*, 27 Barb. 192; *Whitbeck v. Van Ness*, 11 Johns. 409; *Noel v. Murray*, 13 N. Y. 167; *Rew v. Barber*, 8 Cow. 272; *Breed v. Cook*, 15 Johns. 241; *Bank of England v. Newman*,

that an agent who has authority to sell property and receive payment for his principal is not presumed to be empowered to take anything but money in payment therefor;¹ and this is true of an agent who is appointed to receive and collect demands due his principal.²

Whether the receipt by the creditor of the debtor's note, or the note of one of several debtors, with the agreement that it is received at the risk of the creditor, and as full satisfaction, will have the effect to extinguish the debt, is not universally agreed. In New York it has been several times held, and perhaps the doctrine there may be deemed settled, that a debtor's note, although expressly received as satisfaction, cannot extinguish his precedent debt.³

1 *Ld. Raym.* 442; *Bayard v. Shunk*, 1 W. & S. 92; *Fydell v. Clark*, 1 Esp. 447; *Clark v. Mundall*, 1 Salk. 124. But see *Darnall v. Morehouse*, 36 How. Pr. 511; *Turner v. Bank of Fox Lake*, 3 Keyes, 425; *Youngs v. Stahelin*, 34 N. Y. 258; *Owenson v. Morse*, 7 T. R. 64; *Burrows v. Bangs*, 34 Mich. 804; *Gardner v. Gorham*, 1 Doug. (Mich.) 507; *Van Cleef v. Therasson*, 3 Pick. 12; *Carroll v. Holmes*, 24 Ill. App. 453, and a *dictum* in *Morrison v. Smith*, 81 Ill. 221.

¹ *Runyon v. Snell*, 116 Ind. 164; *Stewart v. Woodward*, 50 Vt. 78; *Victor S. M. Co. v. Heller*, 44 Wis. 265; *Quinn v. Snell*, 50 Ark. 380.

If the principal ships goods sold by the agent for other than a cash consideration the contract of sale is ratified. *Billings v. Mason*, 80 Me. 496.

² *Scully v. Dodge*, 40 Kan. 395; *McCormick v. Peters*, 24 Neb. 70; *Nicholson v. Pease*, 61 Vt. 534; *Lochenmeyer v. Fogarty*, 112 Ill. 572; *Wilcox & W. Organ Co. v. Lasley*, 40 Kan. 521; *Deatherage v. Henderson*, 43 id. 684; *Mitchell v. Printup*, 68 Ga. 675.

³ *Cole v. Sackett*, 1 Hill, 516. In this case Cowen, J., said: "It may be considered at present as entirely settled that to operate as a satisfaction the promise must be of some

third person; in other words, something over and above the original debt. A promise by note is a security of no higher degree than an implied promise; and the logic of these pleas is no more than saying: 'Your precedent debt is discharged because I promised to pay it in another form, and you accepted the latter promise as a satisfaction.' What consideration is there for such an acceptance? The new promise to do a thing which the debtor was bound to do before — a thing which he now refuses to do, because he had promised again and again to do it! In these promising times, there are, I apprehend, few debts which on such a theory are not in danger of being barred much short of the statutes of limitations; for creditors, however unwilling, are many times obliged to accept promises as the only satisfaction they can obtain for the present. It is entirely settled that a promissory note in no way affects or impairs the original debt unless it be paid."

Notwithstanding the argument, from want of consideration, in the foregoing opinion, Judge Cowen conceded to negotiable notes taken for an account some additional value

[372] In England, and generally in this country, it is believed that the debtor's negotiable note or bill of a third person, when received by mutual agreement of the parties as satisfaction, has that effect; and the rule applies equally whether the debt be antecedent or contemporaneous.¹ Where any person is obligated to pay money, a payment made in any mode, either property, his negotiable paper, or other securities, if such payment is received as a full satisfaction of the demand, it is equivalent for the purpose of payment to cash.²

to the creditor in *Myers v. Welles*, 5 Hill, 463: "Being negotiable, they might be used more beneficially than the account. Besides, they operate to liquidate the plaintiff's claim. *These advantages constituted sufficient consideration for the suspension.*" See *Frisbie v. Larned*, 21 Wend. 450; *Putnam v. Lewis*, 8 Johns. 389; *Hawley v. Foote*, 19 Wend. 516.

On principle, it might well be claimed that where the new note is supported by sufficient consideration for forbearance, that consideration is sufficient for a discharge of the original debt.

¹ *Kell v. Larkin*, 72 Ala. 493; *Dryden v. Stephens*, 19 W. Va. 1; *Mayer v. Mordecai*, 1 S. C. 398; *Smith v. Hobleman*, 12 Neb. 502; *Sard v. Rhodes*, 1 M. & W. 153; *Sibree v. Tripp*, 15 id. 23; 2 Am. Lead. Cas. (5th ed.) 273; 1 Smith Lead. Cas. pt. 1 (7th Am. ed.) *456; *Yates v. Valentine*, 71 Ill. 643; *Chitty on Bills*, 289 *et seq.* and p. 119; *Story on Prom. Notes*, § 389, note 3, § 405; *Seltzer v. Coleman*, 32 Pa. St. 493; *Smith's Merc. L.* 542; *Cornwall v. Gould*, 4 Pick. 444; *Huse v. Alexander*, 2 Met. 157; *Sheehy v. Mandeville*, 6 Cranch, 253; *Maillard v. Duke of Argyle*, 6 M. & G. 40; *Hart v. Boller*, 15 S. & R. 162; *Jones v. Shawan*, 4 W. & S. 257; *Sutton v. The Albatross*, 2 Wall. C. C. 327; *Keough v. McNitt*, 6 Minn. 513. See *Gloenen v. Schroeder*, 18 id. 66;

Bank v. Bobo, 11 Rich. L. 597; *Haven v. Foley*, 19 Mo. 636; *Dougal v. Cowles*, 5 Day, 511; *Bonnell v. Chamberlin*, 26 Conn. 487; *McMurray v. Taylor*, 30 Mo. 263; *Foster v. Hill*, 36 N. H. 526; *Moody v. Leavitt*, 2 N. H. 171; *Costelo v. Cave*, 2 Hill (S. C.), 528; *Drake v. Mitchell*, 3 East, 251; *Foster v. Allanson*, 2 D. & E. 479; *Moravia v. Levy*, id. 483, n.; *Watson v. Owens*, 1 Rich. 111; *The Kimball*, 3 Wall. 37; *Brown v. Olmsted*, 50 Cal. 162; *Alley v. Rogers*, 19 Gratt. 366; *Burrows v. Bangs*, 34 Mich. 304.

² *O'Bryan v. Jones*, 38 Mo. App. 90; *Rice v. Dudley*, 34 id. 383; *Dryden v. Stephens*, 19 W. Va. 1; *Ralston v. Wood*, 15 Ill. 159; *Gillilan v. Nixon*, 26 id. 52; *Cox v. Reed*, 27 id. 434; *Wilkinson v. Stewart*, 30 id. 48; *Leake v. Brown*, 43 id. 376; *Tinsley v. Ryon*, 9 Tex. 405; *Robson v. Watts*, 11 Tex. 764; *Van Middlesworth v. Van Middlesworth*, 32 Mich. 183; *Wright v. Lawton*, 37 Conn. 167; *Gage v. Lewis*, 68 Ill. 604; *Doolittle v. Dwight*, 2 Met. 561; *Witherby v. Mann*, 11 Johns. 518; *McLellan v. Crofton*, 6 Me. 304; *Randall v. Rich*, 11 Mass. 494; *Pearson v. Parker*, 3 N. H. 366; *Atkinson v. Stewart*, 2 B. Mon. 348; *Howe v. Buffalo, etc. R. Co.*, 37 N. Y. 297; *Keller v. Boatman*, 49 Ind. 104.

In *Pitzer v. Harmon*, 8 Blackf. 112, a negotiable note was given by the surety and was taken in discharge and satisfaction; held not such a

In Massachusetts,¹ Maine,² Indiana³ and Vermont,⁴ when a creditor receives a negotiable note of the debtor either for an antecedent or contemporaneous simple contract debt, it is presumed to be received as absolute and not conditional [373] payment. This is a presumption of fact only, liable to be controlled by evidence that such was not the intention of the parties.⁵ In Wisconsin the taking of a bill of exchange on a previous indebtedness of the drawer to the payee is *prima facie* payment of the debt.⁶

This presumption rests upon the theory that when a note is given for goods it is equally convenient for the creditor, and

payment as would warrant a recovery against the principal for money paid. See *Bennett v. Buchanan*, 8 Ind. 47.

If a check given for a pre-existing debt is ultimately paid there is no "debt owing or accruing" to the creditor between the times of the delivery of the check and its payment so as to make the debtor who drew it subject to garnishment. *Elwell v. Jackson*, 1 Cab. & Ellis, 362; *Thompson v. Peck*, 115 Ind. 512; *Hunter v. Wetsell*, 84 N. Y. 549.

¹ *Melledge v. Boston Iron Co.*, 5 Cush. 158; *Thatcher v. Dinsmore*, 5 Mass. 299; *Goodenow v. Tylor*, 7 id. 36; *Maneely v. McGee*, 6 id. 143; *Chapman v. Durant*, 10 id. 47; *Johnson v. Johnson*, 11 id. 361; *Whitcomb v. Williams*, 4 Pick. 288; *Fowler v. Bush*, 21 id. 230; *Wood v. Bodwell*, 12 id. 268; *Scott v. Ray*, 18 id. 268; *French v. Price*, 24 id. 13. These cases have been followed in recent ones which are referred to in the notes to the next following paragraph.

² *Dole v. Hayden*, 1 Me. 152; *Wise v. Hilton*, 4 id. 435; *Homes v. Smith*, 16 id. 181; *Gilmore v. Bussey*, 12 id. 418; *Trustees, etc. v. Kendrick*, id. 381; *Comstock v. Smith*, 23 id. 202; *Bunker v. Barron*, 79 id. 62. In *Dole v. Hayden*, *supra*, upon a settlement of mutual accounts a promissory

note was given for the balance supposed to be due, but by a mistake in computation the note was made for \$20 more than in truth was due; it was held that the debtor might recover this sum from the creditor although the note still remained unpaid. The court treated the mistake as substantially an omission to allow \$20 of the plaintiff's account, and the action as brought for it.

³ *Weston v. Wiley*, 78 Ind. 54; *Nixon v. Beard*, 111 id. 137; *Alford v. Baker*, 53 id. 280; *Tyner v. Stoops*, 11 id. 22; *Huff v. Cole*, 45 id. 300; *Maxwell v. Day*, id. 509. It is otherwise if the note is not negotiable. *Alford v. Baker*, 53 id. 279. Compare *Godfrey v. Crisler*, 121 id. 203.

⁴ *Hodges v. Fox*, 86 Vt. 74; *Street v. Hall*, 29 id. 165.

⁵ *Butman v. Howell*, 144 Mass. 66; *Green v. Russell*, 132 id. 536; *Fowler v. Ludwig*, 34 Me. 460; *Dodge v. Emerson*, 131 Mass. 467; *Melledge v. Boston Iron Co.*, 5 Cush. 158; *Maneely v. McGee*, 6 Mass. 143; *Watkins v. Hill*, 8 Pick. 522; *Howland v. Coffin*, 9 id. 54; *Reed v. Upton*, 10 id. 525; *Butts v. Dean*, 2 Met. 76, and cases cited in notes to the next paragraph.

⁶ *Mehlberg v. Tisher*, 24 Wis. 607; *Schierl v. Baumel*, 75 id. 69.

generally more so, to sue on it than on the original promise; and so there is no reason for considering the original simple contract as still subsisting and in force; therefore, it is presumed that it was intended by the parties that the note should be deemed a satisfaction.¹ The presumption, however, is founded on the negotiable character of the note, and does not apply to other instruments.² The same presumption arises in Massachusetts when payment is made by the note of a third person, unless there is an agreement to the contrary, or equivalent circumstances;³ but it is otherwise in Indiana,⁴ unless the creditor surrenders the debtor's notes and sues upon the note of the third person.⁵ The presumption that a note is taken as satisfaction is affected by circumstances. Thus, where the note given is not the obligation of [374] all the parties who are liable for the simple contract debt, and *a fortiori* when the note given is that of a third person, and if held to be in satisfaction would wholly discharge the liability of other parties previously liable, the presumption, if it exists at all, is held of much less weight.⁶ The fact that such presumption would deprive the party who takes the note of a substantial benefit has a strong tendency to show that it was not so intended; as where it would imply the discharge of a mortgage.⁷ The taking of a note is to be

¹ Curtis v. Hubbard, 9 Met. 328.

² Alford v. Baker, 53 Ind. 279; Trustees v. Kendrick, 12 Me. 381; Chapman v. Coffin, 14 Gray, 454; Greenwood v. Curtis, 6 Mass. 358.

³ Wiseman v. Lyman, 7 Mass. 286.

Taking the negotiable note of a third person and entering it on the books as payment is not conclusive that it is such. Brigham v. Lally, 130 Mass. 485.

⁴ Godfrey v. Crisler, 121 Ind. 203; Bristol Manuf. Co. v. Probasco, 64 id. 406.

⁵ Dick v. Flanagan, 123 Ind. 277. See Hooker v. Hubbard, 97 Mass. 175; Dewey v. Bell, 5 Allen, 165.

⁶ Paine v. Dwinel, 53 Me. 52; Kidder v. Knox, 48 id. 555; Strang v. Hirst, 61 id. 15; Melledge v. Boston

Iron Co., 5 Cush. 158; Maneely v. McGee, 6 Mass. 143; Emerson v. Providence Hat M. Co., 12 id. 287; French v. Price, 24 Pick. 13; Barnard v. Graves, 16 id. 41; Curtis v. Hubbard, 9 Met. 328.

⁷ Taft v. Boyd, 13 Allen, 86; Bunker v. Barron, 79 Me. 62; Watkins v. Hill, 8 Pick. 522; Pomroy v. Rice, 16 id. 22; Zerrano v. Wilson, 8 Cush. 424. See Fowler v. Bush, 21 Pick. 230.

In Weddigen v. Boston, etc. Co., 100 Mass. 422, a buyer sent the seller a third person's check to pay for a bill of goods; the seller sent a receipt for the amount as received in settlement of the bill. At the time of sending the check the buyer supposed it to be good, but it was season-

regarded as payment only when the security of the creditor is not thereby impaired.¹ In some states, and upon very good reasons, a distinction is made as to the effect to be given to security executed by the debtor. If it is not of higher rank than the evidence of indebtedness held by the creditor it is not presumed to be accepted in payment, but if he takes a higher security or a better assurance of payment than he was before possessed of the presumption is to the contrary.² Where the debtor executes a note in which he waives his right to claim exemptions and gives it to his creditor, it is presumed to be taken by him in payment of a book account.³ The general distinction was made by Judge Story; he thought, however, that it ought not to be extended to security given by a third person.⁴ Whether a note is to have the effect of payment or to be considered as collateral only is to be determined by the law of the state in which it was made and is payable, though the creditor resides in another state and the indebtedness which was the consideration for the note was incurred there.⁵

§ 226. **Same subject.** The rule in the states above named is exceptional. It is held generally in this country, as well as in England, that a note, bill or check of the debtor or of a third person, given and received on account of a previous debt

ably presented and dishonored; held not a payment or accord and satisfaction.

Where a debtor gave his negotiable note for the amount of his debt, and included more than lawful interest in consideration of further delay of payment, the note being void for usury, held the original debt was not discharged and might still be recovered, though a receipt was given at the time the note was taken. *Johnson v. Johnson*, 11 Mass. 359; *Stebbins v. Smith*, 4 Pick. 97; *Ramsdell v. Soule*, 12 Pick. 126; *Meshke v. Van Doren*, 16 Wis. 319; *Lee v. Peckham*, 17 id. 383. See *Webster v. Stadden*, 14 id. 277.

A negotiable note given in New York for goods sold there by a citizen

of that state is no satisfaction of the original debt, so as to bar an action in Massachusetts for the same, although the note was lost and the vendor had given the vendee a receipt stating that the note was received in full for the goods. *Van cleef v. Therasson*, 3 Pick. 12.

¹ *Paine v. Dwinel*, 53 Me. 52; *Lovell v. Williams*, 125 Mass. 442; *Walker v. Mayo*, 143 id. 42; *Vallier v. Ditson*, 74 Me. 553.

² *Chalmers v. Turnipseed*, 21 S. C. 126; *Pelzer v. Steadman*, 22 id. 279; *Gardner v. Hust*, 2 Rich. 608.

³ *Lee v. Green*, 83 Ala. 491.

⁴ *United States v. Lyman*, 1 Mason, 482, 505.

⁵ *Gilman v. Stevens*, 63 N. H. 342.

or one contemporaneously contracted, is not absolute but conditional payment, unless it is accepted as such, or unless it produces payment.¹ The principle is applicable to a check which is certified before its delivery to the creditor. The only effect of the certificate is to increase the currency of the check by adding to the liability of the drawer that of the bank. The creditor does not assume the risk of the solvency of the latter.² Renewal of a note is not a payment,³ and will

¹ The cases which expressly hold the doctrine stated in the text are very numerous; a few only are cited here; those which will be cited in the subsequent discussion of the various branches of the subject under consideration are in harmony with those here collected, except the decisions in Massachusetts, Maine, Indiana and Vermont, and in Wisconsin as to bills of exchange only, and a limited number of cases which make a distinction between the obligations of third persons where they are given for a contemporaneous debt. See first paragraph of last section. *Hunter v. Moul*, 98 Pa. St. 13; *White v. Boone*, 71 Texas, 712; *Caldwell v. Hall*, 49 Ark. 508; *Comptoir D'Escompte v. Dresbach*, 78 Cal. 15; *Thomas v. Westchester Co.*, 115 N. Y. 47; *Fry v. Patterson*, 49 N. J. L. 612; *Brabazon v. Seymour*, 42 Conn. 554; *Bank of Monroe v. Gifford*, 79 Iowa, 300; *Bradley v. Harwi*, 48 Kan. 314; *Levan v. Wilten*, 135 Pa. St. 61; *Whitcher v. Dexter*, 61 N. H. 91; *Holmes v. Briggs*, 131 Pa. St. 233 (these two last cases qualify the proposition by the condition that the creditor must not so improperly conduct himself with respect to the note as to injure the debtor); *Selby v. McCullough*, 26 Mo. App. 66; *Knox v. Gerhauser*, 3 Mont. 267; *Salomon v. Pioneer Co-operative Co.*, 21 Fla. 874; *Fleig v. Sleet*, 43 Ohio St. 53; *First Nat. Bank v. Case*, 63 Wis. 504

(the rule is otherwise where a bill of exchange is accepted: see last paragraph); *Woodburn v. Woodburn*, 115 Ill. 427; *Heath v. White*, 3 Utah, 474; *Wiles v. Robinson*, 80 Mo. 47; *Hunt v. Higman*, 70 Iowa, 406; *Hess v. Dille*, 23 W. Va. 90; *Keel v. Larkin*, 72 Ala. 493; *Cheltenham S. & G. Co. v. Gates Iron Works*, 23 Ill. App. 635, affirmed 124 Ill. 623; *Walsh v. Lennon*, 98 Ill. 27; *Wilhelm v. Schmidt*, 84 Ill. 183; *Pritchard v. Smith*, 77 Ga. 463; *Costelo v. Cave*, 2 Hill (S. C.), 207; *Slocumb v. Lurty*, *Hempst. C. C.* 431; *People v. Howell*, 4 Johns. 296; *Bates v. Rosekrans*, 37 N. Y. 409; *Webster v. Stadden*, 14 Wis. 277; *Burrows v. Bangs*, 34 Mich. 804; *Peter v. Beverly*, 10 Pet. 532; *Owenson v. Morse*, 7 T. R. 64; *Chastain v. Johnson*, 2 Bailey, 574; *Alley v. Rogers*, 19 Gratt. 368; *The Kimball*, 3 Wall. 37; *Newell v. Nixon*, 4 id. 572; *Lee v. Tinges*, 7 Md. 215; *Harris v. Johnston*, 3 Cranch, 311; *Good v. Cheesman*, 2 B. & Ad. 328; *Winslow v. Hardin's Ex'r*, 3 Dana, 543; *Adger v. Pringle*, 11 S. C. 527; *Johnson v. Clarke*, 15 id. 72.

² *Born v. First Nat. Bank*, 123 Ind. 78; *Bickford v. Same*, 42 Ill. 238; *Larsen v. Breene*, 12 Colo. 480; *Andrews v. German Nat. Bank*, 9 Heisk. (Tenn.) 211; *Mutual Nat. Bank v. Rotge*, 28 La. Ann. 933.

³ *Kemmerer's Appeal*, 102 Pa. St. 558; *Graham's Estate*, 14 Phila. 280; *National Bank v. Bigler*, 83 N. Y.

not discharge a mortgage security.¹ But it seems where renewal is a discount of the new note, and there is a payment of the old note out of the avails, it is a discharge of the old debt.² Courts are in the habit of saying that when such paper is given for a debt it is not to be deemed a satisfaction unless there is an express agreement to that effect.³ It is probably not necessary that the proof should be just in that form; but it is doubtless essential that there be an express agreement or circumstances of approximately equal force to show that intention.⁴ There is such a lack of har- [377]

51; Kibbey v. Jones, 7 Bush, 243; Jagger Iron Co. v. Walker, 76 N. Y. 521.

¹ Reeder v. Nay, 95 Ind. 164; Williams v. Starr, 5 Wis. 534; Eastman v. Porter, 14 Wis. 39; Flower v. Elwood, 66 Ill. 438; Coles v. Withers, 33 Gratt. 186; Fowler v. Bush, 21 Pick. 230. In this case a mortgage was given as security for a debt payable in instalments; after the first instalment became due the mortgagee called on the mortgagor for payment, saying he could sell the note and mortgage if such instalment were paid. The mortgagor thereupon gave a negotiable note for such instalment, payable in four months, upon which the mortgagee proposed to raise the money at a bank; and the following indorsement was made on the original note: "Received the first instalment on the within, \$402.78." The mortgagee subsequently sold the note and mortgage. It was held that this was a payment of such instalment and not a mere change of security for the same debt; that the mortgage was discharged *pro tanto*.

² Fisher v. Marvin, 47 Barb. 159; Castleman v. Holmes, 4 J. J. Marsh. 1. *Contra*, Jagger Iron Co. v. Walker, 76 N. Y. 521.

³ The Kimball, 3 Wall. 37; Segrist v. Crabtree, 131 U. S. 287; Pritchard

v. Smith, 77 Ga. 463; Comptoir D'Escompte v. Dresbach, 78 Cal. 15. See Case Manuf. Co. v. Soxman, 138 U. S. 431.

⁴ Randlet v. Herren, 20 N. H. 102; Johnson v. Cleaves, 15 id. 332; Slocumb v. Lurty, Hemp. C. C. 431; Youngs v. Stahelin, 34 N. Y. 258; Yates v. Valentine, 71 Ill. 643.

In Eastman v. Porter, 14 Wis. 39, it is said that where, in connection with the fact that negotiable paper is taken on account of a debt, it is alleged or acknowledged to have been received "as payment," or "in full," or "in full of all demands," these expressions must be considered with that fact, and interpreted as meaning *conditional payment*.

In La Fayette Co. Monument Corp. v. Magoon, 73 Wis. 627, the communications between the parties were to the effect that M. hereby subscribes and hands to the treasurer of said corporation \$1,000 in money to be used, etc. In acknowledging the receipt of this and the accompanying check it was said, "received from M. the sum of \$1,000 according to the foregoing letter." Held, that the check was received as money. Glenn v. Smith, 2 Gill & J. 493; Johnson v. Weed, 9 Johns. 310; Tobey v. Barber, 5 id. 68; Putnam v. Lewis, 8 id. 389; Bateman v. Bailey, 5 T. R. 512; Puckford v. Maxwell, 6 id. 52; Bradford

mony in the adjudications that it is unsafe to attempt to formulate a rule from them. There is a marked tendency in the later cases to lessen the old rule which required an express agreement in order that payment should follow the taking of

v. Fox, 38 N. Y. 289; Comptoir D'Escompte v. Dresbach, 78 Cal. 15.

But in Connecticut, as evidence that a new note is received in payment of an account, peculiar importance is attached to a receipt which expresses that the note is given in *full payment*. It is there held that such a receipt is a discharge unless it is executed under circumstances of mistake, accident or surprise, or is founded in fraud. *Bonnell v. Chamberlin*, 26 Conn. 487; *Fuller v. Crittenden*, 9 id. 401; *Tucker v. Baldwin*, 13 id. 136; *Hurd v. Blackman*, 19 id. 177. See *Bishop v. Perkins*, id. 300; *Beam v. Barnum*, 21 id. 202.

An effort to collect acceptances given by a debtor when they were not received in payment is not such an appropriation of them as satisfies the debt. *Olyphant v. St. Louis O. & S. Co.*, 28 Fed. Rep. 729.

Entering the amount of the negotiable note of a third person upon the creditor's books to the debtor's credit without making any other appropriation of it does not conclusively show that it was taken in payment. *Brighton v. Lally*, 130 Mass. 485. Nor does the subsequent rendering of monthly statements showing such credit. *Cheltenham S. & G. Co. v. Gates Iron Works*, 23 Ill. App. 85; affirmed, 124 Ill. 623.

If the check of a third person is taken the creditor's neglect to give the debtor prompt notice of its dishonor, his retention of it and collecting a dividend out of the drawer's estate do not raise a presumption that it was taken as absolute payment; these facts are exclusively for

the jury. *Holmes v. Briggs*, 131 Pa. St. 233.

The English law is thus stated: "The debt may be considered as actually paid if the creditor at the time of receiving the note has agreed to take it in payment of the debt, and to take upon himself the risk of the note being paid, or if from the conduct of the creditor or the special circumstances of the case, such an agreement is legally to be implied. But in the absence of any special circumstances throwing the risk of the note upon the creditor, his receiving the note in lieu of the present payment of the debt is no more than giving an extended credit, or giving time for payment on a future day, in consideration of receiving this species of security. Whilst the time runs payment cannot legally be enforced, but the debt continues till payment is actually made; and if payment be not made when the time has run out, payment of the debt may be enforced as if the note had not been given." Per Langdale, M. R., in *Sayer v. Wagstaff*, 5 Beav. 415, 423. If the creditor is offered cash but voluntarily takes a bill he is paid and cannot resort to his debtor if the bill is dishonored. *Marsh v. Pedder*, 4 Camp. 257; *Strong v. Hart*, 6 B. & C. 160; *Smith v. Ferrand*, 7 id. 19; *Anderson v. Hillies*, 12 C. B. 499. But unless the creditor had an opportunity to receive money a bill if taken will be presumed to have been accepted as conditional payment. *Robinson v. Read*, 9 B. & C. 449. Under a contract for the sale of goods to be paid for by the buyer's acceptances

security,¹ and to regard the surrender or retention of the original security as decisive of the intention of the parties,² because if the creditor intends to resort to security he already holds he will not surrender it. In the absence of an agree-

or other like forms of credit, the payment is conditional only, and upon dishonor of the bills the seller may sue upon the original contract for the price of the goods; upon a refusal to give the bills the remedy of the seller is for that breach of contract, and he cannot sue for the contract price until the expiration of the stipulated credit. Leake's Contracts, 894; Paul v. Dod, 2 C. B. 800; Helfs v. Winterbottom, 2 B. & Ad. 481; Gunn v. Bolckow, L. R. 10 Ch. 500.

¹ An express agreement to receive payment in something else than money need not be proved; it may be implied from the facts and circumstances. Griffin v. Petty, 101 N. C. 380. A debtor proposed by letter to remit a draft "in payment of bill in full;" the creditor acknowledged the receipt of the draft in full payment. There was no cause of action against the debtor on the account; his liability rested upon his indorsement. Day v. Thompson, 65 Ala. 269. An express agreement is not necessary to make the check, note or bill payment. Riverside Iron Works v. Hall, 64 Mich. 165; Brown v. Dunckel, 46 id. 82; Keel v. Larkin, 72 Ala. 493; Morris v. Harveys, 75 Va. 726; Hall v. Stevens, 116 N. Y. 201 (contemporaneous debt).

The intention to receive a note and collaterals in payment is inferable from an entry in the creditor's books to the effect that they were received in settlement of balance, and a receipt expressing that they were in settlement of the above account. Williams, Ex parte, 17 S. C. 396. In Griffin v. Anderson, 3 S. C. 105,

the words "settled in full" in the bond of a commissioner were considered sufficient to indicate that a note was taken in payment of a balance due from him. See In re Hurst, 1 Flip. 462. If notes secured by a mortgage nearly equal in amount to the debt are given and the balance is paid in cash, and part of the notes are used by the creditor, the debt is extinguished. Quidnuck Co. v. Chaffee, 13 R. I. 438.

² Riverside Iron Works v. Hall, 64 Mich. 165; Brown v. Dunckel, 46 id. 82; Morris v. Harveys, 75 Va. 726; Fidelity Ins. etc. Co. v. Shenandoah V. R. Co., 86 id. 1; Burchard v. Frazer, 23 Mich. 224.

Where the new note is made by a third person the surrender of the old will be, *prima facie*, a discharge of it and a release of its maker from personal liability; but not if the holder of the old note had a specific lien on land as security for the debt and the result of giving the new note is to make the person liable on it the owner of the land, part of the consideration being the new note. Hess v. Dille, 23 W. Va. 90; Merchants' Nat. Bank v. Good, 21 id. 455.

Walker, C. J., in Strong v. King, 85 Ill. 9, 19, said: "The bare reception of a check from the drawer for the amount of the bill will not, ordinarily, be considered as payment, but only as a means of payment; and this is the rule whether the bill is surrendered to the drawer at the time of receiving the check or is retained by the holder until the payment is consummated. It may be imprudent to surrender the bill be-

ment or acts of the parties indicative of a contract, a negotiable note or bill of exchange taken as conditional payment will have the effect to suspend the right of action until it matures.¹ And then it will not be presumed in favor of the [378] creditor that it remains unpaid; he must account for it; and so if he receives a check. Such paper, unless it has been lost, must be produced at the trial of an action on the original consideration that it may be surrendered or canceled.²

§ 227. Same subject. By accepting the note, bill or check either of the debtor or of a third person as conditional pay-

fore actual payment is made, but such improvidence does not change the rule."

In *Flower v. Elwood*, 66 Ill. 438, 444, the same judge said: "And although the surrender of the notes by the mortgagee to the maker is *prima facie* evidence of their payment, still such presumption may be rebutted."

In *Yates v. Valentine*, 71 Ill. 648, his associate, apparently delivering the unanimous opinion of the court, said: "We can conceive of no act showing more decisively that it was intended by the parties that the note was satisfied and should be canceled. It was intended that the defendant should thereafter be bound by the terms of the notes then given, and the old note was given him that it might cease to exist as an evidence of indebtedness against him." *Chastain v. Johnson*, 2 Bailey, 574; *Eastman v. Porter*, 14 Wis. 39; *Smith v. Miller*, 43 N. Y. 171.

Ordinarily the surrender by a creditor to the debtor of the promissory note of the latter on the acceptance of the note of a third person for that amount is *prima facie* evidence that it is taken in satisfaction of the note so surrendered. *Youngs v. Lee*, 12 N. Y. 551; *Pratt v. Coman*, 37 id. 440; *Phoenix Ins. Co. v. Church*, 81

id. 218, 225. But whether the original debt is in fact discharged depends upon the parties' intention. *Noel v. Murray*, 13 N. Y. 167. A note given by executors does not discharge an indebtedness due from the estate of their testator whose note was surrendered to them, unless such was the understanding of the parties. *Glenn v. Burrows*, 37 Hun, 602.

¹ *The Kimball*, 3 Wall. 37; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501; *Griffith v. Grogan*, 12 Cal. 317; *Putnam v. Lewis*, 8 Johns. 389; *Brewster v. Bours*, 8 Cal. 501; *Lee v. Tinges*, 7 Md. 215; *Smith v. Owens*, 21 Cal. 11.

² *Stevens v. Bradley*, 22 Ill. 224; *Heartt v. Rhodes*, 66 id. 351; *Carroll v. Holmes*, 24 Ill. App. 458; *O'Bryan v. Jones*, 38 Mo. App. 90; *McMurray v. Taylor*, 30 Mo. 263; *Salomon v. Pioneer Co-operative Co.*, 21 Fla. 374; *McConnell v. Stettinius*, 7 Ill. 707; *Dangerfield v. Wilby*, 4 Esp. 159; *Hadwen v. Mendizabel*, 10 Moore, 477; *Jaffrey v. Cornish*, 10 N. H. 505; *Mehlberg v. Tisher*, 24 Wis. 607; *Dayton v. Trull*, 23 Wend. 345; *Burdick v. Green*, 15 Johns. 247; *Smith v. Rogers*, 17 id. 340; *Hughes v. Wheeler*, 8 Cow. 78; *Eastman v. Porter*, 14 Wis. 39; *Plant's Manuf. Co. v. Falvey*, 20 Wis. 200; *Cromwell v. Lovett*, 1 Hall, 56; *Taylor v. Allen*, 36 Barb. 294.

ment, the creditor assumes the duty of doing anything in respect to it which is necessary not only to obtain payment by due presentment, but also by protest and notice to fix the liability of the parties. And the *onus* is upon him to show that he has performed that duty.¹ If there are other parties to such paper to which the holder could resort in case of its dishonor any want of diligence on the part of the creditor receiving it by which such parties are discharged will preclude such creditor from returning it and suing upon the original debt.²

There is not the same arbitrary strictness in the rule of diligence, and in respect to consequences of neglect, where a check is received as a means of payment, or even as payment, that prevails in regard to notes and bills. The drawer is in no case discharged from his responsibility to pay the check unless he has suffered some loss or injury by the omission or neglect to make presentment, and then only *pro tanto*.³ But a chose

¹ Kilpatrick v. Home B. & L. Ass'n, 119 Pa. St. 80; Phoenix Ins. Co. v. Allen, 11 Mich. 501; Dayton v. Trull, 23 Wend. 845; Cooper v. Powell, Anthon, 49; Little v. Phenix Bank, 2 Hill, 425; affirmed, 7 id. 859; Jennison v. Parker, 7 Mich. 855; Heartt v. Rhodes, 66 Ill. 351; Bradford v. Fox, 39 Barb. 203; S. C., 16 Abb. Pr. 51; 38 N. Y. 289; Story on Prom. Notes, § 498; Roberts v. Thompson, 14 Ohio St. 1; Schierl v. Baumel, 75 Wis. 69; Corbett v. Clark, 45 id. 406; Allan v. Eldred, 50 id. 185; Chicago, etc. Ry. Co. v. Wisconsin, etc. Ry. Co., 76 Iowa, 615.

The drawer does not waive anything by a subsequent promise to pay unless he made it with knowledge of the facts, which the holder has the burden of proving. Schierl v. Baumel, *supra*.

² Id.; Sandy River Nat. Bank v. Miller, 82 Me. 187.

³ McWilliams v. Phillips, 71 Ala. 80; Hunter v. Moul, 98 Pa. St. 13; Gibbs v. Cannon, 9 S. & R. 201; Overton v.

Tracey, 14 id. 811; Holmes v. Briggs, 181 Pa. St. 233; Story on Prom. Notes, § 497; Kent's Com., Lec. 44; Cruger v. Armstrong, 3 Johns. Cas. 5; Conroy v. Warren, id. 259; Murray v. Judah, 6 Cow. 484; Commercial Bank v. Hughes, 17 Wend. 94; Harbeck v. Craft, 4 Duer, 122; Mohawk Bank v. Broderick, 10 Wend. 304; Little v. Phenix Bank, 2 Hill, 425; Serle v. Norton, 2 Mood. & Rob. 401; Hill v. Beebe, 13 N. Y. 556.

In Bradford v. Fox, 38 N. Y. 289, the defendant averred payment, and it was held that though made by a check the *onus* of proving that the check resulted in payment was on him. Grover, J., said: "To effect this, proof of the delivery and receipt of the check by the plaintiff not being sufficient, the defendant was bound to go further and show that by the *laches* of the plaintiff a loss had been incurred, to be borne by some one; and when this appeared, the law would cast the loss upon the plaintiff, and would work out such

[379] in action in any form received as conditional payment or as collateral security, to the extent collected or paid; or of the loss by the creditor's negligence; or when transferred by him to a third person, unless taken back, is payment on account of the debt for which it was received.¹ So if the creditor take from his debtor an order or note payable to a third person.²

§ 228. **Collaterals collected or lost by negligence of creditor are payments.** When security is given for a debt, and money is realized therefrom, it is, as has just been said, a payment *pro tanto*.³ The money thus received is deemed so appropriated by mutual agreement.⁴ It is payment, not merely a set-off;⁵ but if the debtor pays his debt after such collections on collaterals he may recover them from the creditor.⁶

[380] There is an implied obligation on the creditor to account for the proceeds of collaterals. His failure or refusal

result by making the check operate as payment of the debt." It is believed, however, that after delivery of a check to a creditor as a means of payment, the weight of authority puts the burden of proof on him to show that the check was unproductive; and if there has been a want of diligence, that no loss or injury has resulted to the debtor. *Murray v. Judah*, 6 Cow. 484; *Syracuse, etc. R. Co. v. Collins*, 3 Lans. 29.

¹ *Looney v. District of Columbia*, 118 U. S. 258; *Brown v. Same*, 17 Ct. of Cls. 402; *Donnelly v. Same*, 119 U. S. 839; *Loth v. Mothner*, 53 Ark. 116; *Smith v. Ferrand*, 7 B. & C. 19; *Harris v. Johnston*, 3 Cranch, 311; *John v. John*, *Wright* (Ohio), 584; *McCluny v. Jackson*, 6 Gratt. 96; *Parker v. United States*, 1 Pet. C. C. 262; *Lawrence v. Schuylkill N. Co.*, 4 Wash. C. C. 562; *Bill v. Porter*, 9 Conn. 28. See *Case Manuf. Co. v. Soxman*, 138 U. S. 431, 438.

² *Shaw v. Gookin*, 7 N. H. 16.

³ *Ante*, § 227. See *New London Bank v. Lee*, 11 Conn. 112. A mortgage or other security to indem-

nify an accommodation indorser is not available as security for the debt, either to relieve the indorser or surety from paying it (*Post v. Tradesmen's Bank*, 28 Conn. 420; *Horner v. Savings Bank*, 7 id. 478), or as a means of payment at the instance of the creditor. *Ohio Life Ins. & T. Co. v. Reeder*, 18 Ohio, 35, 46. See *Russell v. La Roque*, 13 Ala. 149.

If collaterals have been exchanged for other securities which prove to be worthless the debtor whose paper was accepted conditionally is not released except so far as he is injured. *Hunter v. Moul*, 98 Pa. St. 13; *Girard F. & M. Ins. Co. v. Marr*, 46 id. 504.

⁴ *Pope v. Dodson*, 58 Ill. 360; *Kemmil v. Wilson*, 4 Wash. C. C. 308; *Midgeley v. Slocomb*, 2 Abb. (N. S.) 275; *Lincoln v. Bassett*, 23 Pick. 154; *Kenniston v. Avery*, 16 N. H. 117; *Dismukes v. Wright*, 3 Dev. & Bat. 78.

⁵ *King v. Hutchins*, 28 N. H. 561; *In re Ouimette*, 1 Sawyer, 47.

⁶ *Overstreet v. Nunn*, 36 Ala. 666; *Dorrill v. Eaton*, 35 Mich. 302.

to give an account of the application thereof will operate as a bar to the recovery of the debt itself.¹ But where the collaterals are placed in the hands of a third person by the debtor, and were never in the hands or under the control of the creditor, he is entitled to recover against the debtor without accounting for them.² If bank bills have been received it lies on the creditor in a suit against a surety to show what has been done with them.³ Taking a collateral does not suspend the right to bring suit on the debt secured.⁴ Nor can the debtor obtain credit thereon for such collateral unless it has been collected or appropriated by the creditor, or lost by his negligence or fault.⁵

Where negotiable paper is received as a means of payment it is *prima facie* payment, and the creditor must show what has become of it; show diligence to obtain payment, or excuse non-presentment, and produce it at the trial.⁶ A note delivered as collateral continues a valid security until the debt is paid, notwithstanding it is changed in form, as into a judgment.⁷ And a creditor who holds security, without special instructions for its application, for various notes due from his debtor, some of which bear the names of sureties, may, in case of the insolvency of the principal debtor and of some of the sureties, apply the same towards the payment of such of the notes as may be necessary for his own protection; and solvent parties upon others cannot avail themselves thereof in any way, in equity, without paying or offering to pay [381] the whole of the notes for which the security was given.⁸ A

¹ *Simes v. Zane*, 1 Phila. (Pa.) 500; *Dussol v. Bruguire*, 50 Cal. 456.

² *Bank of United States v. Peabody*, 20 Pa. St. 454.

³ *Spaulding v. Bank of Susquehanna Co.*, 9 Pa. St. 28.

⁴ *Wilhelm v. Schmidt*, 84 Ill. 183; *Flanagan v. Hambleton*, 54 Md. 222; *Williams v. National Bank*, 72 id. 441, 450; *Dugan v. Sprague*, 2 Ind. 600; *Foster v. Purdy*, 5 Met. 442; *Lincoln v. Bassett*, 23 Pick. 154.

⁵ *Id.*; *Fiske v. Stevens*, 21 Me. 457; *Hawks v. Hinchcliff*, 17 Barb. 492; *Cocke v. Chaney*, 14 Ala. 65; *Slevin*

v. Morrow, 4 Ind. 425; *Hall v. Green*, 14 Ohio, 499; *Prettyman v. Barnard*, 37 Ill. 105.

⁶ *Dayton v. Trull*, 23 Wend. 345; *Cooper v. Powell*, Anth. 49; *Roberts v. Gallagher*, 1 Wash. C. C. 156; *Brown v. Cronise*, 21 Cal. 886; *Plant's Manuf. Co. v. Falvey*, 20 Wis. 200; *Bullard v. Hascall*, 25 Mich. 132.

⁷ *Fisher v. Fisher*, 98 Mass. 303.

⁸ *Wilcox v. Fairhaven Bank*, 7 Allen, 270. F. and H. made and delivered to S. their joint and several note for \$4,500; before its maturity S. gave his note for \$1,000 to C., and

creditor is only obliged to apply the net proceeds of collaterals. Expenses necessarily incurred in rendering them available are to be deducted, and the balance only is a payment upon the debt secured.¹ But the equitable interest of the assignee of a non-negotiable promissory note assigned as collateral security extends only to the amount of the debt for the security of which it was assigned, and not to the costs which have accrued in a suit subsequently brought thereon. And a release from the payee executed subsequent to the assignment will be available for all of such collateral in excess of such debt.² A chose in action which is transferred as collateral [382] security is put under the control of the creditor to make his claim out of it, and it is not in the nature or subject to the

indorsed and delivered as collateral the note of F. and H. C. subsequently assigned S.'s note to F. and delivered the note of F. and H. as collateral security. After this S. sold and assigned the note of F. and H., then in the hands of F., to D., who thereafter demanded the \$4,500 of F., offering to credit the same with the amount of the \$1,000 note, which was refused. Held, that D. was entitled to recover on the note against F. and H. less the amount of the \$1,000 note.

¹Starrett v. Barber, 20 Me. 457; Herrington v. Pouley, 26 Ill. 94; Van Blarcom v. Broadway Bank, 37 N. Y. 540.

²Blake v. Buchanan, 22 Vt. 548. The defendant and one A. of Massachusetts exchanged notes of equal amounts and having equal time to run, in August, 1854. Later in the same month A. deposited defendant's notes and others as collateral, and procured a discount of his own note for \$8,000 by plaintiff. The note had ten days to run; A. failed to pay it, and was driven into insolvency. Separate suits were brought against the defendant on his notes when they became due. At the time

of bringing these suits between \$3,000 and \$4,000 of the collaterals had been paid. When the actions (together) were tried, the collaterals had been paid in to an amount sufficient to pay the plaintiff's claim, except about \$200. Held, that the plaintiff should have judgment for the full amount of the notes, interest and costs, but the rights of the defendant should be provided for by an order in the judgment permitting him to be discharged by paying the balance due the plaintiff with costs; the residue to be paid into court to be subject to its further order on the application of A.'s assignees, or of A. on notice. Nantucket Bank v. Stebbins, 6 Duer, 841.

In Russell v. La Roque, 13 Ala. 149, it was held that where a surety received from his principal a note as indemnity, and passed the same over to the creditor as collateral security for the principal, that the creditor could not recover upon such note after the principal debt was barred by the statute of limitations; but it would have been otherwise if the note had been delivered to the creditor in discharge of the surety's liability.

incidents of a pawn or pledge. It should be collected, not sold.¹

§ 229. **Same subject.** A creditor receiving collateral securities is required to use ordinary diligence, and to observe good faith in respect to the same; if they are lost or impaired through his act or neglect he is liable to the debtor to the extent of the injury; and such damages, or so much as is necessary therefor, will inure as a payment of the debt for which the collaterals were received as security.² If they be negotiable paper to mature at a future day, due diligence imposes on the creditor the necessity of doing those acts which will preserve the liability of indorsers or other secondary parties.³ In case of neglect the creditor is liable for the actual loss, but no more;⁴ and the *onus* is on the debtor to show the extent of the injury.⁵ So if the creditor receives a [383] check in payment of a debt, and unreasonably delays presenting it, he is only liable for the actual injury to the drawer.⁶

A transfer of the collateral by the creditor is an appropriation of it, and he will be held to have elected to take it for what appears by its face to be due thereon in satisfaction to

¹ Chambersburg Ins. Co. v. Smith, 11 Pa. St. 120; Nelson v. Wellington, 5 Bosw. 178; Brookman v. Metcalf, id. 429.

² Roberts v. Gallagher, 1 Wash. C. C. 156; Gallagher v. Roberts, 2 id. 191; Hanna v. Holton, 78 Pa. St. 334; Girard F. & M. Ins. Co. v. Marr, 46 id. 504; Miller v. Gettysburg Bank, 8 Watts, 192; Dyott's Estate, 2 W. & S. 463; Lishy v. O'Brien, 4 Watts, 141; Bank of United States v. Peabody, 20 Pa. St. 454; Chambersburg Ins. Co. v. Smith, 11 id. 120; Sellers v. Jones, 22 id. 423; Muirhead v. Kirkpatrick, 21 id. 237; Foote v. Brown, 2 McLean, 369; Brown v. Cronise, 21 Cal. 386; Whitten v. Wright, 84 Mich. 92; Exeter Bank v. Gordon, 8 N. H. 66; Finnell v. Meaux, 8 Bush, 449; Kenniston v. Avery, 16 N. H. 117; In re Brown, 2 Story, 502; Chamberlyn v. Delarive, 2 Wilson. 853; Bonta v. Curry, 8 Bush, 678; Russell v. Hester,

10 Ala. 535; Powell v. Henry, 27 Ala. 612; Lee v. Baldwin, 10 Ga. 208; Cardin v. Jones, 23 Ga. 175; Kiser v. Riddick, 8 Blackf. 382; Noland v. Clark, 10 B. Mon. 239; Hoffman v. Johnson, 1 Bland Ch. 108; Steger v. Bush, Sm. & M. Ch. 172; Barrow v. Rhineland, 8 Johns. Ch. 619; Jennison v. Parker, 7 Mich. 355; Goodhall v. Richardson, 14 N. H. 567; White v. Howard, 1 Sandf. 81; Nexsen v. Lyell, 5 Hill, 466.

³ Jennison v. Parker, 7 Mich. 355; Russell v. Hester, 10 Ala. 535; Kenniston v. Avery, 16 N. H. 117; Foote v. Brown, 2 McLean, 369; Brown v. Cronise, 21 Cal. 386; Phoenix Ins. Co. v. Allen, 11 Mich. 501.

⁴ Aldrich v. Goodell, 75 Ill. 452; Coonley v. Coonley, Hill & D. 812.

⁵ Id.; Fiske v. Stevens, 21 Me. 457.

⁶ McWilliams v. Phillips, 71 Ala. 80; Hunter v. Moul, 98 Pa. St. 13; Bell v. Alexander, 21 Gratt. 1.

that extent.¹ If he transfers the collateral for less than its face it is his loss.² He must settle with the debtor for the whole nominal value of the collateral, though he settled with the maker for less, or took a note in part satisfaction.³ A creditor may relinquish a collateral security to his debtor without the consent of other creditors, and not thereby lose his resort to the debtor's property.⁴ But a surety would be discharged by such relinquishment; for the creditor is bound to hold security for the benefit of the surety as well as for himself; and if he parts with it without the knowledge or against the will of the surety he will lose his claim against him to the value of what is so surrendered.⁵ One who receives from his debtor as collateral negotiable paper of a third person indorsed by the debtor makes it his own and releases the debtor's indorsement if he neglects to protest it for non-payment.⁶ A creditor

¹ *Hawks v. Hinchcliff*, 17 Barb. 492; *Looney v. District of Columbia*, 113 U. S. 258; *Donnelly v. Same*, 119 id. 339; *Williams, Ex parte*, 17 S. C. 896; *Adger v. Pringle*, 11 id. 535; *Townsend v. Stevenson*, 4 Rich. 62.

² *Id.*

³ *Depuy v. Clark*, 12 Ind. 427. See *Garlick v. James*, 12 Johns. 146; *Phillips v. Thompson*, 2 Johns. Ch. 418.

⁴ *Dyott's Estate*, 2 W. & S. 463.

⁵ *Stewart v. Davis*, 18 Ind. 74. See vol. 2, ch. 7.

⁶ *Whitten v. Wright*, 34 Mich. 92. In this case, upon the trial the plaintiff offered to show that at the time the note was given the maker was insolvent, that he was so at the time of its maturity, and continued so up to the time of the trial, for the purpose of showing that though the note was not properly protested the defendant lost nothing by it. That evidence was held properly excluded. Marston, J., delivering the opinion of the court, said: "It is of the utmost importance that no uncertainty should exist as to the rights and liabilities of parties to

negotiable paper. Should the introduction of evidence upon the trial be sanctioned to show that an indorser had not suffered any injury from a want of protest and notice, an element of uncertainty would then exist, and the way would be opened for a new class of questions and much needless litigation. The value of a note cannot always be determined from the solvency or insolvency alone of the maker. As was said in *Rose v. Lewis*, 10 Mich. 485, 'the value of negotiable paper is well understood not to be absolutely dependent on the amount of property liable to execution which may be possessed by the maker. A very large portion of current securities of undoubted goodness would, under such a test, be worthless. And in cases where the holder of such paper is indebted to the maker, it may be as valuable to him, by way of set-off, as if the maker were wealthy and in sound credit. The value of commercial paper must always depend very much upon the integrity and business habits of those who issue it. And we cannot perceive the justice or

having a note for the purchase-money of a slave, on the [384] death of the purchaser took possession of the slave; he was held liable for the injury done to the estate as executor *de son tort*, and the amount of such liability payment so far upon the note.¹ A creditor who included in a mortgage a premium for a policy of insurance on the life of the debtor as additional security for the debt and neglected to effect the insurance was held liable as upon an express agreement to insure for the amount of the sum for which he should have procured insurance.²

§ 230. Who may make payments. The general rule as to payment or satisfaction by a third person not himself liable as a co-contractor or otherwise seems to be that it is not sufficient to discharge the debtor unless it is made as agent for him and on his account, and with his prior authority or subsequent ratification; but the debtor may ratify the payment by pleading it unless he has previously disavowed it.³

good sense of any rule which should disregard the results of common experience.' If the note in this case had been properly protested and notice given to the defendant, he might have been able to collect it or secure its payment. We think the evidence was properly excluded."

¹ Finnell v. Meaux, 3 Bush, 449.

² Soule v. Union Bank, 45 Barb. 111; 30 How. Pr. 105.

³ Gray v. Herman, 75 Wis. 458; Walter v. James, L. R. 6 Exch. 124; Simpson v. Eggington, 10 Exch. 845; James v. Isaacs, 12 C. B. 791; Belshaw v. Bush, 11 id. 191; Jones v. Broadhurst, 9 id. 193; Clow v. Borst, 6 Johns. 37; Stark v. Thompson, 3 T. B. Mon. 296; Woolfolk v. McDowell, 9 Dana, 268; Lucas v. Wilkinson, 1 Hurl. & N. 420; Atlantic Dock Co. v. Mayor, 53 N. Y. 64; Bleakley v. White, 4 Paige, 654.

In a note to Simpson v. Eggington it is said that "the rule which requires the consideration to move between the parties has been modified

in many important particulars by the introduction of the action for money had and received, and it would seem only reasonable to permit a debt to be extinguished by a payment made to a creditor whenever the circumstances are such that the amount paid might have been recovered by the debtor had no debt existed."

The early cases on the subject are considered by Creswell, J., in Jones v. Broadhurst, *supra*, and also in the arguments of counsel in Walter v. James, *supra*. See Hooper's Case, 2 Leon. 110; Grimes v. Blofield, Cro. Eliz. 541; Edgecombe v. Rodd, 5 East, 294.

In Belshaw v. Bush, 11 C. B. 191 (1851), Maule, J., said: "If a bill given by the *defendant* himself on account of the debt operate as a conditional payment, and so be of the same force as an absolute payment by the defendant, if the condition by which it is to be defeated has not arisen, there seems no reason why a bill given by a stranger for and on

In a recent Wisconsin case the defendant became a debtor for the benefit of a third person, who made payment of his own volition and on his own behalf. The trial court ruled that it was not competent for the party sued to plead payment by another party who was not sued, and who could not be affected by the judgment. Cole, C. J., considers this ruling by asking: "Why not, if it is shown that the creditor accepts the payment in satisfaction of the debt? Can it be said that the obligation is still in force? What sense or reason is there in any such technical rule as that, if it exists? If a debt is fully paid it would seem according to plain common sense that the obligation was extinguished and is no longer in force as a contract. What concern is it to the creditor who pays his debt, especially where he accepts the payment made in satisfaction of his debt?"¹ If the creditor accepts payment under a mistake of fact, as by erroneously supposing

account of the debt should not operate as a conditional payment by the stranger; and if it have that operation, the plea in the present case will have the same effect as if it had alleged that *the money* was paid by William Bush (the stranger) for and on account of the debt. But, if a stranger give money in payment, absolute or conditional, of the debt of another, and the causes of action in respect to it, it must be payment on behalf of the other, against whom alone the causes of action exist, and, if adopted by him, will operate as payment by himself." Coke, Litt. 206b, 36 H. 6.

James v. Isaacs, 12 C. B. 791 (1852). In *assumpsit* for work and labor the defendant pleaded that the money mentioned in the declaration accrued due to the plaintiff under an agreement for the building of a church; that the plaintiff having suspended the work another agreement was entered into between him and one A. under which the plaintiff, in consideration of certain stipulated payments, undertook to complete the

work and to rely for the residue of the contract price upon certain subscriptions which were to be raised; and that A. duly made and the plaintiff received the payments stipulated for by the second agreement in satisfaction and discharge of the original agreement between the plaintiff and the defendants, and of the performance thereof by the latter. Held, that the plea was bad in substance inasmuch as it did not show that the agreement made by A. and the payments under it were intended to be made for the benefit of the defendants, and that they adopted A.'s acts. See 2 Am. Lead. Cas. (4th ed.) 270; Wellington v. Kelly, 84 N. Y. 543; Wolff v. Walter, 56 Mo. 292.

¹ Gray v. Herman, 75 Wis. 453.

In Harrison v. Hicks, 1 Port. 428, the payment of a debt by a stranger to the contract was held an extinguishment of it, whether made by the debtor's consent or not.

In Pearce v. Bryant Coal Co., 121 Ill. 590, payment by a trustee at the request of an officer of the corporation owing the debt extinguished the

that the person who made it had authority to do so, he may return the money and apply to his debtor for the payment of his demand.¹ Satisfaction by one joint tort-feasor or joint debtor is a bar to an action against another.² If a creditor knowing the liability of his debtor takes the individual note of his agent in payment without at the same time doing anything to indicate a purpose to hold the principal, the latter is discharged.³

A purchaser of mortgaged property subject to the [387] mortgage may pay the debt, and payment by him extinguishes the lien.⁴ If a mere stranger or volunteer pays a debt for which another is bound he cannot be subrogated to the creditor's rights in respect to the security given by the real debtor. But if the person who pays the debt is compelled to pay for the protection of his own interests and rights, then he is entitled to such subrogation.⁵

§ 231. To whom payment may be made. Payment must be made to the creditor or to one authorized by him to receive it as agent or assignee; or to one whom the law substitutes in his place as executor, administrator, creditor by trustee process, or the like. If it is made to one entitled to receive it the debt is extinguished though there was a mistake as to the right in which the amount paid accrued.⁶ Payment of a judgment or decree to an attorney of record who obtained it, before his authority is revoked and notice of it given, is valid as to the party making the payment;⁷ but payment of a judgment after it has been assigned to one who is merely the beneficial owner is not a discharge of it; it is otherwise when

evidence of the indebtedness so that the trustee could not enforce it.

Payment made by one who is primarily liable extinguishes the debt. *Smith v. Waugh*, 84 Va. 806.

¹ *Walter v. James*, L. R. 6 Exch. 124.

² *Livingston v. Bishop*, 1 Johns. 291; *Thomas v. Rumsey*, 6 id. 31; *Barrett v. Third Avenue R. Co.*, 45 N. Y. 635; *Woods v. Pangborn*, 75 id. 498; *Ellis v. Esson*, 50 Wis. 138; *Knapp v. Roche*, 94 N. Y. 329; *Brick v. Buel*, 73 Texas, 511.

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³ *Ames P. & P. Co. v. Tucker*, 8 Mo. App. 95; *Paige v. Stone*, 10 Met. 169; *Wilkin v. Reed*, 6 Me. 220; *French v. Price*, 24 Pick. 22; *Hyde v. Paige*, 9 Barb. 250. A less extended rule is applied in some cases. *Coleman v. First Nat. Bank*, 53 N. Y. 388; *Calder v. Dobell*, L. R. 6 C. P. 486.

⁴ *Appledorn v. Steeter*, 20 Mich. 9.

⁵ *Hough v. Ætna L. Ins. Co.*, 57 Ill. 318.

⁶ *Hemphill v. Moody*, 64 Ala. 468.

⁷ *Harper v. Harvey*, 4 W. Va. 539; *Yoakum v. Tilden*, 3 id. 167.

payment is made to the person having the legal title without notice of his assignment.¹ A sheriff is only entitled to receive payment of an execution when he is in possession of a judicial mandate directing him to make the collection of the sum called for, unless he is the creditor's agent.² Payment made to the party designated by the creditor is good.³ If a principal has clothed his agent with the *indicia* of authority to receive payment, as by intrusting to him the possession of the goods to be sold, the purchaser is warranted in paying the price of such as he buys to the agent; but if the latter is not in possession of the goods and is only authorized to make sales, payments made to him are at the risk of the payer.⁴ Payment to an agent is unauthorized after the death of the principal.⁵ Possession of mercantile paper authorizes the receipt of the [388] money and even before it is due⁶ if the possessor has authority from the owner to collect the amount payable on it.⁷ But circumstances may impeach a payment made to one having possession of the evidence of the debt. Thus, payment by the maker of a note before maturity to the son of the holder, who had been forbidden to take payment, with the knowledge of the party paying, is not a good payment, although the note is delivered up by the son; the father may maintain a suit for the note, not having ratified the payment.⁸ The circumstances, however, must show payment in bad faith; it is not enough that there is gross negligence in not ascertaining the party entitled to the money.⁹ Payment of a lost

¹ Seymour v. Smith, 114 N. Y. 481.

² Bailey v. Hester, 101 N. C. 538.

³ Walker v. Crosby, 88 Minn. 84; Sailer v. Barnousky, 60 Wis. 169; Fiske v. Fisher, 100 Mass. 97.

⁴ Butler v. Dorman, 68 Mo. 298; Keown v. Vogel, 25 Mo. App. 85; Pardridge v. Bailey, 20 Ill. App. 351; Putnam v. French, 53 Vt. 404; Hoskins v. Johnson, 5 Sneed (Tenn.), 470; Capel v. Thornton, 8 C. & P. 352; Dean v. International Tile Co., 47 Hun, 319; Higgins v. Moore, 84 N. Y. 417; Artley v. Morrison, 73 Iowa, 132; Adams v. Kearney, 2 E. D. Smith, 42. See Stanton v. French, 83 Cal. 194.

If money is paid to an agent who is not authorized to receive it, the payment is ratified by the principal's bringing an action against him to recover it. Bailey v. United States, 15 Ct. of Cls. 490. And by suing to recover the purchase-price of goods sold. Pardridge v. Bailey, *supra*. See Estey v. Snyder, 76 Wis. 624.

⁵ Lochenmeyer v. Fogarty, 112 Ill. 572.

⁶ Bliss v. Cutter, 19 Barb. 9.

⁷ Cheney v. Libby, 134 U. S. 68.

⁸ Kingman v. Pierce, 17 Mass. 247.

⁹ Cothran v. Collins, 29 How. Pr. 113; Haescig v. Brown, 84 Mich. 503.

negotiable instrument after notice of its loss will not operate as a discharge against the loser unless the person presenting it establishes his title thereto. A notice previously given of the loss of a coupon distinguishable by its number or other ear-mark is sufficient to fix upon the maker the duty of inquiry and of refusal to pay a holder who cannot prove his right; especially is this the rule where an instrument is presented after it has matured.¹ Payment to one not in possession of the evidence of debt, and without a surrender of it, is at the risk of the payer; and if the party receiving the money had no right to receive it the note is not discharged.² The fact that an attorney is authorized to collect interest does not empower him to receive the principal. Such authority, in the absence of direct proof, may, in some cases, be inferred from the possession of the bond and mortgage; but it is incumbent upon the debtor who pays to the attorney to show that the securities were in his possession on each occasion when payments were made, for their withdrawal would be a revocation of the authority.³ If payment of a loan is made to the attorney who negotiated it while he has the custody of the bond and mortgage with the consent of the mortgagee and the mortgagor knows the fact he is discharged although the attorney was not in fact authorized to receive it.⁴ But in case of a mortgage or other non-negotiable evidence of

¹ *Hinckley v. Union Pacific R. Co.*, 129 Mass. 52. See *Hinckley v. Merchants' Nat. Bank*, 131 id. 147.

² *Wheeler v. Guild*, 20 Pick. 545; *Rush v. Fister*, 23 Ill. App. 348; *Viskoeil v. Doktor*, 27 id. 232; *Stiger v. Bent*, 111 Ill. 328.

Payment of a pledged note to the pledgor will not discharge it. *Griswold v. Davis*, 31 Vt. 390.

³ *Williams v. Walker*, 2 Sandf. Ch. 325; *Doubleday v. Kress*, 50 N. Y. 410; *Smith v. Kidd*, 68 id. 180; *Crane v. Gruenewald*, 120 id. 274; *Henn v. Conisby*, 1 Ch. Cas. 93; *Gerrard v. Baker*, id. 94; *Garrels v. Morton*, 26 Ill. App. 433; *Cox v. Cutter*, 28 N. J. Eq. 13; *Eaton v. Knowles*, 61 Mich. 625; *Brewster v. Carnes*,

103 N. Y. 556; *Lane v. Duchac*, 73 Wis. 646. *Contra*, *Shane v. Palmer*, 48 Kan. 481; *Quinn v. Dresbach*, 75 Cal. 159. Compare *Wilcox v. Carr*, 37 Fed. Rep. 130.

A mortgagor who makes the agent of his mortgagee for the collection of the principal and interest due the latter his own agent for the purpose of securing a loan to be used in discharging a mortgage must stand a loss caused by the agent's embezzlement of the money so obtained, the mortgagor not having directed the agent to apply it to the mortgage in his possession. *Boardman v. Blizzard*, 36 Fed. Rep. 26.

⁴ *Crane v. Gruenewald*, 120 N. Y. 274.

debt, probably a payment in good faith to the original holder, in the absence of the paper evidence, would be treated as valid, although there had been an actual assignment of the debt.¹ Payment, however, may not be made to an assignor after notice of such assignment;² and will not be recognized even if the assignor still has possession of the securities;³ not even under garnishment proceedings and an order of the court, if that defense is not made.⁴ Where the demand has been assigned, payment as garnishee of the original creditor is not good unless it is compulsory, though there has been no notice of the assignment, for assignment passes the title without notice.⁵

A compulsory payment under a foreign attachment from a court of competent jurisdiction is good, and will be recognized [389] even in a foreign jurisdiction, though in the latter an earlier attachment had been levied for the same debt.⁶ A payment as trustee or garnishee is good though the trustee might have disputed the jurisdiction of the court ordering such payment.⁷

Where a debt is owing to two persons jointly it may be paid

¹ Trustees of Union College v. Wheeler, 61 N. Y. 88; Foster v. Beals, 21 id. 247. See Richardson v. Ainsworth, 20 How. Pr. 521; Robinson v. Weeks, 6 id. 161; Muir v. Schenck, 3 Hill, 228; Gamble v. Cummings, 2 Blackf. 235.

It is a fair legal presumption that the creditor who holds a non-negotiable chose in action is entitled to receive payment thereof. If it is assigned it is incumbent upon the assignee to show that the debtor was notified in order to protect himself against any payment made to the original creditor. Heermans v. Ellsworth, 64 N. Y. 115; Quinn v. Dresbach, 75 Cal. 159; Bank v. Jones, 65 id. 437.

Under the recording acts the record of the assignment of a mortgage is constructive notice to the world of the rights of the assignee; a purchaser of the equity of redemp-

tion cannot claim any benefit from payments made to the mortgagee after his assignment has been recorded. Brewster v. Carnes, 103 N. Y. 556; Viele v. Judson, 82 id. 32.

² Lyman v. Cartwright, 8 E. D. Smith, 117; Meriam v. Bacon, 5 Met. 95; Guthrie v. Bashline, 25 Pa. St. 80; Field v. Mayor, 6 N. Y. 179; Ten Eick v. Simpson, 1 Sandf. Ch. 244.

³ Chase v. Brown, 32 Mich. 225.

⁴ Roy v. Baucus, 43 Barb. 310.

⁵ Richardson v. Ainsworth, 20 How. Pr. 521; Robinson v. Weeks, 6 id. 161; Muir v. Schenck, 3 Hill, 228.

⁶ Minor v. Rogers Coal Co., 25 Mo. App. 78; Allen v. Watt, 79 Ill. 284; Lieber v. St. Louis A. & M. Ass'n, 36 Mo. 382; Holmes v. Remsen, 4 Johns. Ch. 460; S. C., 20 Johns. 229; McDaniel v. Hughes, 3 East, 367.

⁷ Reed v. Parsons, 11 Cush. 255; Sauntry v. Dunlap, 12 Wis. 364.

to either. Thus, where two persons joined in an agreement to sell and convey land, it was held that a payment to one of them was good though he had no title to the land.¹ Payment of a debt due to a deceased person made before letters granted, to a person who afterward takes them out, is made good by the subsequent letters.² The secondary liability of the owner of a building for the services of workmen employed by the contractor and for materials supplied does not arise until the steps prescribed by statute to acquire a lien therefor have been taken; hence payment made to other persons than the contractor does not bind him.³ The right to the emoluments of an office follows the true title to it.⁴ As between the person entitled to an office and the public there is no obligation upon the latter until the duties of the office have been assumed. The salary fixed therefor is the reward for express or implied services, and therefore cannot belong to one who has not performed services although he is wrongfully hindered from occupying the position in which he might have rendered them.⁵ Where disbursing officers pay official salaries monthly pursuant to law they are justified on grounds of public policy in paying to a *de facto* officer, and such payment is a good defense to an action against the public by the *de jure* officer to recover the salary after he has been placed in possession of the office.⁶ The public is liable for the salary

¹ Waters v. Travis, 9 Johns. 450; McVeany v. Mayor, 80 id. 185; Auditors v. Benoit, *supra*. Henry v. Mt. Pleasant, 70 Mo. 500.

² Priest v. Watkins, 2 Hill, 225; In re Faulkner, 7 id. 181.

³ Walker v. Newton, 53 Wis. 836.

⁴ Conner v. City, 2 Sandf. 370; Nichols v. MacLean, 101 N. Y. 526; People v. Tieman, 80 Barb. 193; Dolan v. Mayor, 68 N. Y. 274; McVeany v. Mayor, 80 id. 185; People v. Miller, 24 Mich. 458; Dorsey v. Smith, 28 Cal. 21; Hunter v. Chandler, 45 Mo. 452; Glascock v. Lyons, 20 Ind. 1; Douglass v. State, 31 id. 429.

⁵ Smith v. Mayor, 87 N. Y. 518; Connor v. Mayor, 5 id. 285; Auditors v. Benoit, 20 Mich. 176.

⁶ Dolan v. Mayor, 68 N. Y. 274; provided for the office and paid L.

due and unpaid a *de jure* officer before judgment in his favor.¹ This is the rule whether the compensation arises from fees payable from the public treasury or an annual salary payable at intervals and whether the officer was appointed or elected.² If payment is made after notice of an adjudication against the right of the person in office the public is liable to the *de jure* officer for the amount.³

§ 232. Pleading payment. By the theory of common-law pleading in the action of *assumpsit*, as well as by the provisions of the modern code, payment, either full or partial, being in confession and avoidance, must be pleaded. It cannot be proved under the general issue or general denial. The issue in debt was upon the existence of present indebtedness; and therefore in that action the rule was different. The general issue in *assumpsit*, however, by a later practice, came to be so expanded as to materially infringe this logical rule; and it was held to embrace many defenses which admitted all the essential facts stated in the declaration, and avoided their effects by matter subsequent, including payment.⁴ If the plaintiff alleges non-payment and must establish it to show a cause

during his incumbency. The injunction did not require the officers to make payment thereof to L. Memphis v. Woodward, 12 Heisk. 499.

¹ Dolan v. Mayor, *supra*; Comstock v. Grand Rapids, 40 Mich. 397; People v. Brennan, 30 How. Pr. 417.

² McVeany v. Mayor, 80 N. Y. 185.

³ Ibid.

⁴ McKyring v. Bull, 16 N. Y. 297. In this case the opinion of Selden, J., interestingly and instructively discusses the subject, and reviews many English cases; the conclusion reached being that the code requires the defendant to plead any new matter constituting either an entire or partial defense, and prohibits him from giving such matter in evidence upon the assessment of damages when not set up in the answer. Skipwith v. Morton, 8 Call, 234. See Edson v. Dellage, 8 How. Pr. 273. But see

Hirsch v. Caler, 21 Cal. 71; Davaney v. Eggenhoff, 43 id. 397.

In Kentucky it is considered to be settled that a partial payment on or before the day on which the debt is due may be pleaded; and full payment after the day is pleadable by statute; but the courts there have not gone so far as to sanction a plea of partial payment after the day, but have decided that it cannot be pleaded. Gearhart v. Olmstead, 7 Dana, 445; McWaters v. Draper, 5 T. B. Mon. 494; Young v. Park, 6 J. J. Marsh. 540; Craig v. Whips, 1 Dana, 875. Nor is either partial or full payment after the day provable under the general issue. Hamilton v. Coons, 5 Dana, 817.

When the petition states facts constituting the plaintiff's claim a general denial does not present an issue authorizing the defendant to prove

of action, payment may be proven under a general denial.¹ Under a general allegation of payment the defend- [390-396] ant may in some jurisdictions give in evidence any facts which in law amount to payment;² while in others only such facts can be shown as tend to establish a common-law or actual payment.³ A plea of payment need not allege the amount paid, the date of payment nor the person who received it;⁴ under such plea partial payment may be proven.⁵ An allegation of the place of payment is surplusage and will not prejudice.⁶ It has been held in Kentucky not necessary for a jury, when sworn on an inquiry of damages, or indeed on the trial of an issue, to notice credits indorsed on a note, unless under the issue of payment; but under the practice in that state whenever a note on which an action is brought is filed the courts of original jurisdiction notice it so far as to cause the clerk to note on the record all credits indorsed thereon as credits on the judgment, and this after a writ of inquiry [397] or verdict when the jury has not noticed them.⁷ Payment of a debt and costs while suit is pending for its recovery extinguishes the claim.⁸ Payment is an affirmative defense and must be pleaded.⁹ The party alleging it has the *onus*; and if it is claimed that payment was made in anything but money he has also the burden of proving that what was received was taken in satisfaction and at the creditor's risk.¹⁰

payment. *St. Louis, etc. R. Co. v. Grove*, 89 Kan. 781.

¹ *Knapp v. Roche*, 94 N. Y. 829; *Quin v. Lloyd*, 41 id. 349; *McElwee v. Hutchinson*, 10 S. C. 486; *State v. Roche*, 94 Ind. 872.

² *Bush v. Sprout*, 43 Ark. 416; *Morehouse v. Northrop*, 38 Conn. 380; *Hart v. Crawford*, 41 Ind. 197; *Farmers' & Citizens' Bank v. Sherman*, 38 N. Y. 69; *Whittington v. Roberts*, 4 T. B. Mon. 178. See *Day v. Clarke*, 1 A. K. Marsh. 521.

³ An equitable defense cannot be proven without leave and upon notice. *Steiner v. Erie Dime S. & L. Co.*, 98 Pa. St. 491; *Hawk v. Geddis*, 16 S. & R. 28.

In Massachusetts the discharge of

a note payable in money by the delivery and acceptance of property must be the result of a subsequent and independent agreement resting upon substantial facts which the answer must set forth. *Ulsch v. Muller*, 148 Mass. 879.

⁴ *Johnson v. Breedlove*, 104 Ind. 521.

⁵ *Keyes v. Fuller*, 9 Ill. App. 528; *State v. Roche*, 94 Ind. 872.

⁶ *Brown v. Gooden*, 16 Ind. 444.

⁷ *Phelps v. Taylor*, 4 T. B. Mon. 170.

⁸ *Root v. Ross*, 29 Vt. 488.

⁹ *Gregory v. Hart*, 7 Wis. 532, 540; *Martin v. Pugh*, 28 id. 184; *Hawes v. Woolcock*, 30 id. 213; *Shipman v. State*, 43 id. 381; *Rossiter v. Schultz*, 62 id. 655.

¹⁰ *Godfrey v. Crisler*, 121 Ind. 208;

§ 233. Evidence of payment. Possession of the evidence of debt is presumptive evidence of authority to receive payment.¹ But as evidence of agency, the presumption ceases on the death of the principal.² So possession of the evidence of debt by the maker or one who succeeds to his rights or estate is *prima facie* evidence of payment.³ Thus the possession of a bank check by the bank on which it is drawn is such evidence that the bank has paid it.⁴ The possession of a canceled check by the drawer who testifies that on the day of its date he made and delivered it to the payee in payment of a debt is sufficient *prima facie* proof of the payment of the amount it calls for.⁵ It is presumed where a check payable to bearer was one day the property of A. and the following day was in the possession and apparent ownership of B., that it was delivered by A. to B. in payment of a debt, though it is not presumed that the transfer was direct.⁶ Possession of the evidence of indebtedness by the payee is *prima facie* proof that the debt has not been paid.⁷ The execution and delivery of a deed which acknowledges the receipt of the purchase-money, in the absence of any other proof, is *prima facie* evidence of its payment.⁸ But possession of a note by the maker is such evidence only after maturity; possession before maturity is not.⁹ Nor is the presumption of payment from such possession rebutted by proof of the mere fact that the payee or former holder is dead.¹⁰ The force of the presumption varies with the circum-

Cheltenham, etc. Co. v. Gates Iron Works, 124 Ill. 628; Hunter v. Moul, 98 Pa. St. 13; Brown v. Olmsted, 50 Cal. 162; Bradley v. Harwi, 43 Kan. 314; Runyon v. Snell, 116 Ind. 164; McWilliams v. Phillips, 71 Ala. 80.

¹Lochenmeyer v. Fogarty, 112 Ill. 572; Williams v. Walker, 2 Sandf. Ch. 325; Megary v. Funtis, 5 Sandf. 376.

²Id.

³Gibbon v. Featherstonhaugh, 1 Stark. 92; Hollenberg v. Lane, 47 Ark. 394; Potts v. Coleman, 67 Ala. 221. When such presumption arises it is inferred that payment was made to a person authorized to receive it. Lipscomb v. De Lanos, 68 Ala. 592.

⁴Wilson v. Goodin, Wright (Ohio), 219.

⁵Peavy v. Hovey, 16 Neb. 416.

⁶Poucher v. Scott, 98 N. Y. 422. See Stimson v. Vroman, 99 id. 74.

⁷Keyes v. Fuller, 9 Ill. App. 528; Humpeler v. Hickman, 13 id. 537.

⁸Crowe v. Colbeth, 63 Wis. 643; Coles v. Soulsby, 21 Cal. 47; Kinster v. Babcock, 26 N. Y. 378; Clark v. Deshon, 12 Cush. 589.

⁹Erwin v. Shaffer, 9 Ohio St. 43; Baring v. Clark, 19 Pick. 220; McGee v. Prouty, 9 Met. 547. See Heald v. Davis, 11 Cush. 319.

¹⁰Larimore v. Wells, 29 Ohio St. 13.

stances of the case in which it is sought to be applied; and the amount of evidence necessary to overcome it is, in general, for the jury.¹ A debtor's books of accounts are not evidence to prove payments made by him to his creditor.²

"A bond and mortgage taken for the same debt, though distinct securities possessing dissimilar attributes and subject to remedies which are as unlike as personal actions and proceedings *in rem*, are nevertheless so far one that payment of either discharges both, and a release or extinguishment of either, without actual payment, is a discharge of the other, unless otherwise intended by the parties;" hence, an acknowledgment upon the record of full satisfaction of the mortgage, no mention being made of the debt or the bond, *prima facie* imports the extinguishment of the debt.³

The receipt of rent for a specified period is presumptive evidence of the payment of previous rent.⁴ So of taxes.⁵ So where A., in consideration of a bill of goods sold to him by B., agreed to pay the amount of the bill in discharge of certain notes signed by B. and indorsed by A., it is like evidence of the payment of a previous indebtedness of B. to A.⁶

If a debtor is placed in an official or fiduciary relation in which it becomes his duty to receive money, the law will in general presume payment of the debt — but the presumption may be rebutted.⁷ Payment received on Sunday, though in violation of the law for the observance of that day, if it is retained, is good.⁸

An indorsement of credit on an evidence of debt by [398] the payee, within the period that raises the legal presumption of payment, is evidence for him for the purpose of repelling that presumption.⁹ But for that purpose it has reference to the time when such payment purports to have been made.¹⁰

¹ Larimore v. Wells, 29 Ohio St. 13.

² Hess' Appeal, 112 Pa. St. 168.

³ Fleming v. Parry, 24 Pa. St. 47;
Seiple v. Seiple, 188 id. 460.

⁴ Brewer v. Knapp, 1 Pick. 382.

⁵ Attleborough v. Middleborough,
10 Pick. 878.

⁶ Colvin v. Carter, 4 Ohio, 354.

⁷ Wilson v. Wilson, 17 Ohio St. 150.
See *ante*, § 222.

⁸ Johnson v. Willis, 7 Gray, 164;
Shields v. Klopff, 70 Wis. 69.

⁹ Dabney's Ex'r v. Dabney's Adm'r,
2 Rob. (Va.) 622.

¹⁰ Hayes v. Morse, 8 Vt. 316.

SECTION 2.

APPLICATION OF PAYMENTS.

§ 234. **General rule.** The general rule on this subject is that a debtor paying money to a creditor to whom he owes several debts may appropriate it to which he pleases. In the absence of an appropriation by the debtor the creditor has a right to make the application. If both omit to make an appropriation the law will apply it according to the justice and equity of the case.¹

¹Allen v. Culver, 8 Denio, 284; National Bank v. Bigler, 83 N. Y. 51; Wetherell v. Joy, 40 Me. 825; Thayer v. Denton, 4 Mich. 192; Stone v. Seymour, 15 Wend. 19; Seymour v. Van Slyck, 8 id. 403; Pattison v. Hull, 9 Cow. 747; Van Rensselaer v. Roberts, 5 Denio, 470; Patty v. Milne, 16 Wend. 557; S. C., 22 id. 558; Seymour v. Marvin, 11 Barb. 80; Davis v. Fargo, Clarke (N. Y.), 470; Hall v. Constant, 2 Hall, 185; Baker v. Stackpole, 9 Cow. 420; Webb v. Dickinson, 11 Wend. 62; Mann v. Marsh, 2 Cal. 98; Trotter v. Grant, 2 Wend. 413; Godfrey v. Warner, Hill & D. 82; Walther v. Wetmore, 1 E. D. Smith, 7; Parker v. Green, 8 Met. 137; Truscott v. King, 6 N. Y. 147; Stewart v. Hopkins, 30 Ohio St. 502; McDaniel v. Barnes, 5 Bush, 183; Parks v. Ingram, 22 N. H. 283; Bosley v. Porter, 4 J. J. Marsh. 621; Reed v. Boardman, 20 Pick. 441; Shaw v. Picton, 4 B. & C. 715; Scott v. Fisher, 4 T. B. Mon. 387; Bayley v. Wynkoop, 10 Ill. 449; Nutall's Adm'r v. Brannin's Ex'r, 5 Bush, 11; Hall v. Marston, 17 Mass. 575; Goddard v. Cox, 2 Str. 1194; Peters v. Anderson, 5 Taunt. 596; Bosanquet v. Wray, 6 id. 597; Brooke v. Enderby, 2 B. & B. 70; Bodenham v. Purchas, 2 B. & Ald. 39; Brady's Adm'r v. Hill, 1 Mo. 315; Sprinkle v. Martin, 72 N. C. 92; Dent v. State Bank, 12 Ala. 275; Wooten v. Buchanan, 49 Miss. 386; Hamilton v. Benbury, Mart. & Hayw. L. & Eq. 586; James v. Malone, 1 Bailey, 384; Mills v. Kellogg, 7 Minn. 469; Bobe v. Stickney, 36 Ala. 492; Dennis v. McLaurin, 81 Miss. 606; Gaston v. Barney, 11 Ohio St. 506; Jones v. Smith, 22 Mich. 360; Waterman v. Younger, 49 Mo. 418; Starrett v. Barber, 20 Me. 457; Irwin v. Paulett, 1 Kan. 418; Pearl v. Clark, 2 Pa. St. 350; Moorehead v. West Branch Bank, 8 W. & S. 550; Selfridge v. Northampton Bank, 8 id. 320; Selleck v. Sugar Hollow T. Co., 13 Conn. 459; Whetmore v. Murdock, 3 Woodb. & M. 390; Dulles v. De Forest, 19 Conn. 190; Bank of United States v. Macalester, 9 Pa. St. 475; Souder v. Schechterly, 91 id. 83; Clarke v. Scott, 45 Cal. 86; Hargroves v. Cooke, 15 Ga. 321; Thomas v. Kelsey, 30 Barb. 268; Hubbell v. Flint, 15 Gray, 550; Richardson v. Woodbury, 12 Cush. 279; Haynes v. Nice, 100 Mass. 327; Cardinell v. O'Dowd, 43 Cal. 586; Wendt v. Ross, 33 Cal. 650; Putnam v. Russell, 17 Vt. 54; Allen v. Kimball, 23 Pick. 473; Robson v. McKoin, 18 La. Ann. 544; Robinson v. Doolittle, 12 Vt. 246; Rosseau v.

§ 235. **By debtor.** The right of the debtor who [399] makes a voluntary payment to direct how it shall be applied is absolute if he signifies his election at the time of making it.¹ He will not lose that right unless he has an opportunity to exercise it and neglects to do so.² The rule is the same in respect to a partial payment accepted by the creditor.³ The direction of the debtor may be inferred from circumstances, and if his intention can thus be shown it is of the same force as though it had been expressed.⁴ The intention to appropriate a payment to a particular debt may be collected from [400] the nature of the transaction, and be referred to the jury as a question of fact.⁵ Thus, where two charges of unequal amounts

Cull, 14 Vt. 83; Early v. Flannery, 47 Vt. 253; Bancroft v. Dumas, 21 Vt. 456; Holmes v. Pratt, 34 Ga. 558.

¹ Aderholt v. Embry, 78 Ala. 185; McCurdy v. Middleton, 82 id. 131; Baldwin v. Flash, 59 Miss. 61; Miles v. Ogden, 54 Wis. 573; Long v. Miller, 93 N. C. 233; Libby v. Hopkins, 104 U. S. 303; Washington N. Gas Co. v. Johnson, 123 Pa. St. 576; Bray v. Crain, 59 Texas, 649; Robinson v. Doolittle, 12 Vt. 246; Wendt v. Ross, 33 Cal. 650; Gaston v. Barney, 11 Ohio St. 506; Selleck v. Sugar Hollow T. Co., 13 Conn. 453; Reynolds v. McFarlane, 1 Overt. 488; McDaniel v. Barnes, 5 Bush, 183; Parks v. Ingram, 22 N. H. 283; Bosley v. Porter, 4 J. J. Marsh. 621; Parker v. Green, 8 Met. 144; Mann v. Marsh, 2 Cal. 99; Trotter v. Grant, 2 Wend. 413; Allen v. Culver, 3 Denio, 284; Van Rensselaer v. Roberts, 5 id. 470; Godfrey v. Warner, Hill & D. 32; Walther v. Wetmore, 1 E. D. Smith, 7; Pattison v. Hull, 9 Cow. 747; Baker v. Stackpoole, id. 420; Webb v. Dickinson, 11 Wend. 62; Stone v. Seymour, 15 id. 19.

Where property is shipped to a creditor who has two demands against the debtor the time of payment is the time of shipment, and not the time when the debtor orders

the property to be sold. Bell v. Bell, 20 S. C. 34; Frost v. Weathersbee, 23 id. 354.

Payments made by an agent to his principal's creditor after the death of the principal cannot be applied to the discharge of indebtedness existing before his death in a proceeding against the testator's estate, at least when the estate is insolvent. Gifford v. Thomas' Estate, 62 Vt. 34; 19 Atl. Rep. 1088.

² Jones v. Williams, 39 Wis. 300; Waller v. Lacy, 1 M. & G. 54; 2 Pars. on Cont. 631.

³ Gaston v. Barney, 11 Ohio St. 506; Wetherell v. Joy, 40 Me. 325.

⁴ Snell v. Cottingham, 72 Ill. 124; Tayloe v. Sandiford, 7 Wheat. 13; Mayor v. Patten, 4 Cranch, 317; Terhune v. Colton, 12 N. J. Eq. 233, 312; Howland v. Rensch, 7 Blackf. 236; Mitchell v. Dall, 2 Har. & G. 159; Robinson v. Doolittle, 12 Vt. 246; Shaw v. Picton, 4 B. & C. 715; Scott v. Fisher, 4 T. B. Mon. 387; Keane v. Branden, 12 La. Ann. 20; Smuller v. Union Canal Co., 37 Pa. St. 68; Lanten v. Rowan, 59 N. H. 215; Roakes v. Bailey, 55 Vt. 542; Bray v. Crain, 59 Texas, 649; Hansen v. Rounsavell, 74 Ill. 238; Plain v. Roth, 107 id. 588.

⁵ Pritchard v. Comer, 71 Ga. 18; West Branch Bank v. Moorehead, 5

exist, one legal and the other illegal, the former not due, and a general payment of an amount not in excess of the illegal claim is made on account, it was held to have been paid upon that claim although there was no direction given.¹ And so where a payment is made to a creditor who holds an original claim against the debtor of which the latter has knowledge and also claims which have been purchased without the debtor's knowledge, it will be presumed that the payment was intended to be applied upon the former.² If the debtor at the time of making the payment makes an entry in his own book, stating that it is upon a particular demand, and shows the entry to the creditor, it is a sufficient appropriation.³

But this right of the debtor to elect to which of several debts a payment shall be applied is confined to voluntary payments. It does not extend to moneys collected by legal process.⁴ The right of the debtor to so direct, however, cannot be defeated by the creditor obtaining possession of the debtor's funds without his consent, except by legal proceedings binding upon him. Where a debtor intrusted funds to an agent with directions to apply them by way of compromise in satisfaction of two demands held against him by the same person, and the creditor knowing this fact levied an attachment on the money so confided to the agent, and also on the money of the agent, and thereupon the latter, to regain possession of his own money, assented under protest to the application of the debtor's money to one of the debts which was unsecured, it was held not binding upon the debtor, and he was allowed when afterwards sued to apply it to either at his option.⁵ So where a surety sends money by the principal to the creditor, and such principal so informs the creditor, they can make no other application than that directed by the surety.⁶

W. & S. 542; *Moorehead v. West Branch Bank*, 8 id. 550.

¹ *Caldwell v. Wentworth*, 14 N. H. 431; *Frazer v. Bunn*, 8 C. & P. 704; *Dorsey v. Wayman*, 6 Gill, 59. See *McCarty v. Gordon*, 16 Kan. 85.

² *Holley v. Hardeman*, 76 Ga. 328.

³ *Frazer v. Bunn*, 8 C. & P. 704.

⁴ *Blackstone Bank v. Hill*, 10 Pick. 129; *Barrett v. Lewis*, 2 Pick. 123;

Wooten v. Buchanan, 49 Miss. 386:

Forelander v. Hicks, 6 Ind. 448:

Nichols v. Knowles, 8 McCrary, 477; S. C., 17 Fed. Rep. 494.

⁵ *Dennis v. McLaurin*, 31 Miss. 606; *Pearl v. Clark*, 2 Pa. St. 350.

⁶ *Reed v. Boardman*, 20 Pick. 441. See *Lansdale v. Graves*, Sneed (Ky.), 215.

Where money is paid by the principal debtor a surety cannot interfere to control the application contrary to the intention of the party paying.¹ Nor can subsequent incumbran- [401] cers control the application of moneys made by the parties to earlier liens.² But sureties on official bonds will not be rendered liable as for defalcation by application of funds received in their time to cancel prior balances or defalcations.³ Nor will an intention of the principal debtor to apply a payment in favor of a surety be presumed, and thus exclude the right of the creditor to make the application.⁴ But this absolute right of directing the application of payments which a debtor has does not pass to his personal representatives; nor [402]

¹ Mathews v. Switzler, 46 Mo. 301; Gaston v. Barney, 11 Ohio St. 506; Field v. Holland, 6 Cranch, 8; Allen v. Jones, 8 Minn. 202.

² Richardson v. Washington Bank, 3 Met. 536; Mills v. Kellogg, 7 Minn. 469. But see Green v. Tyler, 39 Pa. St. 361.

³ In United States v. Eckford's Ex'r, 1 How. (U. S.) 250, McLean, J., said: "The treasury officers are the agents of the law. It regulates their duties, as it does the duties and rights of the collector and his sureties. The officers of the treasury cannot, by any exercise of their discretion, enlarge or restrict the obligation of the collector's bond. Much less can they, by the mere fact of keeping an account current, in which debts and credits are entered as they occur, and without any express appropriation of payments, affect the right of sureties. The collector is a mere agent or trustee of the government. He holds the money he receives in trust, and is bound to pay it over to the government as the law requires. And in the faithful performance of this trust the parties have a direct interest, and their rights cannot be disregarded. It is true, as argued, if the collector shall misapply the public funds, his sureties are responsible. But that is

not the question under consideration. The collector does not misapply the funds in his hands, but pays them over to the government without any special direction as to their application. Can the treasury officers say, under such circumstances, that the funds currently received and paid over shall be appropriated in discharge of a defalcation which occurred long before the sureties were bound for the collector, and by such appropriation hold the sureties bound for the amount? The statement of the case is the best refutation of the argument. It is so unjust to the sureties, and so directly in conflict with the law and its policy, that it requires but little consideration." Jones v. United States, 7 How. (U. S.) 681; Boody v. United States, 1 Woodb. & M. 150; Postmaster-General v. Norvell, Gilpin, 106; United States v. January, 7 Cranch, 572; Seymour v. Van Slyck, 8 Wend. 403; Stone v. Seymour, 15 id. 19; United States v. Linn, 2 McLean, 501.

⁴ Smith's Merc. L. 672; Plomer v. Long, 1 Stark. 153; Hargroves v. Cooke, 15 Ga. 321; Clark v. Burdett, 2 Hall, 197; James v. Malone, 1 Bailey, 334. See Lansdale v. Graves, Sneed (Ky.), 215; Gard v. Stevens, 12 Mich. 292.

does it pertain to any one making payments in a fiduciary capacity.¹ If the terms of an express trust do not determine the order of payments, their order, it is believed, must be fixed by law.

§ 236. **Same subject.** An agreement between debtor and creditor for a particular application of moneys expected from a specific source will preclude any diversion by either without the consent of the other when the money is received.² Thus, where money is realized by a creditor from a collateral security for a debt, such money is deemed appropriated to that debt.³ The plaintiff, an equitable mortgagee for 600%, lent the title deeds of the property to the defendant E., the mortgagor, to enable him to negotiate a sale of it, the deeds to be returned. E. paid plaintiff 300% received by him as part of the purchase-money; afterwards E. became bankrupt. Before such payment was made E. was indebted to the plaintiff on a trade account for a larger amount. E. made no application

¹ Putnam v. Russell, 17 Vt. 54; Barrett v. Lewis, 2 Pick. 123; Cole v. Trull, 9 Pick. 825.

But in Marshall v. Nagel, 1 Bailey, 308, it was held that if a debtor pays a sum of money on account of distinct debts due to different creditors to a common agent of all the creditors, and gives no directions as to the order in which the money is to be applied to the debts, the agent may make the application according to his discretion and the debtor will be bound by it. Carpenter v. Goin, 19 N. H. 479.

² Thompson v. Hudson, L. R. 6 Ch. 320; Lansdale v. Mitchell, 14 B. Mon. 348; Hughes v. McDougale, 17 Ind. 399; King of Spain v. Oliver, Pet. C. C. 276; Sproule v. Samuel, 5 Ill. 135; Stackpole v. Keay, 45 Me. 297; Gwathney v. McLane, 3 McLean, 371; White v. Toles, 7 Ala. 569; Smith v. Wood, 1 N. J. Eq. 74.

In Ross v. Crane, 74 Iowa, 375, the purchaser of a note and mortgage agreed with their maker in writing

to employ him and apply his wages in payment of the mortgage debt. After money enough had been earned to pay the mortgage, the holder applied the amount to another account and assigned the security and the note to a third person. The agreement was held binding and the debt to have been satisfied before the assignment was made.

³ Strickland v. Hardie, 52 Ala. 412; Greer v. Turner, 47 Ark. 11; Pritchard v. Comer, 71 Ga. 18; L'atcher v. Comer, 73 id. 418; Taylor v. Cockrell, 80 Ala. 236; Marziou v. Pioche, 8 Cal. 522; Buckley v. Garrett, 47 Pa. St. 280; Sanford v. Clark, 29 Conn. 457; Masten v. Cummings, 24 Wis. 623; Cross v. Johnson, 30 Ark. 396; McCune v. Belt, 45 Mo. 174; Paine v. Bonney, 6 Abb. 99; Donally v. Wilson, 5 Leigh, 329; Windsor v. Kennedy, 52 Miss. 164; Hicks v. Bingham, 11 Mass. 300; Hall v. Marston, 17 Mass. 575. See Green v. Ford, 79 Ga. 130.

of the 300%. he paid, and plaintiff contended that he might apply it to the trade account, thus lessening the mortgage undischarged. This contention was disapproved of, it being inferable from the nature of the transaction that E. made the payment only in respect to the plaintiff's right to the mortgage, and that it must, from the circumstances, be understood that the payer meant the money to be applied toward the satisfaction of the mortgage.¹ If money is advanced by a factor to purchase property upon the security of its being shipped to him, it will be implied that the advances were made upon the condition that they should be paid out of the proceeds of the property; after the factor has obtained possession of it, the debtor cannot direct the application of the amount realized from it to another debt.² But the agreement to control the debtor's choice must be such as to give the creditor a right in the nature of a lien which can be specifically enforced.³

Where the debtor has directed the application of his payment to a particular debt, he has a right to treat it as actually so applied. The debt will be deemed extinguished to the extent of such payment.⁴ The creditor has no option to disregard the direction,⁵ and no different application by him will avail unless afterwards ratified or acquiesced in by the [403] debtor;⁶ nor will the direction of the latter be overruled or

¹ *Young v. English*, 7 Beav. 10; *Buster v. Holland*, 27 W. Va. 510, 538. See *Stoveld v. Eade*, 4 Bing. 154; *Waters v. Tompkins*, 2 Cr., M. & R. 273; *Pearl v. Deacon*, 24 Beav. 186.

² *Frost v. Weathersbee*, 23 S. C. 354.

³ *Whitney v. Traynor*, 74 Wis. 289; *Stewart v. Hopkins*, 30 Ohio St. 502. See *Mellendy v. Austin*, 69 Ill. 15; *Clarke v. Scott*, 45 Cal. 86.

⁴ *Libby v. Hopkins*, 104 U. S. 303; *Washington N. Gas. Co. v. Johnson*, 123 Pa. St. 576; *Lauten v. Rowan*, 59 N. H. 215; *Irwin v. Paulett*, 1 Kan. 418.

⁵ *Runyon v. Latham*, 5 Ired. L. 551; *Wetherell v. Joy*, 40 Me. 325; *Scott*

v. Fisher, 4 T. B. Mon. 387; *Blanton v. Rice*, 5 id. 258; *Rugeley v. Smalley*, 12 Texas, 238; *Farmers', etc. Bank v. Franklin*, 1 La. Ann. 393; *Stewart v. Hopkins*, 30 Ohio St. 502; *Bank of Muskingum v. Carpenter*, 7 Ohio, 21.

⁶ *Sherwood v. Haight*, 26 Conn. 432; *Jackson v. Bailey*, 12 Ill. 159; *Forelander v. Hick*, 6 Ind. 448; *Semmes v. Boykin*, 27 Ga. 47; *Hall v. Marston*, 17 Mass. 575; *Solomon v. Dreschler*, 4 Minn. 278; *Taylor v. Sandiford*, 7 Wheat. 13; *Bonaffe v. Woodberry*, 12 Pick. 463; *Hussey v. Manufacturers', etc. Bank*, 10 Pick. 415; *Bloodworth v. Jacobs*, 2 La. Ann. 24; *Adams v. Bank*, 3 id. 351; *Robson v. McKoin*, 18 id. 544; *Treadwell v.*

changed in equity.¹ After a debtor has made application of a payment he cannot himself revoke it, and apply it otherwise, without the creditor's consent.² He will be held to the application made, though it was made for interest on a debt not bearing interest;³ to a debt on which the statute of frauds does not allow an action to be brought;⁴ or to an illegal claim.⁵ But where usurious interest has been paid, it is deemed an extortion and allowed to be recovered or applied to the principal debt.⁶ A different rule prevails in Ohio,⁷ and in the District of Columbia.⁸ [404] By mutual consent of the debtor and creditor, where no other parties are interested, the application of a payment may be changed; and in that case the indebtedness first discharged will be revived by implication, without any express

Moore, 34 Me. 112; Black v. Shooler, 2 McCord, 293; Martin v. Draher, 5 Watts, 544; Mitchell v. Dall, 2 Har. & G. 159; McDonald v. Pickett, 2 Bailey, 617; Reed v. Boardman, 20 Pick. 441; McKee v. Stroup, 1 Rice, 291; Moorehead v. West Branch Bank, 3 W. & S. 550; Jones v. Perkins, 29 Miss. 139; Smith v. Wood, 1 N. J. Eq. 74; Cardinell v. O'Dowd, 43 Cal. 586.

¹ Selfridge v. Northampton Bank, 8 W. & S. 320.

It has been held that the debtor cannot impute a payment to principal when interest is due thereon without first paying the interest. Johnson v. Robbins, 20 La. Ann. 569. This may be doubted if the creditor receives the money. Unless the interest was due as damages, it might notwithstanding be recovered. See Williams v. Houghtaling, 3 Cow. 86; Pindall v. Bank of Marietta, 10 Leigh, 484.

² Long v. Miller, 93 N. C. 233.

³ Beard v. Brooklyn, 31 Barb. 142.

⁴ Haynes v. Nice, 100 Mass. 327.

⁵ Tomlinson Carriage Co. v. Kinsella, 31 Conn. 268; Hubbell v. Flint, 15 Gray, 550; Dorsey v. Wayman, 6 Gill, 59; Richardson v. Woodbury, 12

Cush. 279; Feldman v. Gamble, 26 N. J. Eq. 494; Caldwell v. Wentworth, 14 N. H. 431. See Plummer v. Erskine, 58 Me. 59; Mueller v. Wiebracht, 47 Mo. 468.

⁶ Wood v. Lake, 13 Wis. 84, and cases cited; Gill v. Rice, id. 549; Lee v. Peckham, 17 id. 388; Fay v. Lovejoy, 20 id. 403; State Bank v. Ensminger, 7 Blackf. 105; Smead v. Green, 5 Ind. 308; Browning v. Morris, 2 Cowp. 790; Smith v. Bromley, 2 Doug. 695, note; Williams v. Hedley, 8 East, 378; Wheaton v. Hibbard, 20 Johns. 290; Burrows v. Cook, 17 Iowa, 436; Stanley v. Westrop, 16 Tex. 200; Parchman v. McKinney, 12 Sm. & M. 631.

In an action to recover payments made on account of usury the application to the principal debt will be made as of the date of the writ, if the party who made them so requests. Peterborough Savings Bank v. Hodgdon, 62 N. H. 300.

⁷ See Conant v. Seneca Co. Bank, 1 Ohio St. 298; Shelton v. Gill, 11 Ohio, 417; Graham v. Cooper, 17 id. 605; Williamson v. Cole, 26 Ohio St. 207.

⁸ Kendall v. Vanderlip, 2 Mackey, 105.

promise.¹ If there are other parties interested as a surety,² co-debtor,³ or a subsequent incumbrancer,⁴ their consent is essential;⁵ but a debtor's general creditor cannot be heard to complain.⁶

§ 237. **Evidence.** Parol evidence is admissible to show that at the time a promissory note was given for money lent an agreement was made to pay a certain sum as extra interest, and that all the payments made were for such interest and not upon the note.⁷ A copy of a letter addressed by a creditor to his debtor, contained in the letter book of the former, advising the debtor that he had drawn on him for the amount of a particular purchase, is not evidence for such creditor in an action against a guarantor to establish that a payment made shortly afterwards by the debtor who was indebted on several accounts was made in discharge of such purchase; though the draft itself or evidence of its contents, if lost, accompanied by a letter from the debtor to the creditor regretting his inability to meet the draft, and promising speedy payment of that demand, followed by a payment a few days after the date of such letter, is evidence to show that it was a payment made in discharge of that particular claim.⁸ The letter of a debtor, or of his acknowledged general agent, to his creditor, directing him to which of two debts a [405] payment he is about to make shall be applied, is the best evidence to show on what account such payment was received by the creditor.⁹ Such an act of the debtor in an action against his guarantor for one of the debts, where several were

¹ Rundlett v. Small, 25 Me. 29.

² Brockschmidt v. Hagebusch, 72 Ill. 562; Ruble v. Norman, 7 Bush, 532; Ware v. Otis, 8 Me. 387.

³ Thayer v. Denton, 4 Mich. 192; Miller v. Montgomery, 81 Ill. 850; Brown v. Brabham, 3 Ohio, 275.

⁴ Chancellor v. Schott, 23 Pa. St. 68; Tooke v. Bonds, 29 Tex. 419.

⁵ In a suit to foreclose a mortgage which the defendant alleged had been paid, the plaintiff proved an agreement to change the appropriation of the payments previously agreed to be applied to the mortgage

debt, to another debt. Held, that the defendant might then prove that the agreement to change the appropriation was made after he had applied for the benefit of the insolvent laws, and was therefore invalid. Richmond Iron Works v. Woodruff, 8 Gray, 447. See Cremer v. Higginson, 1 Mason, 323; Bank of North America v. Meredith, 2 Wash. C. C. 47.

⁶ Whitney v. Traynor, 74 Wis. 289.

⁷ Rohan v. Hanson, 11 Cush. 44.

⁸ Mitchell v. Dall, 2 H. & G. 159.

⁹ Id.

due, is not considered as merely the declaration of a third person, but it is the act of the party who had the legal right to make the application.¹

§ 238. By creditor. Where the debtor omits to make any appropriation at the time of payment the right to make the application devolves on the creditor. But its exercise is subject to limitations. In one respect, however, it is less restricted than that of the debtor. The creditor is not required to decide at once on receiving the money. Within what time he must exercise the choice has been much discussed. The weight of opinion seems to be that he must make the application within a reasonable time, in view of the circumstances of the particular case, at the latest, before any controversy arises or any material change occurs in the relations of the parties.²

¹ Id.

² Applegate v. Koons, 74 Ind. 347; Robinson v. Doolittle, 12 Vt. 246; Mills v. Fowkes, 5 Bing. N. C. 455; Philpott v. Jones, 2 Ad. & El. 41; Smith's Merc. L. 650; Peters v. Anderson, 5 Taunt. 596; Norris v. Beaty, 6 W. Va. 477; Bridenbecker v. Lowell, 32 Barb. 9; Haynes v. Waite, 14 Cal. 446; Allen v. Culver, 3 Denio, 284; Parker v. Green, 8 Met. 144; Whetmore v. Murdock, 3 Woodb. & M. 390; United States v. Kirkpatrick, 9 Wheat. 720; Backhouse v. Patton, 5 Pet. 160; Hill v. Southerland, 1 Wash. (Va.) 128; Van Rensselaer v. Roberts, 5 Denio, 470.

In *Marsh v. Oneida C. Bank*, 34 Barb. 298, it was held that a bank which holds a note against one of its depositors is not bound to apply his deposits immediately when it becomes due. If not made then, and a judgment is recovered on the note, the right to make such application is not thereby waived or lost, and the bank may afterwards avail itself of the right against an assignee of the deposit. See *Long Island Bank v. Townsend*, Hill & D. 204; *Mayor v. Patten*, 4 Cranch, 317.

In some cases it is held that an application made after an action has been begun is too late. *Taylor v. Coleman*, 20 Tex. 772; *Sanford v. Van Arsdall*, 53 Hun, 70; *Huffstater v. Hayes*, 64 Barb. 573. But it has been sustained when made after suit brought where it harmonized with the intention of the parties. *Bank of California v. Webb*, 48 N. Y. Super. Ct. 175. It is said in the same case (94 N. Y. 467) that the application may be made any time before the court makes it unless the debtor previously requests the creditor to exercise his right of election. In South Carolina the creditor has until verdict or judgment to apply the payments. *Heilbron v. Bissell*, Bailey's Eq. *430; *Price v. Hamilton*, 12 S. C. 32; *Thatcher v. Massey*, 20 id. 542. These cases are rested upon the principle that until the debtor pays the money it is his; and he has the right to control its disposition. After the creditor receives it he may exercise such right, and it continues until the court has exerted its power over the payment.

Whenever the application is made effect must be given to it as of the

The bringing of a suit may determine the creditor's election, as where he holds two notes and an unappropriated payment large enough to pay one of them is made, his suit on one of the notes is an election to apply the money to the payment of the other.¹ But if he brings separate suits on them he will not be allowed on the trial of one to elect to apply to [406] the satisfaction of the other a payment previously made, and not before specially applied by either party.² If there is no provision given in securities the payment of which is enforced by law as to the application of their proceeds the creditor has no right to make an appropriation thereof.³ Neither can he appropriate payments after third persons have acquired rights against the debtor, so as to affect their rights if an application can be made which will protect them.⁴

A banker is not required to apply a balance due by him on an account current to his depositor upon the liability of such customer on a note or bill. And in a suit by a banker against the acceptor of a bill the fact that the drawer had an account with the banker, and that after protest of the bill there were balances in favor of the drawer, would not be evidence in favor of the acceptor to show a payment or satisfaction by the drawer.⁵ If a debtor owes to his creditor several debts it is generally said that the creditor may apply a payment which the debtor does not appropriate to either at his pleasure.⁶ This

time when the money was received. *Poulson v. Collier*, 18 Mo. App. 588; *Bray v. Crain*, 59 Texas, 649.

¹ *Allen v. Kimball*, 23 Pick. 478; *Starrett v. Barber*, 20 Me. 457; *Bohe v. Stickney*, 36 Ala. 492; *Dent v. State Bank*, 12 Ala. 275.

² *Stone v. Talbot*, 4 Wis. 442.

³ *Orleans Co. Nat. Bank v. Moore*, 112 N. Y. 543.

It is said in *Sanford v. Van Arsdall*, 53 Hun, 70, 77, that payments made by a third person who is not the debtor's agent are not voluntary, though they were made pursuant to arrangement or understanding between the parties.

⁴ *Willis v. McIntyre*, 70 Texas, 84; *S. C.*, 8 Am. St. Rep. 574.

⁵ *Citizens' Bank v. Carson*, 32 Mo. 191; *Long Island Bank v. Townsend*, Hill & D. 204. But see *State Bank v. Armstrong*, 4 Dev. L. 519, and *State Bank v. Locke*, id. 529.

⁶ *Perry v. Bozeman*, 67 Ga. 643; *Greer v. Burnam*, 71 id. 31; *Trotter v. Grant*, 2 Wend. 413; *Robbins v. Lincoln*, 12 Wis. 1; *Peters v. Anderson*, 5 Taunt. 596; *Arnold v. Johnson*, 2 Ill. 196; *Brady's Adm'r v. Hill*, 1 Mo. 225; *Brewer v. Knapp*, 1 Pick. 332; *Holmes v. Pratt*, 84 Ga. 558; *Washington Bank v. Prescott*, 20 Pick. 339; *Goddard v. Cox*, 2 Str. 1194; *Allen v. Kimball*, 23 Pick. 478; *Brooke v. Enderby*, 2 B. & B. 70; *Bodenham v. Purchas*, 2 B. & Ald. 39; *Bosanquet v. Wray*, 6 Taunt. 597.

is not true in an absolute and unqualified sense. He is not at liberty to apply a payment to a disputed,¹ contingent,² or unliquidated demand in preference to one admitted, absolute or certain, nor to one not due in lieu of another past due.³ [407] Where part of a debt is barred by the statute and a part is collectible, and the debtor makes a payment requiring and receiving a receipt in full of all demands, the law will imply an application of the payment to the collectible portion.⁴ But where a debtor pays money without any specific directions on account of several debts, all of which are barred, the creditor may apply it to either at his option; he may apply it to the largest and thus revive it as to a balance. But he is not at liberty to apply a part of the payment to each of the several demands and thereby revive them all.⁵ And it has been held that where a payment made is less than either of several distinct demands, the creditor having a right to apply it is not allowed to divide it and apply a part to each demand.⁶ But in other cases the right to make a *pro rata* distribution of the money upon each of several demands is recognized.⁷

¹ Stone v. Talbot, 4 Wis. 442. See Ayer v. Hawkins, 19 Vt. 26; Lee v. Early, 44 Md. 80; McLendon v. Frost, 57 Ga. 448.

² Baker v. Stackpoole, 9 Cow. 420; Cremer v. Higginson, 1 Mason, 838; Whetmore v. Murdock, 8 Woodb. & M. 390. See Kidder v. Norris, 18 N. H. 532; Wright v. Laing, 8 B. & C. 165.

³ Richardson v. Coddington, 49 Mich. 1; Lamprell v. Bellericay Union, 8 Exch. 283; Baker v. Stackpoole, 9 Cow. 420; Early v. Flannery, 47 Vt. 253; Niagara Bank v. Roosevelt, 9 Cow. 409; Bobe v. Stickney, 36 Ala. 482; Burks v. Albert, 4 J. J. Marsh. 97; Heintz v. Cahn, 29 Ill. 808; Bacon v. Brown, 1 Bibb, 834; Parks v. Ingram, 22 N. H. 283; Cloney v. Richardson, 34 Mo. 370; Smith v. Applegate, 1 Daly, 390. See Dedham Bank v. Chickering, 4 Pick. 314; Gass v. Stinson, 8 Sumn. 99; Hunter v. Osterhoudt, 11 Barb. 33; Effinger v. Henderson, 33 Miss. 449.

In Arnold v. Johnson, 2 Ill. 196, it is held the creditor may apply the payment to any debt he sees proper, unless there are circumstances which would render the exercise of such discretion on the part of the creditor unreasonable, and enable him to work injustice to his debtor. See Bridenbecker v. Lowell, 32 Barb. 9; Lindsey v. Stevens, 5 Dana, 107.

⁴ Berrian v. Mayor, 4 Robt. 538. See Hill v. Robbins, 22 Mich. 475.

⁵ Ayer v. Hawkins, 19 Vt. 26. See *contra*, Jackson v. Burke, 1 Dill. 311. See, also, Armistead v. Brooke, 18 Ark. 521.

⁶ Wheeler v. House, 27 Vt. 785.

⁷ Where money is paid by a debtor to a creditor who has several demands against him, and no directions are given how he shall apply it, the creditor may apply it as he pleases; therefore, when he holds two bonds of his debtor, both due, and payable with interest, and money is so paid to him, he may apply it to the part

§ 239. Same subject. It has been held that a cred- [408]
itor may apply money paid by the debtor without directions
to a debt on which the statute of frauds does not allow an
action to be maintained;¹ or on a bill void for want of a
stamp;² or to one of two bills which was barred by the stat-
ute of limitations.³ The general rule, however, is that the
creditor cannot make an application of moneys to any demand
for which he could not sustain an action.⁴ He is not per-

extinguishment of both bonds; and he is not bound to apply it on one bond until it be satisfied, and the residue to the other. *Smith v. Screven*, 1 McCord, 368. See *James v. Malone*, 1 Bailey, 334.

In *Washington Bank v. Prescott*, 20 Pick. 339, four notes were made by the same person, and indorsed by the defendant; they were in the hands of the same holder; and the defendant, before any of them became due, gave the holder an order for the payment of the notes without expressing any priority out of property conveyed by the maker to assignees by an indenture to which the indorser was a party, for the payment of the notes in full or proportionably, which property proved to be insufficient. The assignees, in pursuance of the order, made a payment after all the notes had fallen due, and the holder applied the money to all the notes *pro rata*, instead of applying it wholly to those which had first fallen due, and it was held that he had a right to make such application. In an action on two of the notes, it was held that the other two, with the indorsements thereon, were admissible in evidence in order to explain the appropriation of the money paid on the order. And it was also held, that the jury in assessing the damages were not to regard any dividend which might in the future be paid on such order. See *Blackstone Bank v. Hill*, 10 Pick. 129;

Blackman v. Leonard, 14 La. Ann. 59; *White v. Trumbull*, 15 N. J. L. 314.

In order that the partial payment of a debt part of which is barred shall take it all out of the statute of limitations "there must be reasonable evidence that the debtor recognized and admitted the whole of the indebtedness to be due; but if he did so admit, and made a general payment on account of it, there is no reason for applying the admission and payment to either of the notes rather than to the others, but it would carry out the intentions of the parties to apply the acknowledgment and payment to each of the notes, that is, to the whole indebtedness." *Taylor v. Foster*, 132 Mass. 30.

In *Mills v. Fowkes*, 5 Bing. N. C. 455, it is ruled that a creditor may apply a general payment to a barred debt, though he holds claims which are not barred. But see *Reed v. Hurd*, 7 Wend. 408; *Heath v. Grenell*, 61 Barb. 190; *Harrison v. Dayries*, 23 La. Ann. 216.

¹ *Haynes v. Nice*, 100 Mass. 327; *Philpott v. Jones*, 4 Nev. & Man. 14; S. C., 2 A. & E. 41; *Rohan v. Hanson*, 11 Cush. 44; *Ramsay v. Warner*, 97 Mass. 13.

² *Biggs v. Dwight*, 1 M. & Ry. 308.

³ *Mills v. Fowkes*, 7 Scott, 444; 5 Bing. N. C. 458. See last note to § 238.

⁴ *Kidder v. Norris*, 18 N. H. 532; *Wright v. Laing*, 3 B. & C. 165; *Ban-*

mitted to apply them to an illegal demand, although a debtor may do so.¹ A more precise and accurate statement of the rule in respect to a creditor's right to apply a payment not appropriated by the debtor is that the creditor may apply it on either of several demands at his pleasure where they are all equally valid, payable absolutely, liquidated, due, and not in fact contested.² A creditor will not be allowed to make such an application of a payment as the debtor might reasonably object to, or as would work injustice to him.³ He may not by applying it to a contested claim throw the burden upon the debtor of disproving the demand.⁴ An application by the creditor contrary to the debtor's directions, but acquiesced [409] in by him, will be held binding.⁵ It is not necessary that the demands be all of the same grade or dignity; part may be specialties, and part simple contract debts, and the creditor has the choice on which he will apply a general payment.⁶ As between a legal and equitable demand, it would seem that preference must be given to the legal; the creditor is not at liberty to pay a later equitable claim instead of an older legal debt;⁷ and it is not certain that he has the option to apply

croft v. Dumas, 21 Vt. 456; Nash v. Hodgson, 6 De G., M. & G. 474.

¹ Rohan v. Hanson, 11 Cush. 44; Greene v. Tyler, 39 Pa. St. 361; Robinson v. Allison, 36 Ala. 525; Gill v. Rice, 13 Wis. 549. See McCarty v. Gordon, 16 Kan. 35; Fay v. Lovejoy, 20 Wis. 407; Phillips v. Moses, 65 Me. 70.

In Clark v. Mershon, 2 N. J. L. 70, it was held where a tavern-keeper was indebted to his customer, the items of liquor were to be considered as payment *pro tanto*, and not a *trust* or *credit*, within the tavern act of New Jersey.

In Adams v. Mahnken, 41 N. J. Eq. 332, it is held that creditors who hold a bond containing a void usurious agreement and other indebtedness unaffected by such agreement can only appropriate payments so far as they might have been recovered. Edwards v. Rumph, 48 Ark. 479; Dunbar v. Garrity, 58 N. H. 75.

² See Stone v. Talbot, 4 Wis. 442.

³ Bonnell v. Wilder, 67 Ill. 327; Bridenbecker v. Lowell, 32 Barb. 9; Taylor v. Coleman, 20 Texas, 772; Lindsey v. Stevens, 5 Dana, 107; Arnold v. Johnson, 2 Ill. 196; Ayer v. Hawkins, 19 Vt. 26. See Bean v. Brown, 54 N. H. 395; Gass v. Stinson, 3 Sumn. 99.

⁴ Stone v. Talbot, *supra*.

⁵ Pennsylvania Coal Co. v. Blake, 85 N. Y. 226; Flarsheim v. Bresrup, 43 Minn. 298.

⁶ Meggot v. Wild, 1 Ld. Raym. 287; Mayor v. Patten, 4 Cranch, 317; Peters v. Anderson, 5 Taunt. 596; Hargroves v. Cooke, 15 Ga. 321; Pierce v. Knight, 31 Vt. 701; Penny-packer v. Umberger, 22 Pa. St. 492; Heintz v. Cahn, 29 Ill. 308; Brazier v. Bryant, 2 Dowl. P. C. 477; Chitty v. Naish, *id.* 511.

⁷ Goddard v. Hodges, 1 C. & M. 38.

the money to a prior equitable demand in preference to a later legal one.¹ He may apply a payment to a demand not secured in lieu of one secured, or to one the security for which is more precarious.²

The particular circumstances may give the creditor a right to infer the consent of the debtor to an application not otherwise admissible. He may apply an unappropriated payment to a contingent liability, to a debt not due, to one barred by the statute of limitations, or even to an illegal demand if he has no other. The payment of money under such circumstances necessarily implies a consent to apply it to the demands actually existing.³

Some distinctions have been made in respect to the creditor's right of application between debts which the debtor paying owes separately and alone, and those which he owes jointly with others; and also between debts owing to the person receiving the payment alone, and those to which he and others are jointly entitled. It has been held that if one member of a firm makes a payment to a person who has an account against him, and also against the firm of which he is a member, [410] the creditor must apply the money to the individual account unless he can show a consent to have it otherwise applied.⁴ The law will appropriate it to the individual debt in the absence of any application by the parties, if the money paid is not shown to have been derived from the fund from which the joint liability was to be met.⁵ This strict rule has not been

¹ See *Bosanquet v. Wray*, 6 Taunt. 597; *Birch v. Tebbutt*, 2 Starkie, 74; 2 Pars. on Cont. 631.

² *Hargroves v. Cooke*, 15 Ga. 321; *Waterman v. Younger*, 49 Mo. 413; *Jenkins v. Beal*, 70 N. C. 440; *Simmons v. Cates*, 56 Ga. 609; *Driver v. Fortner*, 5 Porter, 9; *Burks v. Albert*, 4 J. J. Marsh. 97; *Wood v. Callaghan*, 61 Mich. 402; *White v. Beem*, 80 Ind. 239.

³ *Hall v. Clement*, 41 N. H. 166; *Bowe v. Gano*, 9 Hun, 6; *Treadwell v. Moore*, 34 Me. 112; *Ayer v. Hawkins*, 19 Vt. 26. See *Rackley v. Pearco*, 1 Ga. 241; *Bancroft v. Dumas*,

21 Vt. 456; *ante*, § 238; *Arnold v. Prole*, 4 M. & G. 860.

⁴ *Johnson v. Boone*, 2 Harr. 172; *Gass v. Stinson*, 3 Sumn. 98; *Sneed v. Wiester*, 2 A. K. Marsh. 277.

⁵ *Baker v. Stackpoole*, 9 Cow. 420; *Livermore v. Claridge*, 33 Me. 428. See *Lee v. Fountaine*, 10 Ala. 755.

After the dissolution of a partnership one of its members continued the business, agreeing to pay all the partnership debts and taking enough of the firm property to do so; he added other goods to the stock and mortgaged it to secure both the joint and individual debts. It was

uniformly recognized. The creditor has been given the choice, in the absence of directions, to apply it upon the joint debt.¹ Payments made by a surviving partner, while carrying on the partnership business for the joint benefit of himself and the estate of the deceased partner, pursuant to a stipulation in the partnership articles, upon an account, some items of which were contracted before and some after the death of the other partner, must be applied to the discharge of the first items.² Where the debtor making a general payment owes a debt to a firm, and also one to the member of it to whom the payment is personally made, the receiver is precluded by his relation of agent for the firm from preferring his own claim. It is implied in the very nature of an agent's or trustee's contract that he will take the same care, at least, of the property intrusted to him that he does of his own.³ Therefore, he should apply the payment *pro rata* to both debts.⁴

[411] § 240. Same subject. A creditor cannot apply a payment made generally on account of existing debts to a new debt subsequently contracted;⁵ nor to an instalment of the

held that a creditor might apply payments made to the latter debt. *King v. Sutton*, 42 Kan. 600; *St. Louis Type Foundry Co. v. Wisdom*, 4 Lea (Tenn.), 695.

¹ *Van Rensselaer v. Roberts*, 5 Denio, 470; *Boyd v. Webster*, 59 N. H. 89.

² *Stanwood v. Owen*, 14 Gray, 195; *Morgan v. Tarbell*, 28 Vt. 498.

In *Fairchild v. Hoolly*, 10 Conn. 475, an account against a partnership, upon which sundry payments had been made, was entire and unbalanced; before any payments had been made a secret partner had withdrawn from the concern, and the payments were made by one of the partners who remained. Held, that the money with which payment was made could not be presumed to have accrued out of the funds of the new firm, and to be applied, therefore, to the benefit of the fund from which it had been taken; that it could not

be applied to the portion of the account accruing after the withdrawal, on the principle that it should be applied to the debt for which there was the least security, because it did not appear but that the company was as solvent after the withdrawal as before; but that the money so paid should be applied to the oldest items of the account.

³ *Colby v. Copp*, 85 N. H. 434.

⁴ *Id.*; *Favenc v. Bennett*, 11 East, 86; *Barrett v. Lewis*, 2 Pick. 123; *Scott v. Ray*, 18 id. 360; *Cole v. Trull*, 9 id. 325.

⁵ *Miles v. Ogden*, 54 Wis. 573; *Law's Ex'r v. Sutherland*, 5 Gratt. 357; *Baker v. Stackpoole*, 9 Cow. 420. A. owed a debt to B. payable on demand, for which C. was surety. A. assigned debts of others to B. as a means of payment in part. After such assignment, but before the assigned debts were collected, A. contracted another debt to B. for which

same debt becoming due subsequent to the payment.¹ It has been held that the creditor's application is not complete and absolute until the debtor has been notified of it.² When such notice has been given the money is appropriated.³

If the holder for collection of several notes against one debtor which are owned by various persons receives from him a sum less than the amount of all the notes, and the debtor makes no application of the payment, it is competent for the creditors owning the notes to direct the application to any of them. In an action after such payment upon one of such notes, in the absence of any application up to the time of the trial, no part will be applied to the note in suit if it appears that the plaintiff has not received part of the money.⁴ An attorney holding several notes for collection belonging to different persons, and receiving a payment on account of them not appropriated by the debtor, may himself appropriate it.⁵ But if an agent having a demand himself against the debtor, and also acting for a principal who has a demand against the same debtor, receives an unappropriated payment from such debtor, he must apply it ratably to both.⁶

The right of appropriation is confined to the parties; no third person can insist on any application which neither of them has made.⁷ Thus the grantee of the mortgagor cannot insist that money of the mortgagor in the mortgagee's hands [412] shall be used to pay off the mortgage unless this was clearly contemplated by the parties, and the grantee made his purchase upon that understanding.⁸ Strangers can demand noth-

there was no security. Held, that B. could not, after collection of the assigned debts, apply the same to pay the debt contracted after the assignment, and recover the first debt from C., the surety for it. *Donally v. Wilson*, 5 Leigh, 329.

¹ *Gates v. Burkett*, 44 Ark. 90; *Heard v. Pulaski*, 80 Ala. 502; *Kline v. Ragland*, 47 Ark. 111; *Seymour v. Sexton*, 10 Watts, 255.

² *Ryan v. O'Neil*, 49 Mich. 281; *Lane v. Jones*, 79 Ala. 156; *Simson v. Ingham*, 2 B. & C. 65; *Allen v.*

Culver, 8 Denio, 284; *Van Rensselaer v. Roberts*, 5 id. 470.

³ *Id.*

⁴ *Taylor v. Jones*, 1 Ind. 17.

⁵ *Carpenter v. Goin*, 19 N. H. 479.

⁶ *Barrett v. Lewis*, 2 Pick. 123; *Cole v. Trull*, 9 Pick. 325.

⁷ *Harding v. Tift*, 75 N. Y. 461; *Feldman v. Beier*, 78 id. 293; *Coles v. Withers*, 83 Gratt. 186; *Mack v. Adler*, 22 Fed. Rep. 570; *Jefferson v. Church of St. Matthew*, 41 Minn. 392.

⁸ *Gordon v. Hobart*, 2 Story, 243; *Backhouse v. Patton*, 5 Pet. 160.

ing in this regard which the parties have not required.¹ Where creditors claim equities through their debtors they are usually estopped by what the debtors do; but fraud never estops creditors. This doctrine relative to the application of payments applies only where the creditor has two or more honest claims against the debtor; it does not apply so as to conclude creditors where there is only one such. Therefore a subsequent mortgagee may object to the application by the holder of an earlier mortgage of partial payments to usurious interest for the purpose of keeping alive that part which is valid.² As has been already stated, a surety of a debtor who makes an indefinite payment cannot interfere with the election of the creditor; nor will an intention of the debtor be presumed to apply it in favor of the surety so as to exclude the right of the creditor to make the application.³ But where at the inception of the contract of suretyship a mode of payment was agreed upon and a particular fund identified for that purpose, the surety may insist on the application of that fund when it is realized. Thus, a factor who has accepted a bill drawn by his principal, as against an accommodation drawer who becomes such on the faith of a consignment of cotton made to meet it at maturity, cannot apply the proceeds of the consignment to another debt, and no factor's lien for such other debt will be permitted to intervene.⁴ When the party

¹ Spring Garden Ass'n v. Tradesmen's Loan Ass'n, 46 Pa. St. 493. See Parker v. Green, 8 Met. 137.

² Greene v. Tyler, 39 Pa. St. 361. See Chester v. Wheelwright, 15 Conn. 562.

³ Hanson v. Myer, 72 Iowa, 48; Wilson v. Allen, 11 Ore. 154.

Payments made generally to the creditors on account of a person for whom a guaranty is given may be applied by them in liquidation of a balance existing against him before it was given, and the guarantor cannot insist on the payments being applied in exoneration of his liability, although at the time of his assuming it the creditors did not give him notice that any such balance was then

existing. Kirby v. Marlborough, 2 M. & S. 18. See Merrimack Co. v. Brown, 12 N. H. 320.

It is held in Gore v. Townsend, 105 N. C. 228, that a mortgagee who holds two mortgages, the older of which was executed by a husband and his wife to secure the former's debt, and the latter of which was executed by him alone on the same property to secure a subsequent note, cannot appropriate the proceeds of personal property to the payment of the second mortgage; it must go to the payment of the first in exoneration of the wife's dower right, she being a surety for her husband.

⁴ Brander v. Phillips, 16 Pet. 121. See Marryatts v. White, 2 Stark. 101,

having a right to appropriate a payment has done so, [413] the appropriation is final, and he cannot change it.¹

§ 241. **Appropriation by the court.** Where the parties have not made a specific appropriation of moneys paid, and there are several debts or demands for which the party paying the money is liable to the party receiving it, the fundamental rule or principle is that the law will appropriate it according to the justice and equity of the case.² In applying this cardinal principle various subsidiary rules have been recognized, in respect to which and in the reasons assigned therefor the decisions are not entirely in accord. Many cases proceed upon the assumption that the intention of one or both of the parties is to be effectuated, or that the interest of one party in preference to that of the other is entitled to be [414] subserved.³ But it is believed that there is no presumption of

in which security having been given by a surety for goods to be supplied and in respect of a pre-existing debt, the goods were supplied, and payments made from time to time by the principal, in respect of some of which discount was allowed for prompt payment; held, that it must be inferred in favor of the surety that all these payments were intended to be in liquidation of the latter account: also *Shaw v. Picton*, 7 D. & R. 201; 4 B. & C. 715, where the same agent had a bill of account with the grantor of several annuities, for the payment of which A. became surety, and in consequence of a letter written by an attorney in the names of the grantees, at the instance of the agents, demanding payment of the arrears of the annuities from the grantor and his surety, a sum of money was paid under circumstances from which it was to be collected that the money was intended to be specifically appropriated to the annuity account, and the agents applied it to the bill account; held, that this was a misapplication, and that the money ought to be ap-

propriated *pro rata* among the annuitants in relief of the surety.

¹ *Wright v. Wright*, 72 N. Y. 149.

² *Field v. Holland*, 6 Cranch, 8; *Souder v. Schechterly*, 91 Pa. St. 83; *Spiller v. Creditors*, 16 La. Ann. 292; *Stone v. Seymour*, 15 Wend. 19; *Parker v. Green*, 8 Met. 144; *Norris v. Beaty*, 6 W. Va. 477; *Robinson v. Doolittle*, 12 Vt. 246; *Randall v. Parramore*, 1 Fla. 409; *Chester v. Wheelwright*, 15 Conn. 562; *Calvert v. Carter*, 18 Md. 78; *Neidig v. Whiteford*, 29 Md. 178; *Haden v. Phillips*, 21 La. Ann. 517; *Upham v. Lefavour*, 11 Met. 174; *Seymour v. Van Slyck*, 8 Wend. 403; *Hargroves v. Cooke*, 15 Ga. 321; *Leef v. Goodwin*, Taney, 460; *Callahan v. Boazman*, 21 Ala. 246; *Bayley v. Wynkoop*, 10 Ill. 449; *Benny v. Rhodes*, 18 Mo. 147; *Proctor v. Marshall*, 18 Texas, 63; *Oliver v. Phelps*, 20 N. J. L. 180; *McFarland v. Lewis*, 3 Ill. 344; *White v. Trumbull*, 15 N. J. L. 814; *Carson v. Hill*, 1 McMull. (S. C.) 76; *Selleck v. Sugar Hollow T. Co.*, 18 Conn. 453; *Rosseau v. Cull*, 14 Vt. 83; *Starrett v. Barber*, 20 Me. 457.

³ *McDaniel v. Barnes*, 5 Bush, 183;

[415] intention which controls where the law makes the application.¹ If there is evidence of intention, it governs, of course,² but the application then is not made by the law, but by the party whose intention controls. And when the interest of

Allen v. Culver, 8 Denio, 234; Byrne v. Grayson, 15 La. Ann. 457; Spiller v. Creditors, 16 id. 292; Calvert v. Carter, 18 Md. 73; Pierce v. Sweet, 33 Pa. St. 151; Poindexter v. La Roche, 7 S. & M. 699; Bussey v. Gant's Adm'r, 10 Humph. 238; Pattison v. Hull, 9 Cow. 747; Dows v. Morewood, 10 Barb. 183; Johnson's Appeal, 37 Pa. St. 268; Seymour v. Sexton, 10 Watts, 255.

In Johnson's Appeal, *supra*, Strong, J., said: "The fact of actual appropriation to the earliest items of the account not being established, the next question is whether the law requires that the credits should be thus applied. In the absence of direction by the debtor, and of actual application by the creditor, the law will make an equitable application, and in making it will regard the circumstances of the case. In the present case it could make no difference to Duncan whether his credits were applied to the earlier or to the later items of the account. He was equally a debtor for both and both carried interest. It is true that when payments are made upon a running account it is one of the principles of legal application that they shall be treated as extinguishing the earliest charges in the account. But this is not a paramount principle. Another of equal force is that the payments are to be applied to that debt which is least secured. Both these rules look to the interest of the creditor, it being presumed that the debtor by

neglecting to give any direction consented to such an application as would be most beneficial to the creditor. But to apply Duncan's credits to the first items of the account . . . against him and thus extinguish the mortgage in the first instance would be an application not beneficial to the debtor, and most hurtful to the creditors. It would be paying first the debt which was best secured, and leaving the later advances without the protection of a factor's lien and without any security at all as against judgments entered before they were made. It would be reversing the fundamental rule of appropriations." The equitable circumstances stated abundantly justify the application which was made without the presumption that "the debtor by neglecting to give any direction consented to such an application as would be most beneficial to the creditor." There would seem to be no more ground for such a presumption than that the creditor by neglecting to make an actual application of the credits consented to such an application as would be most beneficial to the debtor.

That there is no such presumption that the debtor consents to an application most beneficial to the creditor is evident from the cases that consult the interest of the debtor where there are no countervailing equities. Thus, in accordance with the general course of authority, the law applies a payment to a debt bearing interest

¹ Moore v. Gray, 22 La. Ann. 289.

² If the debtor pays with one intent and the creditor receives with another

the former's intent will be given effect to. Roakes v. Bailey, 55 Vt. 542.

one party is subserved it is not upon any invidious preference; but upon some special ground of equity which appeals to the conscience of the court in his behalf.¹ Such considerations sometimes require a *pro rata* distribution of the payment to all of several debts; sometimes its appropriation to one for being the oldest, or least secured, to relieve the debtor from some special hazard or hardship, or to absolve a surety.

§ 242. **When payments applied pro rata.** If an indefinite payment is made where there are several debts of the same nature and all things equal, it is applied proportionally.² Moneys collected by judicial proceedings founded on several claims cannot be applied by either party; the law will apply them *pro rata*. Thus, where a creditor having several demands against his debtor recovers a portion of the entire

in preference to one not bearing interest. *Seymour v. Sexton*, *supra*. *Crompton v. Prall*, 105 Mass. 255, proceeds on the same principle. *Dows v. Morehead*, 10 Barb. 183, holds that the law will apply payments to that debt, a relief from which will be most beneficial to the debtor; as, for example, acceptances for which an instrument in the shape of a mortgage or pledge of personal property is given. *Poindexter v. La Roche*, 7 S. & M. 699, and *Pattison v. Hull*, 9 Cow. 747, are to the same effect. But a more satisfactory statement of the principle is to be found in *Field v. Holland*, 6 Cranch, 8, where Marshall, C. J., says: "When a debtor fails to avail himself of the power he possesses, in consequence of which that power devolves on the creditor, it does not appear unreasonable to suppose that he is content with the manner in which the creditor will exercise it. If neither party avails himself of his power, in consequence of which it devolves on the court, it would seem reasonable that an equitable application should be made. It being equitable that the whole debt should be paid, it cannot be inequi-

table to extinguish first those debts for which the security is most precarious." See *Langdon v. Bowen*, 46 Vt. 512; *Truscott v. King*, 6 N. Y. 147; *Worthley v. Emerson*, 116 Mass. 374; *The A. R. Dunlap*, 1 Low. 350; *Robie v. Briggs*, 59 Vt. 448. In the last case the debtor owed an individual and joint account; his payments amounted to more than the former; in ignorance of the exact state of the account the creditor entered the whole sum paid to the credit of the individual account. The court applied the surplus to the other.

¹ *Pierce v. Knight*, 31 Vt. 701; *Smith v. Loyd*, 11 Leigh, 512; 2 Greenlf. Ev., § 583.

² *Spiller v. Creditors*, 16 La. Ann. 292; *Jones v. Kilgore*, 2 Rich. Eq. 63; *Baine v. Williams*, 10 S. & M. 113; *Pointer v. Smith*, 7 Heisk. (Tenn.) 137.

Matured notes given for the same consideration and in the hands of a single person constitute but one debt; and payments made after their maturity are applicable to them all. *Egle v. Roman Catholic Church*, 36 La. Ann. 310.

amount in a judicial proceeding founded on them all, the law [416] will apply such a recovery as a payment ratably upon them all; neither the debtor nor the creditor has the right to apply it to the satisfaction of some of them in exclusion of others.¹

If an insolvent debtor assigns for the benefit of those creditors who become parties to the assignment and thereby release their claims, and a dividend is received by one of them, it must be appropriated ratably to all his claims against the debtor, as well to those upon which other parties are liable, or which are otherwise secured, as to those which are not secured.² A general payment made by the principal debtor, pursuant to a compromise of several debts in one lump, will be applied *pro rata* to all the claims against him, in an action against an indorser for part.³ And doubtless the same rule of application would be applied between the debtor and creditor where there has been a general judgment pursuant to a compromise founded upon and embracing several demands.⁴

A *pro rata* distribution of a payment is made on the equitable maxim that equality is equity. Other considerations may concur and lead to the same result. If a debtor creates a trust or security for the payment of several demands, without preference, money realized from that source is deemed appropriated by him to the demands so provided for, and to be proportionately distributed thereto; and either party may insist on such application.⁵ If a general payment is made to a person having two accounts against the party paying, one due to himself and the other to a third party, for whom he was act-

¹ Orleans Co. Nat. Bank v. Moore, 112 N. Y. 543; Standifer v. Codington, 85 La. Ann. 896; Cowperthwaite v. Sheffield, 1 Sandf. 416, affirmed, 3 N. Y. 243; Bridenbecker v. Lowell, 32 Barb. 9. See Thompson v. Hudson, L. R. 6 Ch. 820; Merrimack Co. Bank v. Brown, 12 N. H. 320. Where a fund is insufficient to satisfy several judgments entered the same day, they should be paid *pro rata*, though one was entered a few hours later than the others. Tucker v. Brackett, 25 Tex. (Supp.) 199; Ordinary v. Ma-

Collum, 3 Strobb. 494; Van Aken v. Gleason, 34 Mich. 477; Stamps v. Brown, Walker (Miss.), 526. See Mahone v. Williams, 39 Ala. 202; Jones v. Kilgore, 2 Rich. Eq. 63; Baine v. Williams, 10 S. & M. 113.

² Commercial Bank v. Cunningham, 24 Pick. 270.

³ Butchers' and Drovers' Bank v. Brown, 1 N. Y. Leg. Obs. 149.

⁴ Thompson v. Hudson, L. R. 6 Ch. 820.

⁵ Id.

ing as agent, and no appropriation is made by either, it will be applied ratably to both accounts.¹ So where a debt is [417] payable by instalments, or a mortgage is made to secure a series of notes payable at different times, and a payment is made after all the instalments or notes have become due, and neither party makes any special appropriation of it, according to the weight of authority, it will be applied by the court *pro rata* to all the instalments or notes — and this whether they are held by the original creditor or a part have been transferred, unless the assignee has specially acquired a preference by the agreement of transfer.²

When a debt is payable in instalments, and there are separate notes or other distinct evidences of debt payable at different times, all equally payable with or without interest, and a general payment made is not appropriated by either party, if it exceeds the interest and principal due at the time it was made it will be applied, of course, first to pay what is due of interest and principal, and the residue ratably on all and each of the instalments subsequently payable, with accrued interest on the part thus extinguished.³

¹ *Wendt v. Ross*, 33 Cal. 650.

² *Cage v. Iler*, 5 Sm. & M. 410; *Wooten v. Buchanan*, 49 Miss. 386; *Donley v. Hays*, 17 S. & R. 400; *Cooper v. Ulmann*, Walk. Ch. 251; *Mohlen's Appeal*, 5 Pa. St. 418; *Henderson v. Herrod*, 10 Sm. & M. 681; *English v. Carney*, 25 Mich. 178; *McCurdy v. Clark*, 27 id. 445; *Youmans v. Heartt*, 84 id. 397; *Betz v. Heebner*, 1 Penn. 280; *Smith v. Nettles*, 9 La. Ann. 455; *Bailey v. Bergen*, 2 Hun, 520; *Parker v. Mercer*, 6 How. (Miss.) 823; *Cremer v. Higginson*, 1 Mason, 323; *Perrie v. Roberts*, 2 Ch. Cas. 84. But see *State Bank v. Tweedy*, 8 Blackf. 447; *Murdock v. Ford*, 17 Ind. 52; *Stanley v. Beatty*, 4 Ind. 134; *Cullum v. Erwin*, 4 Ala. 452; *Bank of United States v. Covert*, 13 Ohio, 240; *Turner v. Pierce*, 31 Wis. 342.

³ In *Righter v. Stall*, 8 Sandf. Ch. 608, a debtor owed a mortgage debt,

payable in ten annual instalments. About two-thirds of the debt was paid at a time when a small amount was due for interest, and before any part of the principal had fallen due. There was no direction given by the debtor, nor actual application of the payment made by the creditor; and it was held that the law must make the application, and that after discharging the interest due the balance must be applied ratably in exoneration of each and all of the instalments.

In *Jencks v. Alexander*, 11 Paige, 619, the following rules are laid down: 1. Where the principal is not due, but the interest is due, the payment must first be applied to pay the interest then due; and the residue towards that part of the principal which will first become due and payable, so as to stop the interest, *pro tanto*, from the time of such pay-

[418] § 243. General payment applied to oldest debt. If no other paramount rule of appropriation governs, an indefinite

ment. 2. When neither principal nor interest has become due at the time of the payment, the amount paid should be applied to the extinguishment of principal and interest ratably; so as to extinguish a part of the principal and the interest which has accrued on the part of the principal thus extinguished. The facts of the case were, that August 24, 1833, a mortgage was given for \$650, payable in five equal yearly payments, the first to become due on the first of January following, with interest annually. Five hundred dollars were paid and indorsed on the day the mortgage was given. On the 14th of the following September a further sum of \$3 was paid. On the 4th of November, 1835, proceedings to foreclose were commenced on a claim of \$20.93 of delinquent interest, and it was held that \$20.58 was then due. The chancellor said: "I think the counsel for the complainants is wrong in supposing that nothing had become due and payable upon the mortgage at the time the proceedings to foreclose were instituted. It is true a sum much larger than the two instalments of \$130 each, and all interest upon the residue, had been paid. But the proper application of the payments was to apply them towards the satisfaction of the principal of the debt at the time of such payments respectively, after deducting from such payments the interest which had then accrued. The payment of the \$500 on the day of the date of the mortgage, being applied in satisfaction of the three first instalments of principal and \$110 of the fourth instalment, left \$20 of the fourth and the whole of the fifth instalments still due.

And as by the terms of the bond and mortgage the interest on the whole \$650 was payable annually, the mortgagee would have been entitled to the annual interest on the \$150 which still remained due on the last two instalments, if there had been no subsequent payment. The payment of \$3 on the 14th of September, 1833, must be applied towards the fourth instalment of principal, after deducting therefrom the interest on the \$3 from the 24th of the preceding August. In other words, when the principal is not due, but interest is due (a different case), the payment must first be applied to the extinguishment of the interest then due and payable, and the residue to the extinguishment of that part of the principal which will first become due, so as to stop interest, *pro tanto*, from the time of such payment. But when neither principal nor interest has become due (the case in hand) at the time of the payment, such payment, in the absence of any agreement as to the application, is to be applied to the extinguishment of principal and interest ratably, according to the decision of the supreme court in the case of *Williams v. Houghtaling*, 3 Cow. 86."

In *Williams v. Houghtaling* the court say: "When, according to the terms of the bond payable by instalments, interest cannot be demanded until the principal is payable (as in this case), payments made on an instalment not due and payable should be applied to the extinguishment of principal and such proportion of interest as has accrued on the principal so extinguished. For instance, an instalment on a bond of \$500 is due on the 1st of January, 1825, with in-

payment made to a person to whom a debtor paying the money owes several debts will be applied to that which first accrued.¹ This rule is especially applicable to items of debt and

terest from 1st January, 1824; on the 1st of July, 1824, the obligor pays \$207; the \$7 should be applied to pay the six months' interest accrued on \$200, and the \$200 extinguishes so much principal."

There is *dictum* in *Jencks v. Alexander* apparently in conflict with the text and in conflict with *Righter v. Stall*. The conclusion arrived at is not in conflict. If the payment of \$500 had been ratably applied to the five instalments, they would have been severally reduced to \$30, and interest on each annually payable would be the same, and due at the same time, as upon a like amount in the two past instalments. When the payment of \$3 was made no interest or principal was due. It being paid on the mortgage generally was applicable ratably towards paying the entire principal and interest.

In *Turner v. Pierce*, 31 Wis. 342, there was a land contract made October 22, 1863, upon which the purchase-money was \$5,600, due in six annual instalments, payable August 1, 1865, to 1870, with interest on the whole sum unpaid, payable at the time each instalment became due — the purchaser having the option to make the payments on or before the times mentioned, and then to pay interest only to the time of such payment. Before any of the principal became due the purchaser made a large payment, receipted to apply on the land contract. On the 5th of March, 1866, an action for strict foreclosure of the contract was begun on the ground that the purchaser was in default. The title had failed to a part of the lands, and the court held that each instalment

should be reduced in the proportion that the value of that part (\$1,832) bore to the whole value, and that the defendant was entitled to have the payment applied to the instalments first becoming due at such decreased rates, and that therefore nothing was due when the suit was commenced. See *Starr v. Richmond*, 30 Ill. 276.

¹ *Thompson v. St. Nicholas Nat. Bank*, 113 N. Y. 325; *Northwestern L. Co. v. American Exp. Co.*, 73 Wis. 656; *The Mary K. Campbell*, 40 Fed. Rep. 906; *Sanford v. Van Arsdall*, 53 Hun, 70; *Duncan v. Thomas*, 81 Cal. 56; *Jefferson v. Church of St. Matthew*, 41 Minn. 392; *Moses v. Noble*, 86 Ala. 407; *Ashby v. Washburn*, 28 Neb. 571; *Marks v. Ledyard*, 82 Ala. 69; *State v. Chadwick*, 10 Ore. 423; *Mackey v. Fullerton*, 7 Colo. 556; *Bennett v. McGillan*, 28 Fed. Rep. 411; *McGillin v. Bennett*, 132 U. S. 445; *Pardee v. Markle*, 111 Pa. St. 548; *Kline v. Ragland*, 47 Ark. 111; *Brown v. Shirk*, 75 Ind. 266; *McCurdy v. Middleton*, 82 Ala. 131; *Hammett v. Dudley*, 62 Md. 154; *Hersey v. Bennett*, 28 Minn. 86; *Helm v. Commonwealth*, 79 Ky. 67; *Bancroft v. Holton*, 59 N. H. 141; *Frost v. Mixsell*, 88 N. J. Eq. 586; *Wagner's Appeal*, 103 Pa. St. 185; *Wiesenfeld v. Byrd*, 17 S. C. 106; *Miliken v. Tufts*, 31 Me. 497; *Fairchild v. Holly*, 10 Conn. 475; *Smith v. Loyd*, 11 Leigh, 512; *Robinson's Adm'r v. Allison*, 36 Ala. 526; *Howard v. McCall*, 21 Gratt. 205; *Wendt v. Ross*, 33 Cal. 650; *Seymour v. Sexton*, 10 Watts, 255; *Shedd v. Wilson*, 27 Vt. 478; *St. Albans v. Failey*, 46 Vt. 448; *Langdon v. Bowen*, 46 Vt. 512; *Up-ham v. Lefavour*, 11 Met. 174; *Dows*

[420] credit in a general account current.¹ When both parties concur in the entry of the payments upon general account, without specific application, the law infers an intention on the part of both that they shall satisfy the charges therein in the order of their entry; and they will be so applied unless some controlling equity requires a different disposition.²

It has been held that this rule should apply without reference to the fact that one item may be better secured than another, since the particular parts, being blended together in one common account, have no separate existence; the balance only is considered as due;³ and a payment made on such account without a more specific appropriation is treated by a majority of the cases as applied to the earliest items, although for some of these the creditor has a lien or other security and has none for the others.⁴ Where there is a single open account

v. Morewood, 10 Barb. 183; *Allen v. Culver*, 3 Denio, 284; *Webb v. Dickinson*, 11 Wend. 62; *Hollister v. Davis*, 54 Pa. St. 508; *Wheeler v. Cropsy*, 5 How. Pr. 288; *Allen v. Brown*, 39 Iowa, 330; *Livermore v. Rand*, 26 N. H. 85; *Parks v. Ingram*, 22 N. H. 283; *Thompson v. Phelan*, 23 N. H. 339; *Caldwell v. Wentworth*, 14 N. H. 431; *Bacon v. Brown*, 1 Bibb, 334; *Sprague v. Hazenwinkle*, 53 Ill. 419; *Clayton's Case*, 1 Meriv. 585; *United States v. Kirkpatrick*, 9 Wheat. 720; *Berrian v. Mayor*, 4 Robt. 538; *Horne v. Planters' Bank*, 32 Ga. 1; *McKee v. Commonwealth*, 2 Grant Cas. 23; *Mills v. Fowkes*, 5 Bing. N. C. 455; *Pennell v. Deffell*, 4 De G., McN. & G. 372; *Harrison v. Johnston*, 27 Ala. 445; *Postmaster-General v. Furber*, 4 Mason, 333; *Hansen v. Rounsavell*, 74 Ill. 238; *Souder v. Schechterly*, 91 Pa. St. 83. See *Killorin v. Bacon*, 57 Ga. 497.

In the case of mutual accounts the credits on one side are applied to the extinguishment of the debts on the other as payments intentionally made thereon, and not as the set-off of one independent debt

against another. *Sanford v. Clark*, 29 Conn. 457.

¹*Goetz v. Piel*, 26 Mo. App. 634; *Swett v. Boyce*, 134 Mass. 381; *Crompton v. Pratt*, 105 id. 255.

²*Id.*; *Jones v. United States*, 7 How. (U. S.) 681; *Sanford v. Clark*, 29 Conn. 457; *Souder v. Schechterly*, 91 Pa. St. 83.

If a trustee pays trust money on his account at his banker's and mixes it with his own funds and draws checks against it in the usual manner for his personal use he will be presumed to have drawn his own and not the trust money. *Knatchbull v. Hallett*, 13 Ch. Div. 696, overruling earlier cases.

³*Harrison v. Johnston*, 27 Ala. 445.

⁴*Worthley v. Emerson*, 116 Mass. 374; *Truscott v. King*, 6 N. Y. 147; *The A. R. Dunlap*, 1 Low. 350; *Moore v. Gray*, 22 La. Ann. 289; *Cushing v. Wyman*, 44 Me. 121; *Hersey v. Bennett*, 28 Minn. 86; *Miller v. Miller*, 23 Me. 22. But see *Pierce v. Sweet*, 33 Pa. St. 151; *Thompson v. Davenport*, 1 Wash. (Va.) 125; *Schuelenberg v. Martin*, 2 Fed. Rep. 747. The last case is distinguishable because the

and a general payment is made by the debtor at full age, it is presumed to be in satisfaction of the earliest items although they accrued during his minority.¹

The rule under consideration for applying an indefinite payment to the debts which first accrued applies not only to the first items of an account but to distinct debts contracted at different times.² The rule is not unjust or prejudicial to a debtor; it operates, however, more beneficially to the creditor; for it often saves a debt from the bar of the statute of limitations, and closes the door to the older transactions which it may be presumed are more difficult of proof. But the rule ap- [421] plies the payments in the natural and logical order of the transactions. It is not supported, however, by reasons so cogent but that it will yield when there is evidence of a contrary intention,³ or where some superior equity requires a different application.⁴

§ 244. General payment applied to a debt bearing interest, and first to interest. As between debts bearing and those not bearing interest, the law directs an indefinite payment to be applied to the former.⁵ The reason generally assigned is that of relieving the debtor in respect to the debt which is most burdensome, or the presumed choice of the debtor.⁶ This may be conceded to be sufficient for this appli-

payment was not a voluntary one; a fact which the court failed to observe.

¹ *Thurlow v. Gilmore*, 40 Me. 378.

² *Parks v. Ingram*, 22 N. H. 283; *Thompson v. Phelan*, id. 339; *McDaniel v. Barnes*, 5 Bush, 183; *Robinson's Adm'r v. Allison*, 38 Ala. 526; *Byrne v. Grayson*, 15 La. Ann. 457; *Upham v. Lefavour*, 11 Met. 174; *Langdon v. Bowen*, 46 Vt. 512; *Smith v. Loyd*, 11 Leigh, 512; *Jones v. United States*, 7 How. (U. S.) 681; *McKinzie v. Nevius*, 22 Me. 188; *Allstan v. Contee*, 4 Har. & J. 851; *Draften v. Boonville*, 8 Mo. 395; *Copland v. Toulmin*, 7 Cl. & F. 349; *Simson v. Ingham*, 2 B. & C. 72; *Hooker v. Keay*, 1 Q. B. Div. 178.

This rule will not be applied to

payments made by a reorganized partnership without the consent of its new members. *St. Louis Type Foundry Co. v. Wisdom*, 4 Lea (Tenn.), 695; *Burland v. Nash*, 2 F. & F. 687; *Thompson v. Brown*, 1 Mood. & M. 406; *Roakes v. Bailey*, 55 Vt. 542.

³ *City Discount Co. v. McLean*, L. R. 9 C. P. 692; *Langdon v. Bowen*, 46 Vt. 512.

⁴ *Upham v. Lefavour*, 11 Met. 174.

⁵ *Heyward v. Lomax*, 1 Vern. 24; *Scott v. Fisher*, 4 T. B. Mon. 387; *Blanton v. Rice*, 5 id. 253; *Bacon v. Brown*, 1 Bibb, 334; *Scott v. Cleveland*, 38 Miss. 447; *Bussey v. Gant's Adm'r*, 10 Humph. 238.

⁶ *Id.* See *Neal v. Allison*, 50 Miss.

175.

cation, and some others, where a particular one is specially beneficial to a debtor without being attended with a corresponding loss to the creditor which the law is equally solicitous to prevent. Interest due is first to be satisfied when a general payment is made; and if there be a surplus it is to be applied to the principal. If the payment falls short of the interest, the balance of the interest is not to be added to the principal, but remains to be extinguished by the next payment, if it is sufficient.¹

Where a debt bearing interest remains unpaid until interest is due on the interest, where it is permitted, general payments [422] are to be applied, first, to such interest on interest; secondly, to interest on the principal; and lastly, to the principal.² And in applying payments on a sum secured by a penal bond, they will be applied to the interest in the first instance, although their sum exceeds the penalty.³ A payment of usury will be applied in law to discharge the amount legally due.⁴ Payments received on a debt bearing interest before either is

¹ *Monroe v. Fohl*, 72 Cal. 568; *Morgan v. Michigan Air Line R. Co.*, 57 Mich. 430; *Bradford Academy v. Grover*, 55 Vt. 462; *Case v. Fish*, 58 Wis. 56; *Hurst v. Hite*, 20 W. Va. 183; *Frazier v. Hyland*, 1 Har. & J. 98; *Gwinn v. Whitaker*, id. 754; *Bond v. Jones*, 8 Sm. & M. 368; *Spires v. Hamot*, 8 W. & S. 17; *Peebles v. Gee*, 1 Dev. L. 341; *Hampton v. Dean*, 4 Texas, 455; *Hearn v. Cutberth*, 10 id. 216; *McFadden v. Fortier*, 20 Ill. 509; *Hart v. Dorman*, 2 Fla. 445; *Lash v. Edgerton*, 13 Minn. 210; *Hammer v. Nevill*, Wright, 169; *Estebene v. Estebene*, 5 La. Ann. 738; *Union Bank v. Lobdell*, 10 id. 130; *Bird v. Lobdell*, id. 159; *Johnson v. Robbins*, 20 id. 569; *Moore v. Kiff*, 78 Pa. St. 96; *Williams v. Houghtaling*, 3 Cow. 86; *Righter v. Stall*, 3 Sandf. Ch. 608; *State v. Jackson*, 1 Johns. Ch. 13; *People v. County of New York*, 5 Cow. 331; *Jencks v. Alexander*, 11 Paige, 619; *Starr v. Richmond*, 30 Ill. 276; *Johnson v. John-*

son, 5 Jones' Eq. 167; *De Bruhl v. Neuffer*, 1 Strobb. 426. See *Mercer's Adm'r v. Beale*, 4 Leigh, 189.

If part of the interest is barred by the statute of limitations an unappropriated payment will not be applied to its discharge because it is not wholly due. In *re Fitzmaurice's Minors*, 15 Irish Ch. 445.

² *Anketel v. Converse*, 17 Ohio St. 11.

³ *Smith v. Macon*, 1 Hill Ch. (S. C.) 339.

⁴ *Burrows v. Cook*, 17 Iowa, 436; *Parchman v. McKinney*, 12 Sm. & M. 631; *Stanley v. Westrop*, 16 Texas, 200; *Bartholomew v. Yaw*, 9 Paige, 165. See *ante*, § 236.

In a suit under the national bank act to recover usurious interest and the forfeiture provided for, if occasional settlements have been made by the parties, payments deducted from the principal and interest then due and new notes given for the balances, the payments will be applied

due should be applied to pay the principal and the interest accrued on that part of the principal so extinguished.¹ The rule which applies a general payment first to interest due, rather than principal, is directly opposite to that which applies a payment on an interest-bearing debt in preference to one not bearing interest; it does not favor the debtor, but the creditor; for the law in some states allowing interest due to bear interest is exceptional.

§ 245. **General payments applied to the debt least secured.** If one debt be secured and another not, and a general payment is made, the prevailing rule is that the court will apply it to the debt which is not secured, or that for which the security is most precarious.² If, however, the se-

pro rata to the principal and interest due at the time. *Kinser v. Farmers' Nat. Bank*, 58 Iowa, 728.

¹ *Righter v. Stall*, 3 Sandf. Ch. 608; *Jencks v. Alexander*, 11 Paige, 619; *Williams v. Houghtaling*, 3 Cow. 86; *Miami Exporting Co. v. United States Bank*, 5 Ohio, 260.

In *Starr v. Richmond*, 30 Ill. 276, Walker, J., said: "It appears to be more equitable and just that when the holder receives money before it is due, on a demand drawing interest, it should be applied, in the absence of an agreement to the contrary, to the principal. Otherwise, by loaning the sum thus received, he would, in effect, compound the interest, or have placed at interest before its maturity a larger sum than his original claim. In other words, he would receive interest on the maker's money as well as his own. After the principal and interest both become due it would be otherwise. The court below, we think, erred in applying any portion of the payment made before the maturity of the note to the extinguishment of interest, but should have appropriated the whole of the payment to the principal." *McElrath v. Dupuy*, 2 La. Ann. 520; *Fay v. Lovejoy*, 20 Wis. 407.

² *Garrett's Appeal*, 100 Pa. St. 597; *Goetz v. Piel*, 26 Mo. App. 634, 643; *Nichols v. Knowles*, 3 McCrary, 477; S. C., 17 Fed. Rep. 494; *Sanborn v. Stark*, 31 Fed. Rep. 18; *McCurdy v. Middleton*, 82 Ala. 181; *Poulson v. Collier*, 18 Mo. App. 583; *The D. B. Steelman*, 5 Hughes, 210; *Hare v. Stegall*, 60 Ill. 380; *Wilhelm v. Schmidt*, 84 id. 183; *Plain v. Roth*, 107 id. 588; *Frazier v. Lanahan*, 71 Md. 131; *Lester v. Houston*, 101 N. C. 605; *North v. La Flesh*, 73 Wis. 520; *McDaniel v. Barnes*, 5 Bush, 183; *Thomas v. Kelsey*, 30 Barb. 268; *Blanton v. Rice*, 5 T. B. Mon. 253; *Field v. Holland*, 6 Cranch, 8; *Burks v. Albert*, 4 J. J. Marsh. 97; *Hammer v. Rochester*, 2 id. 144; *Foster v. McGraw*, 64 Pa. St. 464; *Pattison v. Hull*, 9 Cow. 747; *Dows v. Morewood*, 10 Barb. 183; *Johnson's Appeal*, 37 Pa. St. 268; *Pierce v. Sweet*, 33 id. 151; *Langdon v. Bowen*, 46 Vt. 512; *Wilcox v. Fairhaven Bank*, 7 Allen, 270; *Hempfield R. Co. v. Thornburg*, 1 W. Va. 261; *Gaston v. Barney*, 11 Ohio St. 510; *Moss v. Adams*, 4 Ired. Eq. 42; *Ransour v. Thomas*, 10 Ired. L. 164; *State v. Thomas*, 11 id. 251; *Jenkins v. Beal*, 70 N. C. 440; *Sprinkle v. Martin*, 72 id. 92; *Chester v. Wheelwright*, 15

[423] curity of one of the debts is by a surety, a general payment will be applied to the debt for which he is liable that he may be relieved.¹ But in some states the courts, carrying the rule to greater length, hold that the application will be made to the debt which bears heaviest upon the debtor, and apply a general payment so as to discharge a debt for which he has given security in preference to an unsecured demand in order to release the collateral.²

There is a marked conflict of decision upon this point relating to the application by the court of indefinite payments, arising, as before intimated, from the diverse judicial assumptions; on the one hand that such payments are as a general rule to be applied in the manner most beneficial to the debtor, and on the other, that they are to be applied most beneficially to the creditor.³ No court, however, has so far relied upon [424] either assumption as to resolve all questions by it. As

Conn. 562; *Bosley v. Porter*, 4 J. J. Marsh. 621; *Gordon v. Hobart*, 2 Story, 243; *Taylor v. Talbot*, 2 J. J. Marsh. 49; *Hillyer v. Vaughan*, 1 id. 583; *Sager v. Warley*, Rice Ch. (S. C.) 26; *Heilbron v. Bissell*, 1 Bailey Eq. 480; *Gregory v. Forrester*, 1 McCord Ch. 818; *Smith v. Wood*, 1 N. J. Eq. 74; *Jones v. Kilgore*, 2 Rich. Eq. 68; *Baine v. Williams*, 10 Sm. & M. 118; *McQuaide v. Stewart*, 48 Pa. St. 198; *Smith v. Brooke*, 49 id. 147; *Planters' Bank v. Stockman*, 1 Freeman's Ch. 502.

¹*Pritchard v. Comer*, 71 Ga. 18; *Pearl v. Deacon*, 1 De G. & J. 461; *Kinnaird v. Webster*, 10 Ch. Div. 139; *Berghaus v. Alter*, 9 Watts, 386; *Ross v. McLauchlan*, 7 Gratt. 86; *Marryatts v. White*, 2 Stark. 101; *Gard v. Stevens*, 12 Mich. 292; *Bridenbecker v. Lowell*, 32 Barb. 9.

²*Frazier v. Lanahan*, 71 Md. 131; *Griswold v. Onondaga Co. Savings Bank*, 93 N. Y. 301; *Pattison v. Hull*, 9 Cow. 747; *Dows v. Morewood*, 10 Barb. 183; *Poindexter v. La Roche*, 7 Sm. & M. 699; *Dorsey v. Gassaway*, 2 Har. & J. 402; *McTavish v. Carroll*,

1 Md. Ch. 160 (but see *Gwinn v. Whitaker*, 1 Har. & J. 754); *The Antarctic*, 1 Sprague, 206; *Neal v. Allison*, 50 Miss. 175. See *Thatcher v. Massey*, 20 S. C. 542. Payments will be so applied as to save a debtor's homestead. *First Nat. Bank v. Hollinsworth*, 78 Iowa, 575.

³So much has this assumption of favoring one party or the other as a rule entered into the judgments of the courts, that it has been a convenient resort for determining incidental questions. Thus where it was proved that a payment was made in a certain year, but the day and month could not be shown, the court directed the credit to be given as of the last day of the year, a day most favorable to the creditor. *Byers v. Fowler*, 14 Ark. 86. See *Anderson v. Mason*, 6 Dana, 217; *Bank of Portland v. Brown*, 22 Me. 295.

If the course of dealing between the parties indicates an understanding that payments are to be applied in the way most beneficial to the creditor the court will give effect to it. *Gwin v. McLean*, 62 Miss. 121.

before stated, neither assumption, apart from some special ground, is founded in reason or principle. Neither party, by reason merely of being debtor or creditor, has any claim to be preferred; each as a general rule has had an election to appropriate the payment, and each having waived it has an equal claim to a just application by the court. The rule that the debt which is least secured should be first paid, where there are no special circumstances, stands on very slight preponderance of equity. The most that can be said for it was said by Marshall, C. J.: "It being equitable that the whole debt should be paid it cannot be inequitable to extinguish first those debts for which the security is most precarious;"¹ and it is not surprising that the humane consideration of relieving the debtor of the more burdensome debt should determine the application the other way. But the rule to pay first the debt least secured seems to be supported by a decided weight of authority.

There is also considerable contrariety of decision upon other points relative to the application of payments by the court. The cases agree that an indefinite payment is to be applied to the oldest debt, where no other rule of appropriation conflicts; but it often occurs that another and sometimes several rules do conflict. Then the relative force of the conflicting rules, and the particular circumstances must control the application. That rule is often met by the rule that the least secured debt shall be first paid. Both may be said to operate in favor of the creditor, but they do not always conduce to the same application. The latter is paramount when no circumstances exist to increase the force of the other. Where the secured and unsecured debts are by mutual consent items in a general account current, and especially if, by like consent, the payment is also credited in the account, the rule for applying the credit to the oldest items prevails, notwithstanding the partial security;² but not without dissent. Where the creditor's security consisted in retaining title to the property sold, and the purchase-price of the articles so conditionally sold constituted the earliest items in the account, and the payments were, by mutual consent, entered as credits therein, the interest [425]

¹ Field v. Holland, 6 Cranch, 8.

² Ante, § 243.

of the purchaser to perfect his title to the property was deemed to preponderate against the interest of the creditor to obtain payment of his unsecured, rather than his secured, claims; and the concurrence of the parties in making the transaction a matter of account evinced their intention that the payments should satisfy the charges in the order of their entry.¹

SECTION 3.

ACCORD AND SATISFACTION.

§ 246. Definition. A claim or demand may be satisfied by the party liable delivering, paying or doing, and the claimant accepting, something different from that which was owing or claimed, if they so agree.² It is a substituted payment. When

¹ Crompton v. Pratt, 105 Mass. 255.

In Pointer v. Smith, 7 Heisk. (Tenn.) 137, A., a Tennessean, as agent, hired out in Alabama the slaves of several Tennesseans, and afterwards received in Alabama a part of the hire, without any appropriation at the time by either agent receiving or the debtor paying. Held, that the law of Alabama would govern as to the subsequent appropriation of the payment; but in the absence of any proof as to the law of thereof, applicable to the circumstances, the debtor could not make a subsequent appropriation, and it should be distributed *pro rata*.

In Smith v. Union Bank of Georgetown, 5 Pet. 518, it was held that the right of priority of payment among creditors of an intestate depends on the law of the place where the assets are administered, and not on the law of the place of the contract, or of the domicile of the deceased; and, therefore, where administration was taken under the laws of Maryland of assets there, where all debts are of equal dignity, and the intestate was domiciled and owed a bond debt in Vir-

ginia, where bond debts have a preference, the latter debt had no prior right of payment out of the assets in Maryland.

² If the amount due is unliquidated and the party owing it makes an offer of a less sum in settlement and attaches thereto the condition that if the sum is taken at all it must be received in full or in satisfaction, and the other party receives it with knowledge of the condition, he takes it subject thereto, and it operates as a full accord and satisfaction notwithstanding the payee, at the time of receiving it, declares that he takes it in satisfaction *pro tanto* only. McDaniels v. Bank, 29 Vt. 230; Preston v. Grant, 34 id. 201; Berdell v. Bissell, 6 Colo. 162; McGlynn v. Billings, 16 Vt. 329; McDaniels v. Lapham, 21 id. 222; Vermont State Baptist Convention v. Ladd, 58 id. 95; Bull v. Bull, 34 Conn. 455; Patten v. Douglass, 44 id. 541.

If a party injured, with knowledge of all the facts, demands and receives from the wrong-doer a sum of money on account of the injury, either in whole or in part, it is presumed that

such agreement is executed — carried fully into effect — the original demand is canceled, satisfied, extinguished. It is thus discharged by what the law denominates *accord and satisfaction*. It is a discharge of the former obligation or liability by receipt of a new consideration mutually agreed upon.

§ 247. **Consideration.** For the purpose of support- [426] ing such an agreement and giving it effect, the law treats all considerations which have value, without regard to the extent of that value, as sufficient, as it does in all other cases of contract; — inadequacy is not a valid objection; a court will not consider the disparity, if there is any, between the value of the liability discharged and the thing done or promised, which forms the consideration, if the latter is of some value.¹

§ 248. **Payment of part of a debt will not support agreement to discharge the whole.** Where there is an overdue money demand, liquidated and not disputed, and a part only of it is paid, though this is accepted as full satisfaction, there is only a part performance of the obligation in kind; the agreement to discharge the residue is void for want of consideration. All claims for damages, for torts committed, or for contracts broken, are payable in money. When a demand therefor is certain, or rendered certain by agreement or adjudication, and is no longer disputed, it cannot be satisfied with any less amount than the precise sum owing. If a part is paid there is a partial performance of the obligation of the party liable, and no more. His payment is only a discharge *pro tanto*. This part payment may have been induced solely by the assurance that it would be accepted as full satisfaction, and it may have been impossible to compel payment; still,

it was intended as a full recompense, and it is an accord and satisfaction. *Hinkle v. Minneapolis, etc. Ry. Co.*, 31 Minn. 434. But it is otherwise if the party in fault pays money voluntarily and not in response to a claim made by the other, or if any fact gives the payment the character of a gratuity. *Sobieski v. St. Paul & D. R. Co.*, 41 Minn. 169.

¹*Savage v. Everman*, 70 Pa. St. 315; *Hartman v. Danner*, 74 id. 33;

Very v. Levy, 13 How. (U. S.) 345; *Hardman v. Bellhouse*, 9 M. & W. 596; *Sibree v. Tripp*, 15 id. 23; *Booth v. Smith*, 3 Wend. 66; *Kellogg v. Richards*, 14 id. 116; *Steinman v. Magnus*, 11 East, 390; *Lewis v. Jones*, 4 B. & C. 506; *Blinn v. Chester*, 5 Day, 360; *Webster v. Wyser*, 1 Stew. 184; *Davis v. Noaks*, 3 J. J. Marsh. 497; *Wood v. Roberts*, 2 Stark. 417; *Boothby v. Sowden*, 3 Camp. 175; *Bradley v. Gregory*, 2 id. 383.

the party paying has done in kind only what he was under a legal obligation to do in respect to the amount paid, and the corresponding amount of the obligation is thereby satisfied, but no more; therefore the agreement of the creditor to discharge the residue is in a legal sense gratuitous and not binding.¹

[427] The actual value of a debt or demand depends on the probability of voluntary payment, or the possibility of collection by legal process. Where a debt is doubtful, a creditor

¹Gurley v. Hiteshue, 5 Gill, 217; St. 477; Carrington v. Crocker, 37 Fitzgerald v. Smith, 1 Ind. 310; N. Y. 336; Cumber v. Wane, 1 Str. 426; Sibree v. Tripp, 15 M. & W. 23; Markel v. Spitler, 28 id. 488; Stone v. Lewman, id. 97; Dederick v. Fitch v. Sutton, 5 East, 230; Pinnell's Case, 5 Rep. 117; Lynn v. Leman, 9 Johns. 333; Johnston v. Bruce, 2 H. Bl. 317; Thomas v. Brannan, 5 id. 268; Harris v. Close, 2 id. 448; Seymour v. Minturn, 17 id. 169; Moss v. Shannon, 1 Hilt. 175; Heathorn, 2 B. & C. 477; Mitchell v. White v. Jordan, 27 Me. 370; Latapee v. Cragg, 10 M. & W. 367; Skaife v. Pecholier, 2 Wash. C. C. 180; Key, 3 B. & Ad. 313; Straton v. Jackson, 3 B. & C. 421; Graves v. Warren v. Skinner, 20 Conn. 559; Tall, 2 T. R. 366; Churchill v. Jones v. Ricketts, 7 Md. 108; Campbell v. Booth, 8 Md. 107; Curtiss v. Bowman, 39 Vt. 518; Hardey v. Coe, 5 Martin, 20 Ill. 575; Donohue v. Wood- Gill, 189; Smith v. Bartholomew, 1 bury, 6 Cush. 150; Bryant v. Proctor, Met. 276; Arnold v. Park, 8 Bush, 3; 14 B. Mon. 451; Williams v. Lang- Taylor v. Odd Fellows' Mut. Relief ford, 15 id. 566; Conkling v. King, 10 Ass'n, 145 Mass. 134; Smith v. Chil- Barb. 372; S. C. 10 N. Y. 440; Keeler ton, 84 Va. 840; Martin v. Frantz, 127 Pa. St. 389; Hayes v. Massachu- v. Salisbury, 33 N. Y. 648; Fellows v. setts Mut. L. Ins. Co., 125 Ill. 626; Stevens, 24 Wend. 299; Howard v. Helling v. United Order of Honor, 29 Norton, 65 Barb. 161; Bliss v. Swarts, Mo. App. 309; Jaffray v. Davis, 48 64 id. 215; Harper v. Graham, 20 Hun. 500; Emmittsburg R. Co. v. Ohio, 105; Fell v. McHenry, 42 Pa. Donoghue, 67 Md. 383; St. Louis, St. 41; Pierson v. McCahill, 21 Cal. etc. R. Co. v. Davis, 35 Kan. 464; 122; Bunge v. Koop, 5 Robt. 1; Foakes v. Beer, 9 App. Cas. 605; Hammond v. Christie, id. 160; Gaff- S. C., 11 Q. B. Div. 221; Eldred v. ney v. Chapman, 4 id. 275; Irvine v. Peterson, 80 Iowa, 264.
In Gordon v. Moore, 44 Ark. 349, 355, it is held "that an agreement by a creditor to accept a smaller sum in satisfaction of a debt, carried into effect by the receipt of the money, and the execution of a formal and positive release, with all other acts essential to an absolute relinquishment of his right, is a valid and irrevocable act."

may obtain a part of the nominal amount by discharging the residue, and thus realize all that it is actually worth, and perhaps more. For this reason the rule stated has been regarded by the courts as only a technical one; and they have satisfied it on nice distinctions.¹

§ 249. Any other act or promise which is a new consideration will suffice. If there be any benefit or even legal [428] possibility of benefit² to the creditor thrown in, the additional weight will turn the scale and render the consideration sufficient to support the agreement.³ Payment at a different place,⁴ or before the original debt is due,⁵ is sufficient. So if, instead of offering payment of a less sum, the debtor procures a third person to become security, either by engaging his personal credit or pledging his property for the payment of a smaller

¹ Kellogg v. Richards, 14 Wend. 116; Smith v. Ballou, 1 R. L. 496; Harper v. Graham, 20 Ohio, 105; Brooks v. White, 2 Met. 288; McDaniels v. Lapham, 21 Vt. 222. See Weymouth v. Babcock, 42 Me. 44; Milliken v. Brown, 1 Rawle, 391; Lamb v. Goodwin, 10 Ired. 320; McDaniels v. Bank, 29 Vt. 230; Mathis v. Bryson, 4 Jones' L. 509.

In Woolfolk v. McDowell, 9 Dana, 268, a creditor accepted his own note outstanding in the hands of a third person, in satisfaction of a larger amount against his debtor, but worthless because the debtor was unable to pay it. Judge Marshall said: "We think his acceptance is sufficient to establish the adequacy of the satisfaction. It cannot be said that there was no consideration for giving up any part of the debt of the defendant, because although the value of the entire consideration given can be measured, there is no measure of the value of the debt which the defendant could not pay."

² "What is called 'any benefit, or even any legal possibility of benefit,' is not that sort of benefit which a creditor may derive from getting

payment of part of the money due to him from a debtor who might otherwise keep him at arm's length, or possibly become insolvent, but is some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal." Foakes v. Beer, 9 App. Cas. 605 (1884).

³ 1 Smith Lead. Cas. 600; Steinman v. Magnus, 2 Camp. 124; Bradley v. Gregory, id. 388; Wood v. Roberts, 2 Stark. 417; Boothby v. Sowden, 3 Camp. 175; Sibree v. Tripp, 15 M. & W. 23; Bidder v. Bridges, 37 Ch. Div. 406.

⁴ Jones v. Perkins, 29 Miss. 141; Smith v. Brown, 3 Hawks, 580; Harper v. Graham, 20 Ohio, 105; Austin v. Dorwin, 21 Vt. 39; Spann v. Baltzell, 1 Fla. 302; Arnold v. Park, 8 Bush, 3; Milliken v. Brown, 1 Rawle, 391.

⁵ Sonnenberg v. Riedel, 16 Minn. 83; Goodnow v. Smith, 18 Pick. 414; Brooks v. White, 2 Met. 288; Levy v. Very, 12 Ark. 148; Boyd v. Moats, 75 Iowa, 151; Schweider v. Lang, 29 Minn. 254.

sum;¹ or the payment of such sum by a third person, in Arkansas;² or if the debtor alone gives negotiable paper for a smaller sum to satisfy a larger debt not in negotiable form;³ or if one of several joint debtors, whether in partnership or not, does so, and the note or bill, and not the payment of it, is accepted as satisfaction, it is valid; giving such security is a new consideration, for it may be more advantageous than the debt in its previous form.⁴ Giving notes for smaller sums than the amount of the indebtedness which was represented by a single note, so that the creditor may sue on them in justice's court, is a sufficient consideration.⁵ An accord and satisfaction [429] moving from a stranger, or a person having no pecuniary interest in the subject-matter, if accepted in discharge of the debt, constitutes a good defense to an action to enforce the liability against the debtor.⁶ He sufficiently adopts it by tak-

¹ Keeler v. Salisbury, 33 N. Y. 648; Brooks v. White, 2 Met. 283; Babcock v. Dill, 43 Barb. 577; Le Page v. McCrea, 1 Wend. 164; Harrison v. Close, 2 Johns. 448; Seymour v. Minturn, 17 id. 169; Dederick v. Leman, 9 id. 333; Conkling v. King, 10 N. Y. 440; Welby v. Drake, 1 C. & P. 557; Belshaw v. Bush, 11 C. B. 191; James v. Isaacs, 12 id. 791; Steinman v. Magnus, 11 East, 390; Watkinson v. Inglesby, 5 Johns. 386; Henderson v. Stobart, 5 Exch. 99; Dias v. Wanmaker, 1 Sandf. 469; Seymour v. Goodrich, 80 Va. 303; Bidder v. Bridges, 37 Ch. Div. 406; Roberts v. Brandies, 44 Hun, 468; Varney v. Conery, 77 Me. 527; Laboyteaux v. Swigert, 103 Ind. 596. See Warburg v. Wilcox, 7 Abb. 336.

² Gordon v. Moore, 44 Ark. 349; Pettigrew Machine Co. v. Harmon, 45 id. 290.

³ Curlewis v. Clark, 3 Exch. 375; Cooper v. Parker, 15 C. B. 825; Sibree v. Tripp, 15 M. & W. 28; Goddard v. O'Brien, 9 Q. B. Div. 37.

⁴ Thompson v. Percival, 5 B. & Ad. 925; Sheehy v. Mandeville, 6 Cranch, 253; Mason v. Wickersham, 4 W. &

S. 100; Cole v. Sackett, 1 Hill, 516; Waydell v. Luer, 5 id. 448; S. C., 3 Denio, 410; Arnold v. Camp, 12 Johns. 409; Lodge v. Dicas, 3 B. & Ald. 611; Pearson v. Thomason, 15 Ala. 700; Russell v. Lytle, 6 Wend. 390; Barron v. Vandvert, 13 Ala. 232; Webb v. Goldsmith, 2 Duer, 413; Cartwright v. Cooke, 3 B. & Ad. 701; Evans v. Powis, 1 Exch. 601; Kinsler v. Pope, 5 Strobb. 126; Evans v. Drummond, 4 Esp. 89; Reed v. White, 5 id. 122; Lyth v. Ault, 7 Exch. 669; Bedford v. Deakin, 2 Stark. 178. See Ricketts v. Hall, 2 Bush, 249; Keeler v. Salisbury, 27 Barb. 485; S. C., 33 N. Y. 648; Conkling v. King, 10 Barb. 372.

In Bowker v. Harris, 30 Vt. 425, a wife's note was held sufficient consideration, she having paid it, though it was void when made. See, also, Kirwan v. Kirwan, 4 Tyrwh. 491; Hart v. Alexander, 2 M. & W. 484; Powles v. Page, 3 C. B. 16.

⁵ In re Dixon, 2 McCrary, 556.

⁶ Jones v. Broadhurst, 9 C. B. 173; Leavitt v. Morrow, 6 Ohio St. 71; Harrison v. Hicks, 1 Port. 423; Daniel v. Hallenbeck, 19 Wend. 408;

ing advantage of it by plea.¹ There must be something received to which the creditor was not before entitled.² And it must possess some value or by legal possibility be of benefit to him.³ The extent of the value is not material.⁴ Part of a claim may be satisfied by withdrawal of the defense of infancy to the residue.⁵ Suspension or abandonment of a suit is a sufficient consideration.⁶ If there is a new consideration of some value, it is enough, though it is of much less value than the debt discharged.⁷ Where a debtor pays part of a debt for which the creditor holds a note, upon an agreement that such part payment shall be full satisfaction, and, in pursuance of such agreement, the note is surrendered or canceled, the transaction will amount to full accord and satisfaction.⁸ The surrender is equivalent to a release.⁹ An accord and satisfaction by one of several jointly liable is a discharge of all.¹⁰ At common law an accord and satisfaction to one of two obligees of a common money bond was good because they were considered as having a joint interest in the debt, with its incident of survivorship, and the satisfaction to one of them

Clow v. Borst, 6 Johns. 37; Stark v. Thompson, 3 Mon. 296; Woolfolk v. McDowell, 9 Dana, 268; Belshaw v. Bush, 11 C. B. 191.

¹ Belshaw v. Bush, *supra*; Snyder v. Pharo, 25 Fed. Rep. 398; Bennett v. Hill, 14 R. I. 322.

² Bryant v. Proctor, 14 B. Mon. 451; Hethcoate v. Crookshanks, 2 T. R. 24; Harper v. Graham, 20 Ohio, 105; Good v. Cheesman, 2 B. & Ad. 328; Fitch v. Sutton, 5 East, 230; Acker v. Phoenix, 4 Paige, 305; Commonwealth v. Miller, 5 Mon. 205; Riley v. Kershan, 52 Mo. 224; Rose v. Hall, 26 Conn. 392; Bartlett v. Rogers, 3 Sawyer, 62.

³ Blinn v. Chester, 5 Day, 360; Booth v. Smith, 3 Wend. 66; Webster v. Wyser, 1 Stew. 184; Keeler v. Neal, 2 Watts, 424; Davis v. Noaks, 3 J. J. Marsh. 494. See *ante*, § 247; Foster v. Dawber, 6 Exch. 839.

⁴ *Id.*; Pinnel's Case, 5 Rep. 117; Andrew v. Boughey, 1 Dyer, 75a.

⁵ Cooper v. Parker, 15 C. B. 822.

⁶ Smith v. Monteith, 13 M. & W. 427.

⁷ 1 Smith's Lead. Cas. pt. 1, *445; Kellogg v. Richards, 14 Wend. 116; Jones v. Bullitt, 2 Litt. 49; Brooks v. White, 2 Met. 283; Harper v. Graham, 20 Ohio, 105; Boyd v. Hitchcock, 20 Johns. 76; Le Page v. McCrea, 1 Wend. 164; Sanders v. Branch Bank, 13 Ala. 853.

⁸ Ellsworth v. Fogg, 35 Vt. 855; Draper v. Hitt, 43 Vt. 439; Beach v. Endress, 51 Barb. 570.

⁹ *Id.*

¹⁰ Atwood v. Brown, 72 Iowa, 723; Turner v. Hitchcock, 20 id. 810; Metz v. Soule, 40 id. 236; Long v. Long, 57 id. 497; Goss v. Ellison, 136 Mass. 503; Coonley v. Wood, 36 Hun, 559. The discharge of a party not shown to be a wrong-doer will not affect the right of action against the other defendants. Wardell v. McConnell, 25 Neb. 558.

of the full amount due to all put an end to the bond.¹ But in equity the general rule with regard to money lent by two persons to a third was that they were *prima facie* regarded as tenants in common and not as joint tenants, both of the debt and of any security held for it. "Though they take a joint security, each means to lend his own money and to take back his own."² This is, however, but a presumption, and may be rebutted. The accord is good as to the obligee who received his share.³

[430] § 250. **Composition with creditors.** There is no want of consideration in agreements for composition between a debtor and two or more of his creditors; for the engagement of one is a sufficient consideration for that of the others.⁴ When an unliquidated or disputed demand is the subject of accord, and a certain sum is paid and accepted as full satisfaction, the consideration is manifest.

§ 251. **Compromise.** The settlement or compromise of a disputed or doubtful claim is a good consideration for a promise.⁵ The claim must be a real one and the parties must regard their rights concerning it as in fact or in law doubtful, and the compromise must be made *bona fide*.⁶ A mere state-

¹ Wallace v. Kelsall, 7 M. & W. 264.

² Morley v. Bird, 3 Ves. 631; Matson v. Dennis, 10 Jur. (N. S.) 461; S. C., 12 Week. Rep. 926.

³ Steeds v. Steeds, 22 Q. B. Div. 537.

⁴ Pierson v. McCahill, 21 Cal. 122; Fellows v. Stevens, 24 Wend. 292; Steinman v. Magnus, 11 East, 390; Keeler v. Salisbury, 33 N. Y. 648; Way v. Langley, 15 Ohio St. 392; Ricketts v. Hall, 2 Bush, 249; Tuckerman v. Newhall, 17 Mass. 581; Diermeyer v. Hackman, 52 Mo. 282; Reay v. Whyte, 3 Tyrwh. 596; Boyd v. Hind, 1 H. & N. 938; Cutter v. Reynolds, 8 B. Mon. 596; Boothby v. Sowden, 8 Camp. 174; Bradley v. Gregory, 2 id. 383; Wood v. Roberts, 2 Stark. 417; Cockshott v. Bennett, 2 T. R. 765; Hale v. Holmes, 8 Mich. 37; Hartle v. Stahl, 27 Md. 157. See Case v. Gerrish, 15 Pick. 49.

⁵ Brockley v. Brockley, 122 Pa. St. 1; Schaben v. Brunning, 74 Iowa, 102; Zimmer v. Becker, 66 Wis. 527; Stewart v. Ahrenfeldt, 4 Denio, 189; Wehrum v. Kuhn, 61 N. Y. 623; Hammond v. Christie, 5 Robt. 160; United States v. Clyde, 13 Wall. 35; United States v. Child, 12 Wall. 232; United States v. Justice, 14 Wall. 535; Brett v. Universalist Society, 63 Barb. 610.

⁶ Wahl v. Barnum, 116 N. Y. 87; Zoebisch v. Von Minden, 120 id. 406; Moon v. Martin, 122 Ind. 211; Gilliam v. Alford, 69 Texas, 267; Grandin v. Grandin, 49 N. J. L. 508; Cook v. Wright, 1 B. & S. 559; Callisher v. Bischoffsheim, L. R. 5 Q. B. 449; Ockford v. Barrelli, 20 Week. Rep. 116; Miles v. New Zealand A. E. Co. 32 Ch. Div. 266; Demars v. Musser-Sauntry Land Co., 37 Minn. 418; An-

ment that the amount of a claim was in dispute is not enough to show that there was a consideration for accepting less than was due.¹ Whether the compromise amount be received or a promise to pay it, the original claim is extinguished if the parties so agree, and there is a sufficient consideration.² An adjustment of any unliquidated demand, whether in dispute or not, stands on a similar principle.³ Stated accounts and settlements are treated with favor, and are conclusive unless there is proof of mistake or fraud.⁴ A definite sum paid [431] or agreed to be paid, and adopted by the parties as an adjustment and compensation for either a doubtful and disputed de-

thony v. Boyd, 15 R. L. 495; Headley v. Hackley, 50 Mich. 43.

In *Miles v. New Zealand A. E. Co.*, *supra*, the court dissents from some observations made by Lord Esher, M. R., in *Ex parte Banner*, 17 Ch. Div. 480, 490, to the effect that it was not only necessary to the validity of a settlement that the plaintiff believed he had a good cause of action, but that the circumstances must in fact raise some doubt whether there was or was not a good cause of action.

¹ *Emmitsburg R. Co. v. Donoghue*, 67 Md. 383.

It was observed in *Edwards v. Baugh*, 11 M. & W. 641: "The declaration alleges that certain disputes and controversies were pending between the plaintiff and the defendant whether the defendant was indebted to the plaintiff in a certain sum of money. There is nothing in the use of the word 'controversy' to render this a good allegation of consideration. The controversy merely is that the plaintiff claims the debt and the other denies it."

² *Grandin v. Grandin*, 49 N. J. L. 508; *Korne v. Korne*, 30 W. Va. 1; *Tuttle v. Tuttle*, 12 Met. 551; *Peace v. Stennet*, 4 J. J. Marsh. 449; *Jones v. Bullitt*, 2 Litt. 49; *Reid v. Hibbard*, 6 Wis. 175; *Pulling v. Supervisors*, 3 Wis. 337; *Calkins v. State*,

13 Wis. 389; *Metz v. Soule*, 40 Iowa, 236; *Ogborn v. Hoffman*, 52 Ind. 439; *Riley v. Kershan*, 52 Mo. 224; *Merry v. Allen*, 39 Iowa, 235; *Gates v. Shutts*, 7 Mich. 127; *Converse v. Blumrich*, 14 id. 109; *Mayhew v. Phoenix Ins. Co.*, 23 id. 105; *Hooper v. Hooper*, 26 id. 435; *Bowen v. Lockwood*, id. 441; *Hull v. Swarthout*, 29 id. 249; *Campbell v. Skinner*, 30 id. 32; *Reithmaier v. Beckwith*, 35 id. 100; *Neary v. Bostwick*, 2 Hilt. 514.

³ *Sanford v. Abrams*, 24 Fla. 181; *Donohue v. Woodbury*, 6 Cush. 148; *Bateman v. Daniels*, 5 Blackf. 71; *Harris v. Story*, 2 E. D. Smith, 363; *Longridge v. Dorville*, 5 B. & Ald. 117; *Watters v. Smith*, 2 B. & Ad. 889; *Haigh v. Brooks*, 10 A. & E. 309; *Wilkinson v. Byers*, 1 id. 106; *Wright v. Acres*, 6 id. 726; *Atlee v. Backhouse*, 3 M. & W. 633; *Sibree v. Tripp*, 15 id. 23; *Llewellyn v. Llewellyn*, 3 Dowl. & L. 318; *Allis v. Billing*, 2 Cush. 19; *Durham v. Wadlington*, 2 Strobb. Eq. 258; *Abbott v. Wilmot*, 22 Vt. 437; *Ellis v. Bitzer*, 2 Ohio, 295.

⁴ *Id.*; *Wilde v. Jenkins*, 4 Paige, 481; *Lockwood v. Thorne*, 11 N. Y. 170; *Pulliam v. Booth*, 21 Ark. 420. See *Purtel v. Morehead*, 2 Dev. & Bat. 239.

mand, or one which is uncertain and unliquidated, constitutes a sufficient consideration for the discharge of such original demand. And upon such adjustment, by which a definite sum, paid or to be paid, is substituted for the claim as it formerly existed, the latter is extinguished on the principle of accord and satisfaction.¹

Where money is due and there is an agreement to accept something else in lieu of it, and that something else is delivered and accepted, the agreement cannot be said to be without consideration, though the thing so delivered and accepted is of less value than the nominal amount of the debt. Anything of legal value, whether a chose in possession or in action, actually received in full satisfaction of a debt is good for that effect.² Nor is the adequacy of the consideration affected because the value of the collateral thing received in satisfaction was fixed by agreement of the parties at a less sum than the amount of the debt. Thus, where a larger sum than \$750 was owing and actually due in money, an agreement to receive \$750 worth of salt and the actual reception of it in discharge of the whole debt was held to have that effect.³ The right to compromise a suit may be exercised by the person who is authorized to bring it in the first instance,⁴ and a com-

¹ The satisfaction of a cause of action for personal injury made by the person injured bars his representatives after his death from asserting any claim because of the act of negligence for which satisfaction was made. *Read v. Great Eastern Ry. Co.*, L. R. 3 Q. B. 355; *Dibble v. New York & E. R. Co.*, 25 Barb. 183.

² 1 Smith's Lead. Cases, pt. 1, 445; *Jones v. Bullitt*, 2 Litt. 49; *Brooks v. White*, 2 Met. 283; *New York State Bank v. Fletcher*, 5 Wend. 85; *Frisbie v. Larned*, 21 id. 451; *Bullen v. McGillicuddy*, 2 Dana, 90; *Pope v. Tunstall*, 2 Ark. 209; *Booth v. Smith*, 3 Wend. 66; *Boyd v. Hitchcock*, 20 Johns. 76; *Le Page v. McCrea*, 1 Wend. 164; *Kellogg v. Richards*, 14 id. 116; *Sanders v. Branch Bank*, 13 Ala. 353; *Blinn v. Chester*, 5 Day,

359; *Watkinson v. Inglesby*, 5 Johns. 386; *Eaton v. Lincoln*, 13 Mass. 424; *Musgrove v. Gibbs*, 1 Dall. 216; *Arnold v. Post*, 8 Bush, 3; *Churchill v. Bowman*, 39 Vt. 518; *Gavin v. Annan*, 2 Cal. 494.

³ *Jones v. Bullitt*, 2 Litt. 49; *Woolfolk v. McDowell*, 9 Dana, 268; *Gaffney v. Chapman*, 4 Robt. 275. But see *Howard v. Norton*, 65 Barb. 161.

In *Platts v. Walrath, Hill & Denio*, 59, it was held that giving a mortgage for a debt, less a certain deduction agreed to be made in consideration of the security, is not payment of the debt so that a note subsequently given for the sum deducted will be deemed without consideration.

⁴ *Stephens v. Nashville, etc. Ry.*, 10 Lea (Tenn.), 448.

promise made by one plaintiff will bind his co-plaintiffs if it appears that the amount paid was received as full satisfaction for the whole injury.¹

§ 252. Agreement must be executed. The agreement [432] or accord must be executed.² But if the agreed satisfaction consists of an agreement rather than the performance of it, the accord is executed when the agreement which is the consideration of the discharge is entered into, whether it is ever performed or not.³ Formerly to a bond, accord and satisfaction could be pleaded by deed only, for an obligation under seal could not be discharged but by an instrument of equal dignity.⁴ But this rule is not now followed if there has been actual performance.⁵

§ 252a. Rescission or exoneration before breach. Rescission of an executory contract, or exoneration before breach, is not accord and satisfaction.⁶ After breach, however, when

¹ *Pogel v. Meilke*, 60 Wis. 248; *Ellis v. Esson*, 50 id. 138.

² *Hearn v. Kiefe*, 38 Pa. St. 147; *Williams v. Stanton*, 1 Root, 426; *Pope v. Tunstall*, 2 Ark. 209; *Hall v. Smith*, 10 Iowa, 48; *Flack v. Garland*, 8 Md. 191; *Woodward v. Miles*, 24 N. H. 289; *Coit v. Houston*, 3 Johns. Cas. 243; *Watkinson v. Inglesby*, 5 Johns. 886; *Russell v. Lytle*, 6 Wend. 890; *Bank v. De Grauw*, 23 Wend. 842; *Peytoe's Case*, 9 Co. 79; *Walker v. Seaborne*, 1 Taunt. 526; *Fitch v. Sutton*, 5 East, 230; *Tuckerman v. Newhall*, 17 Mass. 581; *Tilton v. Alcott*, 16 Barb. 599; *Spruneberger v. Dentler*, 4 Watts, 126; *Rising v. Patterson*, 5 Whart. 816; *Daniels v. Hatch*, 21 N. J. L. 391; *Bayley v. Homan*, 3 Bing. N. C. 915; *Allies v. Probyn*, 5 Tyrwh. 1079; *Edwards v. Chapman*, 1 M. & W. 231; *Collingbourne v. Mantell*, 5 id. 292; *Gabriel v. Dresser*, 15 C. B. 622; *Brown v. Perkins*, 1 Hare, 564; *Lawrence v. Woods*, 4 Bosw. 354; *Holton v. Noble*, 88 Cal. 7; *Gulf, etc. Ry. Co. v. Gordon*, 70 Texas, 80; *Burgess v. Dennison Paper Manuf. Co.*, 79 Me. 266; *Sanford v.*

Abrams, 24 Fla. 181; *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548; *Johnson v. Hunt*, 81 Ky. 821; *Schlitz v. Meyer*, 61 Wis. 418; *Fink v. Joseph*, 2 New Mex. 188.

³ *Woodward v. Miles*, 24 N. H. 289; *Watkinson v. Inglesby*, 5 Johns. 886; *Eaton v. Lincoln*, 13 Mass. 424; *Seaman v. Haskins*, 2 Johns. Cas. 195; *Heaton v. Angier*, 7 N. H. 397; *Good v. Cheesman*, 2 B. & Ad. 828; *Reeves v. Hearne*, 1 M. & W. 323; *Buttigieg v. Booker*, 9 C. B. 689; *Kromer v. Heim*, 75 N. Y. 574; *McCreery v. Day*, 119 id. 1; *Bennett v. Hill*, 14 R. I. 432.

⁴ *Levy v. Very*, 12 Ark. 148; *Ligon v. Dunn*, 6 Ired. 138.

⁵ *McCreery v. Day*, 119 N. Y. 1; *Capital City Mut. F. Ins. Co. v. Detwiler*, 28 Ill. App. 656; *Hastings v. Lovejoy*, 140 Mass. 261.

⁶ *Barelli v. O'Conner*, 6 Ala. 617. It is said to be a general rule of law that a simple contract may before breach be waived or discharged without deed and without consideration; but after breach there can be no discharge except by deed or upon suffi-

the demand becomes due for damages, whatever may be the [433] grade of the contract which is broken, it may be satisfied by matter *in pais*, and is subject to the defense of accord and satisfaction. That is a good defense to an action for breach of covenant.¹ And the modern doctrine is that it is good to an action on a judgment.²

cient consideration. Byles on Bills, 168. See *Foster v. Dawber*, 6 Exch. 838; *Dobson v. Espei*, 2 H. & N. 79. This is doubtless true of contracts mutually executory. In such contracts mutual waiver is a rescission. See 1 Smith's Lead. Cas. *465. If the consideration be executed on one side, the executory obligation of the other party founded thereon cannot be waived without consideration, or such act of renunciation as would amount to a release; unless it has been acted upon. See upon this general subject, *Blood v. Enos*, 12 Vt. 625; *Johnson v. Reed*, 9 Mass. 78; *Rogers v. Atkinson*, 1 Ga. 12; *Richardson v. Cooper*, 25 Me. 450; *Cuff v. Penn*, 1 M. & S. 21; *Goss v. Nugent*, 5 B. & Ad. 58; *Cummings v. Arnold*, 8 Met. 486; *Weld v. Nichols*, 17 Pick. 538; *Ward v. Walton*, 4 Ind. 75; *Low v. Forbes*, 18 Ill. 568; *Crowley v. Vitty*, 7 Exch. 322; *Grafton Bank v. Woodward*, 5 N. H. 99; *Payne v. New South Wales Coal Co.*, 10 Exch. 291; *Kellogg v. Olmsted*, 28 Barb. 96; *Hunt v. Barfield*, 19 Ala. 117; *Thurston v. Ludwig*, 6 Ohio St. 1; *Adams v. Nichols*, 19 Pick. 275; *McKee v. Miller*, 4 Blackf. 222; *Harrison v. Close*, 2 Johns. 448; *Sard v. Rhodes*, 1 M. & W. 155; *Crawford v. Mille-*

paugh, 13 Johns. 87; *Seymour v. Minturn*, 17 id. 169; *Foster v. Dawber*, 6 Exch. 839; *King v. Gillett*, 7 M. & W. 55; *Langden v. Stukes*, Cro. Car. 383.

The technical distinction between a satisfaction before or after the breach is disregarded, and a new parol agreement followed by its actual performance, whether made or executed before or after the breach, is a good accord and satisfaction of a covenant. *McCreery v. Day*, 119 N. Y. 1, and cases cited; *Hastings v. Lovejoy*, 140 Mass. 261.

¹ *Payne v. Barnet*, 3 A. K. Marsh. 312; *Strang v. Holmes*, 7 Cow. 224; *Keeler v. Salisbury*, 83 N. Y. 648; *United States v. Howell*, 4 Wash. C. C. 620.

² *Savage v. Everman*, 70 Pa. St. 315; *Jones v. Ransom*, 8 Ind. 327; *Reid v. Hibbard*, 6 Wis. 175; *Farmers' Bank v. Groves*, 12 How. (U. S.) 51; *McCullough v. Franklin Coal Co.*, 21 Md. 256; *Campbell v. Booth*, 8 Md. 107; *Le Page v. McCrea*, 1 Wend. 164; *Brown v. Feeter*, 7 id. 301; *Evans v. Wells*, 22 id. 324, 341; *La Farge v. Herter*, 11 Barb. 159; *Boyd v. Hitchcock*, 20 Johns. 76; *Witherby v. Mann*, 11 id. 518; *Baum v. Buntyn*, 62 Miss. 10.

SECTION 4.

RELEASE.

§ 253. Definition. A release of a chose in action is an immediate technical discharge of it by deed.¹ It operates directly upon the demand to extinguish it, and must be pleaded as a release.² But a release implies a consideration, and therefore the demand is inferentially satisfied.³ The cancelment of a released demand, however, is not the consequence of the supposed satisfaction, but the direct effect of the release. The release is not merely evidence of the extinguishment, but is itself the extinguisher.⁴ Though it recites only a nominal consideration,⁵ or, under recent statutes allowing the consideration of sealed instruments to be inquired into, it is [434] proved to be only nominal, the release will still operate to extinguish the claim to which it relates.⁶

§ 254. Differs from accord and satisfaction. A seal is not necessary to render a release and discharge of a liability effectual if the agreement embraces the demand and is upon a sufficient consideration. It can operate to extinguish the demand by way of accord and satisfaction,⁷ and in this form a debtor may avail himself of a release made by an agent in his own name.⁸ A mere receipt may have such an effect; but it

¹ A parol release of a money judgment in consideration of the receipt of a less sum than it calls for is invalid, though the release be indorsed upon the execution issued in the original action. *Weber v. Couch*, 134 Mass. 26.

Voluntary declarations by a creditor of an intention to release a debtor unless accompanied by some act which amounts to a release at law will not operate as an equitable release. *Irwin v. Johnson*, 36 N. J. Eq. 347, overruling *Leddel v. Starr*, 20 id. 274.

² *Corbett v. Lucas*, 4 McCord, 323.

³ *Warner v. Durham*, Hill & Denio, 206; *Matthews v. Chicopee Manuf. Co.*, 3 Robt. 711; *McAllester v. Sprague*, 34 Me. 296.

⁴ *McCrea v. Purmort*, 16 Wend. 460, 474.

⁵ *Wilt v. Franklin*, 1 Bin. 502; *Morse v. Shattuck*, 4 N. H. 229; *Gully v. Grubbs*, 1 J. J. Marsh. 387; *Maclary v. Reznor*, 3 Del. Ch. 445.

⁶ *Stearns v. Tappen*, 5 Duer, 294. See *Davis v. Bowker*, 2 Nev. 487; *Green v. Langdon*, 28 Mich. 222.

A cause of action may be released upon a consideration coming from a third person. *Compton v. Elliott*, 48 N. Y. Super. Ct. 211.

⁷ *Farmers' Bank v. Blair*, 44 Barb. 641; *Corbett v. Lucas*, 4 McCord, 323; *Coon v. Knap*, 8 N. Y. 402; *Lewiston v. Junction R. Co.*, 7 Ind. 597.

⁸ *Evans v. Wells*, 22 Wend. 324.

is only *prima facie* evidence of payment.¹ In Connecticut a receipt approximates in its effect to a release.² The general rule, however, is that a mere receipt is but evidence of the payment which it states, and is open to contradiction.³ A release not under seal, and without consideration, is void.⁴ Nor will equity compel a creditor to affix a seal to a release not founded on a consideration, even upon an averment that the seal was omitted by mistake.⁵

§ 255. **Construction.** Extrinsic proof is not allowed to restrict a release of all demands, by showing it was not intended to cover particular ones within its terms.⁶ A release may extinguish a particular demand, although it was not in the minds of the parties at the time of its execution. It will be held to embrace demands which are within its terms, [435] whether contemplated or not.⁷ In construing releases, however, general words, and even those the most comprehensive, may be limited to particular demands, where it appears by the consideration, the recitals and the nature and circumstances of the demands, to one or more of which it is proposed to apply the release, that such restriction was intended by the parties.⁸ And even where the word release is used, and the instrument is under seal, if it be apparent from the whole of it and the circumstances of the case that the parties did not intend a release, such intention as may appear will prevail,

¹ Thompson v. Fausate, 1 Pet. C. C. 182; Mose v. Miller, 1 Wash. (Va.) 328.

² Hurd v. Blackman, 19 Conn. 177; Bishop v. Perkins, id. 800; Tucker v. Baldwin, 13 id. 136; Bonnell v. Chamberlin, 26 id. 487.

³ Danziger v. Hoyt, 46 Hun, 270; Coon v. Knap, 8 N. Y. 402; Egleston v. Knickerbacker, 6 Barb. 458; Houston v. Shindler, 11 id. 36; White v. Parker, 8 id. 48.

⁴ Crawford v. Millspaugh, 13 Johns. 87; Seymour v. Minturn, 17 id. 169; Dewey v. Derby, 20 id. 462; Barnard v. Darling, 11 Wend. 28.

⁵ Jackson v. Stackhouse, 1 Cow. 122.

⁶ Deland v. Amesbury Manuf. Co.,

7 Pick. 244; West Boylston Manuf. Co. v. Searle, 15 id. 225; Rice v. Woods, 21 id. 30. See Van Brunt v. Van Brunt, 3 Edw. Ch. 14; Hoes v. Van Hoesen, 1 Barb. Ch. 379.

⁷ Hyde v. Baldwin, 17 Pick. 307.

⁸ Rich v. Lord, 18 Pick. 322.

A release will be construed from the standpoint occupied by the parties to it when it was executed; in order to do this extrinsic evidence is admissible to show the circumstances then existing, and the nature of the transaction. The words used must not be added to or taken from. Rowe v. Rand, 111 Ind. 206. If only general words are used the instrument will be construed most strongly against its maker. Ibid.

and the instrument may be construed simply as an agreement not to charge the person to whom it is executed.¹ A release of all claims for damages by reason of the construction of a railroad upon the lands of the releasor cuts off his right and any right of his lessee or grantee to recover for injuries resulting from the careful and skilful construction of the road, and carries with it to the company the right to do all incidental acts essential to the enjoyment of the right granted.² A covenant to discontinue a pending action at law and to release all claim or right of action for present or future damages arising from a specified cause bars all judicial proceedings for that cause — a suit for an injunction as well as an action for damages.³ In determining the scope to be given a release the consideration for it will have great influence; if that is nominal or small as compared with the rights surrendered, and the generality of the language used indicates that it affects rights of which the party who executed it was ignorant, equity will restrict its effect to that intended.⁴ The obligation imposed upon a railroad company to fence its road cannot be got rid of by any release it may obtain from the owner of the land over which the road is constructed.⁵

§ 256. Who may execute. A release will be effectual to discharge a debt or liability within its terms, although it is not executed by all in whom the right of action is vested, and though it is to only one of several persons jointly liable. Where several must join as plaintiffs in bringing an action a release of the cause of action by one of them is a bar.⁶ One

¹Solly v. Forbes, 2 Brod. & Bing. Mo. 383; Lusted v. Chicago & N. R. 46; 1 Par. on Cont. 28. See Jackson Co., 71 Wis. 391; Kirchner v. New v. Stackhouse, 1 Cow. 122; McIntyre Home S. M. Co., 59 Hun, 186.
v. Williamson, 1 Edw. 84; Kirby v.
Turner, Hopk. 309; Matthews v. Chicopee Manuf. Co., 3 Robt. 711.

²Burrow v. Terre Haute & L. R. Co., 107 Ind. 482; Hoffeditz v. Railway Co., 129 Pa. St. 264; Updegrove v. Pennsylvania, etc. R. Co., 132 id. 540. Compare St. Louis, etc. R. Co. v. Hurst, 25 Ill. App. 98.

³Kennerty v. Etiwan Phosphate Co., 17 S. C. 411.

⁴Blair v. Chicago & A. R. Co., 89

⁵Cincinnati, etc. R. Co. v. Hildreth, 77 Ind. 504.

⁶Osborn v. Martha's Vineyard R. Co., 140 Mass. 549; Pattison v. Skillman, 43 N. J. Eq. 392; Wallace v. Kelsall, 7 M. & W. 264; Clark v. Dinsmore, 5 N. H. 186; Kimball v. Wilson, 3 id. 96; Austin v. Hall, 13 Johns. 286; Decker v. Livingston, 15 id. 479; Sherman v. Ballou, 8 Cow. 304; Pierson v. Hooker, 3 Johns. 68; Napier v. McLeod, 9 Wend. 120;

partner may, without being specially authorized thereto, bind his firm by a sealed release of a partnership claim.¹ The right to execute a release cannot be exercised to the detriment of third persons. If a grantee by a covenant in a deed has assumed the payment of a mortgage upon the premises, the grantor cannot, after the mortgagee has accepted the grantee as his security, and without the mortgagee's assent, release the grantee.² The person who is entitled to the damages resulting from the death of another may release the right of action therefor.³

§ 257. **Effect when executed by or to one of several claiming or liable.** One of several joint creditors may receive payment or satisfaction and discharge the entire obligation, and the others will be bound.⁴ But the case must be [436] free from fraud on the co-creditors who do not join.⁵ Where, however, the release on its face purports to be a satisfaction of only the portion of the debt or claim belonging to the party executing it, it will have effect only to that extent. The demand will then be deemed severed with the debtor's consent, and a separate action may be brought for the residue by the creditors entitled thereto.⁶ A release by the nominal

Bulkley v. Dayton, 14 Johns. 387; *Murray v. Blatchford*, 1 Wend. 583. See *Gram v. Cadwell*, 5 Cow. 489; *Bruen v. Marquand*, 17 Johns. 58; *Halsey v. Fairbanks*, 4 Mason, 206; *Wiggin v. Tudor*, 23 Pick. 434; *Wilkinson v. Lindo*, 7 M. & W. 81; *Gibson v. Winter*, 5 B. & Ad. 96.

¹ *Allen v. Cheever*, 61 N. H. 32.

² *Gifford v. Corrigan*, 117 N. Y. 257.

³ *Stuebing v. Marshall*, 10 Daly, 406.

⁴ *Lumbermen's Ins. Co. v. Preble*, 50 Ill. 332.

⁵ *Id.* In *Upjohn v. Ewing*, 2 Ohio St. 13, it was held that one or less than all of several joint creditors, between whom no partnership exists, cannot release the common debtor, so as to conclude the co-creditors who do not assent to such release. Though they may thus defeat an action at law, where all the joint creditors must join in an action, it does

not follow that a recovery in equity, where no such joinder is necessary, may not be had. See *Emerson v. Baylies*, 19 Pick. 55; 3 Par. on Cont. 617 and note.

⁶ In *Holland v. Weld*, 4 Me. 255, there was a contract by one with four persons that he would clear certain obstructions from a river. Afterwards one of the four executed to him a release from all liability to such party, making the release for any damage sustained in consequence of any past or future non-performance. Mellen, C. J., said: "This release, in its terms, discharges Weld from his liabilities to Austin only, for any damage sustained by him. To give it any more broad and extensive operation would be contrary to the expressed intention of both of the parties. According to *Cole v. Knight*, 8 Mod. 277, and *Lyman v. Clark*, 9

creditor is not good against, but a fraud on, the real party in interest. If the party taking it and seeking to avail himself of it was aware that the releasor had no interest in the demand released, the instrument will be disregarded.¹

A release of one of several joint or joint and several debtors or wrong-doers discharges all. The deed is taken most strongly against the releasor, and is conclusive evidence that he has been satisfied.⁴ This rule applies to wrong-doers though there was no concert of action among them, if the injury was single;³ and the effect is the same, though a

Mass. 235, a release should be confined to the object which was in view, and on which it was plainly the intention of all that it should operate. The contract was originally joint; and had no release been given by Austin, an action must necessarily have been brought in the name of all the four against the defendant; but as he has accepted the release, and availed himself of it so far as he was once liable to Austin, he has by this act converted the joint contract into a several one; and he must now permit the plaintiff and the other two promisees to consider the contract in that light, and assert their claims against him accordingly. This course is manifestly just and sanctioned by settled principles." *Baker v. Jewell*, 6 Mass. 460; *Carrington v. Crocker*, 87 N. Y. 336.

¹ *Gram v. Cadwell*, 5 Cow. 489; *Legh v. Legh*, 1 Bos. & P. 447; 1 Par. on Cont. 27; 2 id. 617, and note; *Timan v. Leland*, 5 Hill, 237.

A surety paying the debt may be subrogated notwithstanding a legal release of it. And an intention to be subrogated will be presumed from the mere act of paying. *Neilson v. Fry*, 16 Ohio St. 552; *Dempsey v. Bush*, 18 id. 376.

² *Delong v. Curtis*, 35 Hun, 94; *Urton v. Price*, 57 Cal. 270; *Ellis v. Eason*, 50 Wis. 188; *Lamb v. Greg-*

ory, 12 Neb. 506 (joint judgment debtors); *Chapin v. C. & E. L. R. Co.*, 18 Ill. App. 47; *Gunther v. Lee*, 45 Md. 60; *Coke Litt.* 232; *Bac. Abr.*, Release, 9; *Bronson v. Fitzhugh*, 1 Hill, 185; *Rowley v. Stoddard*, 7 Johns. 207; *Catskill Bank v. Messenger*, 9 Cow. 37; *Hoffman v. Dunlop*, 1 Barb. 185; *Parsons v. Hughes*, 9 Paige, 591; *Ward v. Johnson*, 13 Mass. 148; *Tuckerman v. Newhall*, 17 id. 581; *Wiggin v. Tudor*, 23 Pick. 434; *Houston v. Darling*, 16 Me. 413; *Ruble v. Turner*, 2 Hen. & M. 39; *Cornell v. Masten*, 35 Barb. 157; *Matthews v. Chicopee Manuf. Co.*, 3 Robt. 711; *Mottram v. Mills*, 2 Sandf. 189; *Bloss v. Plymale*, 3 W. Va. 393; *Brown v. Marsh*, 7 Vt. 320; *Armstrong v. Hayward*, 6 Cal. 183; *Frink v. Green*, 5 Barb. 455; *Rice v. Webster*, 18 Ill. 321; *Prince v. Lynch*, 38 Cal. 528; *Hunt v. Terril's Heirs*, 7 Marsh. 68; *Dean v. Newhall*, 8 T. R. 168; *Hutton v. Eyre*, 6 Taunt. 289; *Lacy v. Kinaston*, 1 Ld. Raym. 688; 12 Mod. 551; *Johnson v. Collins*, 20 Ala. 435; *McAllister v. Dennin*, 27 Mo. 40.

³ *Stone v. Dickinson*, 5 Allen, 29; *Brown v. Cambridge*, 3 id. 474; *Goss v. Ellison*, 136 Mass. 508; *Aldrich v. Parnell*, 147 id. 409; *Seither v. Philadelphia T. Co.*, 125 Pa. St. 397; *Tompkins v. Clay Street R. Co.*, 66 Cal. 163.

claim is made against one who was not in fact liable, if he has given a consideration for a release.¹ So, if one is discharged by law, as by bankruptcy, at the instance or with the consent of the creditor or party injured.² The release of one of several joint debtors, if it does not increase the original responsibilities of the others, will not work a dissolution of the contract to those not released.³ This is the case where parties are only separately liable; and there the discharge of one does not discharge any other.⁴ The plaintiff, however, is entitled to only one satisfaction; and if the manner of releasing one involves satisfaction in whole or in part of the claim it will inure to the discharge, *pro tanto*, of all who are liable therefor.⁵ Where two are separately liable for the same debt, and stand in such relation to each other that in case of payment by one there is a right to reimbursement or contribution from the other, then a release of the party bound to reimburse or liable to contribute has been held to be a discharge of both. The reason the release of one joint obligor

¹ *Leddy v. Barney*, 139 Mass. 394; *Seither v. Philadelphia T. Co.*; *Tompkins v. Clay Street R. Co.*, *supra*. *Contra*, *Wardell v. McConnell*, 25 Neb. 558.

² *Robertson v. Smith*, 18 Johns. 459; 1 Par. on Cont. 29.

³ *Mortland v. Himes*, 8 Pa. St. 265.

The release of an infant co-signer of a note after he has repudiated his liability on attaining his majority and reconveyed his interest in the land which was the consideration for the note does not discharge the other maker. *Young v. Currier*, 63 N. H. 419.

The defense of a release by operation of law is purely personal and the instrument is not cause for setting aside, at the instance of another creditor, a confession of judgment by the person who has been discharged for the amount due on the obligation covered by the release. *Thomas v. Mueller*, 106 Ill. 36.

⁴ *Bank of Poughkeepsie v. Ibbot-*

son, 5 Hill, 461; *Van Rensselaer v. Chadwick*, 24 Barb. 333; *Mathewson v. Lydiate*, Cro. Eliz. 408, 470; *Bac. Abr.*, Release (G.).

⁵ *Ellis v. Esson*, 50 Wis. 138; *Lord v. Tiffany*, 98 N. Y. 412; *Kasson v. People*, 44 Barb. 347.

In *Babcock & W. Co. v. Pioneer Iron Works*, 34 Fed. Rep. 388, the bill charged the joint infringement of a patent by P. and S., by the manufacture by P. for sale by S. of the patented article. A settlement was made between complainant and P., the money paid by him "to cover the costs of complainant in this suit against P. and all damages for the infringement by said P. of the letters patent sued on;" all claims and demands against S. were expressly reserved. The parties both being liable for the acts of either, the stipulation released S. from liability for both costs and damages. See *Gunther v. Lee*, 45 Md. 60.

discharges the other is that if either pays the debt the other is liable to contribution, which would be defeated by the release if it were permitted to exonerate only the party to whom it is made. Thus, where by the constitution and statutes of a state stockholders are personally liable, jointly and severally, for the debts of a corporation, the discharge, by release under seal, of one stockholder was held a discharge not only of all the others but also of the corporation.¹

¹ Prince v. Lynch, 38 Cal. 528. Sawyer, C. J., said: "If not jointly liable in the strict sense of that term, as has been suggested, the legal incidents, as between the corporation and stockholders, to the extent of their personal liability, are, it seems to us, precisely the same. The stockholder is not a surety in any sense of the term. He is under the constitution and statute primarily liable in the same sense as the corporation is primarily liable. The same identical act which casts the liability on the corporation also casts it on the stockholder. There are not separate contracts. The stockholder does not stand in the position of an indorser or guarantor. An indorser or guarantor is not liable on the same contract. His contract is a separate and distinct one of his own, to which the principal is no party. It is founded upon the principal contract, and finds its consideration only in that contract; but it is a separate and distinct contract, nevertheless, and the terms are different. Each is liable on his own particular contract, but there is no joint contract or joint obligation. The maker and indorser or guarantor of a note may be sued jointly, it is true, but this does not result from the fact that there is a single joint contract.

"It is suggested that the reason the release of one joint obligor discharges the other is, that if one pays the debt the other is liable to contribution, which would be de-

feated by the release if it were permitted to exonerate only the party to whom it is made. On this ground it is said to be held to extinguish the debt. Now this incident attends the relation in question, and this principle is as applicable to it as to the case of two joint makers of a note.

"Suppose the corporation is sued and a recovery had; the stockholder released must contribute his share, for the corporation can levy an assessment on all the stockholders, according to their respective shares, to raise funds to pay the judgment. The corporation must pay it, unless it too is discharged, and the other shareholders are entitled to have him contribute his share. Or, suppose the corporation is in funds, and pays without an assessment, it takes from the stockholder released his *pro rata* share of a fund which would otherwise go to him in dividends, and thus he is made to contribute notwithstanding his release. So, suppose McClelland had sued other stockholders of the corporation and recovered and collected from them the whole amount of his debt; the stockholder or stockholders so compelled to pay would have a claim for contribution against Lynch for his share, and thus either the right to contribution of the shareholder who has been compelled to pay, or the release of Lynch, must be defeated. Suppose, again, that McClelland should discharge all the stockholders from per-

[438] A simple contract cannot operate as a release nor be pleaded as such; therefore such an agreement for the discharge of one of several parties jointly or jointly and severally liable must, as before stated, be of such character as to discharge all by way of accord and satisfaction. If the agreement embraces the entire cause of action, and purports, upon [439] sufficient consideration, to discharge it, it will have that effect as to all the parties liable, though made with only one.¹ But a simple contract to discharge one of several who are liable will not have that effect by force of the agreement, as a release operates, but only by force thereof based upon a

sonal liability, as has been suggested, and the corporation itself should still remain liable, each stockholder would still be liable to contribute his *pro rata* share, either in the form of an assessment levied by the corporation to pay the debt, or by a diminution of dividends, and the release would be defeated, or the corporation deprived of power to protect its property. One of two results must inevitably be reached. Either the debt is extinguished as to all by the release, or the release is wholly inoperative as to all. Thus the incidents and consequences are the same as between joint debtors and joint obligors in any other form. We think, therefore, that the case is within the rule, and that a valid release, under seal, discharges the corporation and other stockholders, as well as the stockholder released. The releases to the defendant, Lynch, referred to in the findings, were in due form and under seal, and we think, to the extent of the amount released, discharged the corporation as well as Lynch. But we think the court erred in holding that the whole \$416.66, due McClelland, was released. The language of the release is: 'I hereby release and discharge said Francis Lynch from *his proportion* of said company's said indebtedness to me.' The release

by its express terms, then, is only 'from his proportion of said company's said indebtedness to me;' not from the whole. '*And this shall be said Lynch's receipt in full to date, for his proportion and share of all indebtedness to me by said company, and a bar to any and all suits against said Lynch for the same;*' that is to say, *for his proportion and share*. It is manifest that McClelland did not intend to release his whole demand, but only Lynch's share. Although Lynch might be liable under the act to pay McClelland the whole demand against the company, as held in *Larabee v. Baldwin*, 35 Cal. 155, if the amount of the aggregate debts of the corporation upon which he was personally responsible was sufficient; yet, the whole would not be *his share* of the indebtedness, because he would be entitled to recover the excess paid by him over his share from the corporation, and to call upon his co-stockholders, who were personally liable, to contribute. The fact that he might be liable personally, under the statute, in the first instance, to pay the whole to the creditor, does not increase or diminish or in any way affect the amount of his share of the demand."

¹ *Ellis v. Eason*, 50 Wis. 138; *Eastman v. Grant*, 84 Vt. 390; *Matthews v.*

sufficient consideration for satisfaction of the entire demand.¹ Hence a conventional discharge which has been given to only one of several who are bound, in order to have the effect of a release as to all, and to be pleadable as such, must be a technical release under seal.²

§ 258. **What will operate as a release.** No special [440] form of words is necessary if the intention is clear to discharge the debt.³ Various acts will have the effect of a release. The act of surrendering a note or other evidence of debt will work that result.⁴ A bequest of the debt to the debtor;⁵ the intermarriage of the debtor and creditor;⁶ appointment of the debtor executor,⁷ will produce the same result. So, taking judgment against one of several jointly bound without issuing process against the others releases those not sued;⁸ and so does taking the body of the debtor or one of several on execution⁹ and discharging him or them from cus-

Chicopee Manuf. Co., 3 Robert. (N. Y.) 711.

¹ *Ellis v. Esson*, *supra*; *Walker v. McCulloch*, 4 Me. 421; *McAllester v. Sprague*, 34 id. 296; *Rowley v. Stoddard*, 7 Johns. 207; *Harrison v. Close*, 2 id. 449; *Farmers' Bank v. Blair*, 44 Barb. 641; *Shaw v. Pratt*, 22 Pick. 305; *Smith v. Bartholomew*, 1 Met. 276. See *Honegger v. Wettstein*, 47 N. Y. Super. Ct. 125.

² *Bloss v. Plymale*, 3 W. Va. 393; *Frink v. Green*, 5 Barb. 455; *De Zeng v. Bailey*, 9 Wend. 336; *Rowley v. Stoddard*, 7 Johns. 207; *McAllester v. Sprague*, 34 Me. 296; *Bronson v. Fitzhugh*, 1 Hill, 185; *Shaw v. Pratt*, 22 Pick. 305; *McAllester v. Dennin*, 27 Mo. 40; *Berry v. Gillis*, 17 N. H. 9.

In *Mitchell v. Allen*, 25 Hun, 543, an unsealed instrument acknowledged the payment of money from one of several persons liable for the releasor's injuries; it expressly provided that it was not to affect the other defendants, and that the claims against them were retained. It was held that the discharge of all was a necessary legal result of the satisfac-

tion and discharge of one. The court approved *Ruble v. Turner*, 2 Hen. & Munf. (Va.) 38, where three persons were sued for an assault and battery; pending suit an unsealed stipulation acknowledged satisfaction from one of them and provided that it was not to affect the liability of the others. It was held to work a discharge of all. See *Ellis v. Esson*, 50 Wis. 138, for an interesting discussion of the subject.

³ 2 Par. on Cont. 713.

⁴ *Beach v. Endress*, 51 Barb. 570.

⁵ *Hobart v. Stone*, 10 Pick. 215.

⁶ *Curtis v. Brooks*, 37 Barb. 476; *Smiley v. Smiley*, 18 Ohio St. 543.

⁷ *Thomas v. Thompson*, 2 Johns. 470; *Eichelberger v. Morris*, 6 Watts, 42; *Fishel v. Fishel*, 7 id. 44; *Raab's Estate*, 16 Ohio St. 274.

⁸ *Mitchell v. Brewster*, 28 Ill. 163; *Anderson v. Levan*, 1 W. & S. 334; *Jones v. Johnson*, 8 id. 276; *Stewart's Appeal*, id. 476.

⁹ *Gould v. Gould*, 4 N. H. 173; *Palethorpe v. Leshner*, 2 Rawle, 272; *Sharp v. Speckenagle*, 3 S. & R. 464.

tody. Under a statute which authorizes any surety to require a creditor or obligee forthwith to institute an action upon the accrual of the right to do so, and which provides that if it is not done within a reasonable time the surety shall be discharged, only such sureties as have given the notice required are released by the neglect to sue.¹ A release of damages by a widow whose husband was killed is not invalid because it was executed in order that another person who was named by him as the beneficiary in a mutual insurance policy on his life might realize the amount due, a condition of it being that any employee of a designated railway company who was a member of the society should release the company from all liability for injuries to him.² An agreement by the owner of property which has been seized under a writ against a third person that it may be sold and the proceeds retained in its place does not release a cause of action for the taking and selling.³

§ 259. **Covenant not to sue.** A covenant with a sole debtor or all the debtors never to sue, or not to sue without any limitation of time, will, on the principle of avoiding circuitry of action, have the effect of a release.⁴ For the same reason a covenant by the creditor to indemnify the debtor against the particular debt is a release.⁵ But a covenant not to sue one of several joint debtors or joint obligors, or to indemnify him, [441] is not a release; the covenantee's only remedy is by action on the covenant;⁶ because it cannot be inferred from

¹ *Cochran v. Orr*, 94 Ind. 433.

² *State v. Baltimore & O. R. Co.*, 36 Fed. Rep. 655. See *Fuller v. Baltimore & O. Relief Ass'n*, 67 Md. 433.

³ *Sartwell v. Moses*, 62 N. H. 355.

⁴ *Kennerty v. Etiwan Phosphate Co.*, 17 S. C. 411; *Clopper v. Union Bank*, 7 Har. & J. 92; *Parker v. Holmes*, 4 N. H. 97; *Hodges v. Smith*, Cro. Eliz. 623; *Cuyler v. Cuyler*, 2 Johns. 186; *Arnold v. Park*, 8 Bush, 3; 2 Saund. 478, note (1); *Deux v. Jefferies*, Cro. Eliz. 353; *Ford v. Beach*, 11 Q. B. 842; *Willis v. De Castro*, 4 C. B. (N. S.) 216; *Badeley v. Vigurs*, 4 E. & B. 71; *Giles v. Spencer*, 3 C. B. (N. S.) 244; *Phelps v. Johnson*, 8 Johns. 54; *Clark v. Bush*,

8 Cow. 151; *Brown v. Williams*, 4 Wend. 360; *Hosack v. Rogers*, 8 Paige, 229; *Hastings v. Dickinson*, 7 Mass. 155; *Shed v. Pierce*, 17 id. 623; *Williamson v. McGinnis*, 11 B. Mon. 74; *Lane v. Owings*, 3 Bibb, 247; *Harvey v. Harvey*, 3 Ind. 473; *Reed v. Shaw*, 1 Blackf. 245; *Jackson v. Stackhouse*, 1 Cow. 122; *White v. Dingley*, 4 Mass. 433; *Sewall v. Sparrow*, 16 id. 24; *Garnett v. Macon*, 6 Call, 308; *Lacy v. Kynaston*, 2 Salk. 575; 12 Mod. 548; 1 Ld. Raym. 688; *Dean v. Newhall*, 8 T. R. 168. See *Kowing v. Manly*, 2 Abb. (N. S.) 377.

⁵ *Connop v. Levy*, 11 Q. B. 769; *Clark v. Bush*, 3 Cow. 151.

⁶ *Benton v. Mullen*, 61 N. H. 125;

such a covenant that it was the intention to discharge the debt.¹ It cannot avail as an estoppel in order to avoid circuit of action. It is said by high authority that a covenant containing no words of release has never been construed as a release unless it gave the party claiming the benefit of that construction a right of action which would precisely counter-vail that to which he was liable; and unless, also, it was the intention of the parties that the last instrument should defeat the first.² And where two are jointly and severally bound a covenant not to sue one does not amount to a release of the other,³ unless, perhaps, the covenant be given after a suit had been brought separately against one, and the creditor had by that action chosen to consider the covenantee the sole debtor.⁴ The amount paid, however, upon the demand by way of partial discharge as a consideration for such a covenant will be regarded as satisfaction to that extent.⁵ Nor will a covenant with a debtor not to sue for a limited time suspend the right of action.⁶

- Tuckerman v. Newhall, 17 Mass. 581; Miller v. Fenton, 11 Paige, 18; Harrison v. Close, 2 Johns. 448; Catskill Bank v. Messenger, 9 Cow. 87; Rowley v. Stoddard, 7 Johns. 207; Bank of Chenango v. Osgood, 4 Wend. 607; Couch v. Mills, 21 id. 424; Shed v. Pierce, 17 Mass. 623; Goodnow v. Smith, 18 Pick. 414; Aylesworth v. Brown, 31 Ind. 270; Carondelet v. Desnoyer, 27 Mo. 36; Walker v. McCulloch, 4 Me. 421; Williamson v. McGinnis, 11 B. Mon. 74; Lane v. Owings, 3 Bibb, 247; Frink v. Green, 5 Barb. 455; Snow v. Chandler, 10 N. H. 92; Mason v. Jouett, 2 Dana, 107; Berry v. Gillis, 17 N. H. 9; Durell v. Wendell, 8 id. 369; Parker v. Holmes, 4 id. 97; Smith v. Mapleback, 1 T. R. 441; Hutton v. Eyre, 6 Taunt. 289; Gibson v. Gibson, 15 Mass. 112; Ward v. Johnson, 6 Munf. 6; Thimbleby v. Barron, 3 M. & W. 210; Dow v. Tuttle, 4 Mass. 414; Aloff v. Scrimshaw, 2 Salk. 573; Hoffman v. Brown, 6 N. J. L. 429; Fullman v. Valentine, 11 Pick. 159; Garnett v. Macon, 6 Cal. 308; Lacy v. Kynaston, 2 Salk. 575; 12 Mod. 548; 1 Ld. Raym. 688; Dean v. Newhall, 8 T. R. 168.
- ¹ Id.; Ruggles v. Patton, 8 Mass. 480; Sewall v. Sparrow, 16 id. 24; Shed v. Pierce, 17 id. 623; Snow v. Chandler, 10 N. H. 92; Walker v. McCulloch, 4 Me. 421; Durell v. Wendell, 8 N. H. 369.
- ² Garnett v. Macon, 6 Cal. 308. See Berry v. Gillis, 17 N. H. 9.
- ³ Lacy v. Kynaston, 12 Mod. 548, 551; Ward v. Johnson, 6 Munf. 6; Tuckerman v. Newhall, 17 Mass. 581; Hutton v. Eyre, 6 Taunt. 289.
- ⁴ Shed v. Pierce, 17 Mass. 623.
- ⁵ Snow v. Chandler, 10 N. H. 92.
- ⁶ Id.; Guard v. Whiteside, 18 Ill. 7; Foster v. Purdy, 5 Met. 442; Howland v. Marvin, 5 Cal. 501; Clark v. Russel, 3 Watts, 218; Hainaker v. Eberley, 2 Bin. 510; Berry v. Bates, 2 Blackf. 118; Reed v. Shaw, 1 id. 245; Thalman v. Barbour, 5 Ind. 178; Lowe v. Blair, 6 Blackf. 282; Pearl v.

[442] The release of the principal debtor will absolve the sureties, and the release of a primary security will discharge collaterals.¹ But it is competent to provide otherwise and to reserve a right to resort to securities.² And a release may by express provision discharge one of several who are liable, and exempt others from its operation. In such case the action may be brought against all for the purpose of recovery against those not released.³ Such a reservation or limitation cannot be made by parol.⁴ When, however, the debtor, or one of several debtors jointly bound, stipulates that his discharge shall not prevent a recovery against other parties, it is implied that he will not set it up against them when they have paid the demand and call on him for reimbursement or contribution.⁵ A release cannot take effect *in futuro* or upon a future right of action; but only upon some present right either complete or inchoate; it may be so framed as to cut off a conditional or contingent liability, as for example that of an indorser.⁶

Wells, 6 Wend. 291; Chandler v. Her-
rick, 19 Johns. 129; Winans v. Hus-
ton, 6 Wend. 471; Perkins v. Gilman,
8 Pick. 229; Couch v. Mills, 21 Wend.
424. But see Clopper v. Union Bank,
7 Har. & J. 92; Blair v. Reid, 20 Texas,
310; Morgan v. Butterfield, 3 Mich.
615.

¹ Jackson v. Stackhouse, 1 Cow.
122; Mottram v. Mills, 2 Sandf. 189;
Newcomb v. Raynor, 21 Wend. 108;
Brown v. Williams, 4 id. 360.

A release by an acceptor of the
drawer, discharging him from any
claim for damages, etc., as drawer of
a bill, will not bar an action by the
acceptor for money paid to take up
the bill for the drawer's accommoda-
tion. Pearce v. Wilkins, 2 N. Y. 469;
affirming Wilkins v. Pearce, 5 Denio,
541.

² Pierce v. Sweet, 83 Pa. St. 151;
Bruen v. Marquand, 17 Johns. 58;
Stewart v. Eden, 2 Cai. 121; Sohler
v. Loring, 6 Cush. 537; Hutchins v.
Nichols, 10 id. 299; Seymour v. Min-
turn, 17 Johns. 169; Keeler v. Bartine,

12 Wend. 110; Hubbell v. Carpenter,
5 N. Y. 171. See Matthews v. Chico-
pee Manuf. Co., 3 Robt. 711.

³ Northern Ins. Co. v. Potter, 63
Cal. 157; Pettigrew Machine Co. v.
Harmon, 45 Ark. 290; Twopenny v.
Young, 3 B. & C. 211; Lancaster v.
Harrison, 4 M. & P. 561; S. C., 6 Bing.
726; Solly v. Forbes, 2 Brod. & Bing.
38; North v. Wakefield, 13 Q. B. 538.

⁴ Bronson v. Fitzhugh, 1 HNI, 185;
Brooks v. Stuart, 9 A. & E. 854.

⁵ 1 Par. on Cont. 285; Hubbell v.
Carpenter, 5 N. Y. 171; Pitman on
Pr. & Surety, 181-2, 189.

⁶ Reed v. Tarbell, 4 Met. 98; Nich-
ols v. Tracy, 1 Sandf. 278; Pierce v.
Parker, 4 Met. 80; Hastings v. Dick-
inson, 7 Mass. 153; Gibson v. Gibson,
15 Mass. 110.

Parsons says (2 Par. on Cont. 714):
"A release, strictly speaking, can op-
erate only on a present right, because
one can give only what he has, and
can only promise to give what he
may have in future. But where one
is possessed of a distinct right, which

SECTION 5.

TENDER.

§ 260. Right to make. Though a *tender*, not accepted, [443] does not go to the extent of liquidation, it is so connected with the subject of payment as to justify some consideration of it in this connection. A debtor has the right at common law, before suit, to tender the amount due to his creditor upon a certain and liquidated demand, and thereby save himself from the payment of subsequent interest and costs.

§ 261. On what demands it may be made. It seems that a tender may be made on a *quantum meruit*,¹ but not on a claim for unliquidated damages.² It may be pleaded in an action on a bare covenant for the payment of money.³ In an action for breach of contract the court cannot compel the acceptance in mitigation of damages of the property for the non-delivery of which the action is brought on a tender of it being made on the trial.⁴

§ 262. When it may be made. At common law the tender must be made before the commencement of the suit,⁵ but this

is to come into effect and operation hereafter, a release in words of the present may discharge this right."

In *Martin v. Baltimore & O. R. Co.*, 41 Fed. Rep. 125, an employee of defendant became a member of a relief association, and as a condition of membership and in consideration of funds paid by defendant to said association and its guaranty of the payment of the benefits promised by the association signed a contract releasing defendant from any liability to him by reason of accident while in its service. Bond, J., charged the jury that if, prior to plaintiff's employment, he signed such contract and received the benefits arising therefrom before and after suit brought, and gave receipts for the money paid, which receipts released and discharged the defendant, he could not recover.

¹ *Johnson v. Lancaster*, 1 Str. 576. See *Dearle v. Barrett*, 2 A. & E. 82.

² *Id.*; *Green v. Shurtliff*, 19 Vt. 592; *Gregory v. Wells*, 62 Ill. 232; *Cilley v. Hawkins*, 48 Ill. 308; *McDowell v. Keller*, 4 Cold. 258; *Davys v. Richardson*, 21 Q. B. Div. 202; *Kaw Valley Fair Ass'n v. Miller*, 42 Kan. 20.

³ *Johnson v. Clay*, 7 Taunt. 486; 1 Moore, 200. See *Mitchell v. Gregory*, 1 Bibb, 449; *post*, § 883.

⁴ *Colby v. Reed*, 99 U. S. 560.

⁵ *Colby v. Reed*, 99 U. S. 560; *Bac. Abr., Tender*; *Fishburne v. Sanders*, 1 N. & McC. 242; *Reed v. Woodman*, 17 Me. 43; *Knight v. Beach*, 7 Abb. (N. S.) 241; *Suffolk Bank v. Worcester Bank*, 5 Pick. 106; *Jackson v. Law*, 5 Cow. 248; *Retan v. Drew*, 19 Wend. 304.

In *Sweetland v. Tuthill*, 54 Ill. 215, Walker, J., said: "It is first urged that our practice does not warrant

limitation has long since been generally abrogated by statute. [444] It is no answer to a plea of tender, before the commencement of the suit, that the plaintiff had, before such tender, retained an attorney and instructed him to sue out a writ against the defendant, and that the attorney had accordingly applied for such writ before the tender, and it was afterwards sued out.¹ In strictness the plea of tender is applicable only to cases where the party pleading it has never been guilty of any breach of his contract, and therefore it is not good if made after the day fixed for payment.² But this rigid rule is not adhered to in this country, and in many of the states the right of tender at any time after the debt is due is recognized.³ If payment is required to be made within a certain period, which ends on Sunday, a tender the next day is in time.⁴ It may be made on an interest-bearing debt before it is due, tendering the amount which would be due at maturity.⁵ Some doubt has been expressed whether a tender is good of a debt not bearing interest before it is due.⁶ A vendor cannot be placed in default by a tender of the purchase-money before

the payment of money into court, so as to escape the payment of the costs of the suit. This may be true, but we deem it unnecessary to determine that question in this case. The law does clearly authorize a debtor to make a tender of the amount he owes his creditor, and thus relieve himself from costs if a suit shall afterwards be brought. And no reason is perceived why a debtor may not, even after a suit is brought, and at any time before the trial, make a sufficient tender and relieve himself from future costs." See *Thurston v. Marsh*, 14 How. Pr. 572.

¹ *Briggs v. Calverly*, 8 T. R. 629. See *Kirton v. Braithwaite*, 1 M. & W. 310; *Hull v. Peters*, 7 Barb. 331.

² *Hume v. Peploe*, 8 East, 168; *Poole v. Tumbridge*, 2 M. & W. 223; *Dobie v. Larkan*, 10 Exch. 776; *City Bank v. Cutter*, 3 Pick. 414; *Suffolk Bank v. Worcester Bank*, 5 id. 106;

Dewey v. Humphrey, id. 187; *Frazier v. Cushman*, 12 Mass. 277; *Rose v. Brown*, Kirby, 293; *Tracy v. Strong*, 2 Conn. 659; *Ashburn v. Poulter*, 35 id. 553.

³ 2 Par. on Cont. 642.

⁴ *Sands v. Lyon*, 18 Conn. 18.

⁵ *Eaton v. Emerson*, 14 Me. 335; *Tillou v. Britton*, 9 N. J. L. 120; *Saunders v. Frost*, 5 Pick. 259.

A tender of the amount due on a promissory note is good if made at the time fixed for payment, though before the expiration of the days of grace, interest for such days being included. *Wyckoff v. Anthony*, 9 Daly (N. Y.), 417. On appeal this question was not passed upon, it being held that the right to object to the tender at the time it was made was waived. *Wyckoff v. Anthony*, 90 N. Y. 442.

⁶ 2 Par. on Cont. 642. See *McHard v. Whetcroft*, 3 Har. & McH. 85.

the stipulated time for payment;¹ nor can a premature tender affect the security for a debt;² nor any other right of the creditor.³ A tender on a past-due obligation is good though preliminary notice of it is not given.⁴ The necessity of such notice in England when a *post diem* tender of the money due upon a mortgage is made rests entirely on custom.⁵

In computing the time, after entry for condition of a mortgage broken, within which a mortgagor may redeem the day of entry is to be excluded.⁶ And where payment must be made, as in such a case within a certain period, it has been made a question at what time of the last day the right of payment or tender expires. In the old cases it is held that payment should be made at a convenient time in which the money may be counted before sunset.⁷ It is probable that

¹ Rhorer v. Bila, 88 Cal. 51; Reed v. Rudman, 5 Ind. 409; Cogan v. Cook, 22 Minn. 137.

² Noyes v. Wyckoff, 114 N. Y. 204.

³ Abshire v. Corey, 113 Ind. 484.

⁴ Sharp v. Wyckoff, 89 N. J. Eq. 376.

⁵ Browne v. Lockhart, 10 Sim. 420, 424.

⁶ Wing v. Davis, 7 Me. 81.

⁷ In Wade's Case, 5 Coke, 114a, it was said: "Although the last time of payment of the money by force of the condition is a convenient time in which the money may be counted before sunset; yet, if the tender be made to him who ought to receive it at the place specified in the condition, at any time of the day, and he refuse it, the condition is forever saved, and the mortgagor or obligor needs not make a tender of it again before the last instant." See Coke Litt. 202.

In Wing v. Davis, 7 Me. 81, the validity of a tender made late in the evening of the last day to redeem after entry for condition broken was in question. Mellen, C. J., said: "In Hill v. Grange, 1 Plowd. 178, the condition was to pay rent within ten days after certain feasts, in which

case the justices unanimously held that the lessee had liberty within the ten days; and, therefore, they observe 'the lessee is in no danger as long as he has time to come and pay it; and he has time to come and pay it as long as the tenth day continues, and the tenth day continues until the night comes; and when the night is come, then his time elapses.' So that his time to pay continues until the separation of day and night. And in arguing this point, Robert Brook, chief justice, and Saunders, said that if the rent reserved was a great sum, as £500 or £1,000, the lessee ought to be ready to pay it in such convenient time before sunset in which the money might be counted; for the lessor is not bound to count it in the night, after sunset, for if so he might be deceived; for Brook said: *Qui ambulat in tenebris nescit qua radit.*' The language of the court in the case of Greeley v. Thurston does not advance a different principle. The question is, what is the whole day in relation to a tender in contracts of this character. We are not aware that modern decisions have changed the law as established by the old

[445] the courts would not now recognize the rule as a fixed and arbitrary requirement without regard to circumstances to tender the money while the daylight lasts. There is some reason for holding a tender unseasonable which is made late at night

cases; or the facts necessary to be proved to support a plea of tender; except so far as the conduct of the creditor may in certain cases amount to a waiver of objections against the formality of the tender, or in case of his artful avoidance or evasion. In the case before us there is nothing like a waiver as to the unseasonableness of the hour; in fact, this was the objection made by the defendants at the time of the alleged tender; which was attempted to be made not long before midnight, when the defendants and their families were asleep, and all the lights extinguished. No reason has been assigned why a payment or a tender was delayed to so unusual an hour; and if a loss to the plaintiff is the consequence of this strange delay, he must thank his own imprudence. We do not decide that a tender may not, in any circumstances, be good, though made after the departure of daylight; it is not necessary to intimate any opinion on the point. Our decision is founded on the facts of this case; and the tender not having been made in due season, we need not inquire as to the sufficiency of the sum which was offered."

In *Greeley v. Thurston*, 4 Me. 479, the question was when the default of the maker of a promissory note occurred, he claiming that he had the whole of the last day in which to pay it, and that until that day is passed he cannot be said to have broken his contract. *Weston, J.*, said: "There is no question that with regard to bonds, mortgages and instruments in writing, other than notes of hand or bills of exchange,

the party who engaged to pay money, or to perform any other duty, fulfills his contract, if he does so on any part of the day appointed. Unless the case of negotiable paper forms an exception to the general rule which attaches to other written contracts, the maker of a negotiable note of hand and the acceptor of a bill of exchange are not liable to be sued until the day after these instruments become due and payable. In the case of *Leftley v. Mills*, 4 T. R. 170, we have the opinion of Mr. Justice Buller, given in strong terms, although the decision was finally placed upon another ground, that the general rule before intimated does not apply to bills of exchange. In that case a clerk called with the bill, upon which the question arose, at the house of the defendant, the acceptor, on the day it became due, and, not finding him at home, left word where the bill might be found, that the defendant might send and take it up; this not being done at six o'clock in the evening it was noted for non-payment. Between seven and eight o'clock the same clerk called again on the defendant with the bill, who then offered to pay the amount of it, but refused to pay an additional half-crown for the notary. Lord Kenyon was of opinion, at the trial, that the tender was sufficient, and directed a verdict for the defendant. A rule was obtained to show cause why the verdict should not be set aside and a new trial granted. The court said, in granting the rule, that the main question was whether the acceptor had the whole day to pay the bill in, or whether it became due on demand at

if the creditor has gone to bed, and declines to consider [447] it on that ground where no cause for so delaying it exists.¹ The latest judicial exposition of the question is to the effect that where no place is named in the agreement for the making of payment, or no established usage prevails to the contrary, as in the case of notes and bills, the payer has the whole of the day at any place where he may meet the payee, and both may have the proper means and opportunity of making and receiving the tender. The party bound must do all that, without the concurrence of the other, he can do to make the payment or perform the act, and that at a convenient time before midnight, such time varying according to the *quantum* of payment or the nature of the act to be done. If he is to

any time on the last day. After argument, Lord Kenyon stated that in this, as in other contracts, the acceptor had the whole day; but said, if there were any difference between bills of exchange and other contracts in this respect, the claim of the notary could not be supported, this being an inland bill payable fourteen days after sight, and the statute of William, which first authorized a protest upon inland bills, giving it only upon such bills as were payable a certain number of days after date. Upon this last ground Buller, J., concurred; and he added: 'I cannot refrain from expressing my dissent to what has fallen from my lord respecting the time when the payment of bills of exchange may be enforced. One of the plaintiff's counsel has correctly stated the nature of the acceptor's undertaking, which is to pay the bill on demand on any part of the third day of grace; and that rule is now so well established that it will be extremely dangerous to depart from it. With regard to foreign bills of exchange, all the books agree that the protest must be made on the last day of grace; now that supposes a default

in payment, for a protest cannot exist unless default be made. But if the party has until the last moment of the day to pay the bill, the protest cannot be made on that day. Therefore the usage on bills of exchange is established; they are payable any time on the last day of grace, on demand, provided that demand be made within reasonable hours. A demand at a very early hour of the day, at two or three o'clock in the morning, would be an unreasonable hour; but, on the other hand, to say that the demand should be postponed until midnight, would be to establish a rule attended with mischievous consequences.' Upon consideration we adopt the views of Mr. Justice Buller; and it is our opinion that bills of exchange and negotiable notes should be paid on demand, if made at a reasonable hour, on the day they fall due; and if not then paid, that the acceptor or maker may be sued on that day, and the indorser and drawer also, after notice given or duly forwarded." *Shed v. Brett*, 1 Pick. 401; *City Bank v. Cutter*, 8 Pick. 414.

¹ Id.

pay money it must be tendered at a sufficient time before midnight for the tenderee to receive and count it.¹ This rule may well be qualified by adding a condition that the tender shall be made at such time as will give the creditor an opportunity to ascertain the state of the account between him and his debtor; because he is not bound to know at his peril at all times the exact sum due him;² and besides the law will doubtless take account of the fact that business men are not at all times prepared to surrender the evidences of their claims against their debtors. Commercial paper being payable on the day of maturity at any reasonable hour when demanded, a breach of the contract to pay may occur whenever such demand is made. In the absence, however, of any demand the debtor upon such paper undoubtedly has the same time on the last day to fulfill his promise as when he is indebted in any other form.³

§ 263. In what money. The offer must be made in the legal tender money of the country, if it is demanded.⁴ But where bank or treasury notes which circulate as money, though not made a legal tender, are offered, the objection that they are not legal tender is deemed one of form, and waived if not specially made, or if objection is rested on some other ground;⁵

¹ *Smith v. Walton*, 5 Houst. (Del.) 141, following *Startup v. Macdonald*, 6 M. & G. 593, 624; S. C., 46 Eng. C. L. 623.

² *Root v. Bradley*, 49 Mich. 27; *Waldron v. Murphy*, 42 id. 668; *Chase v. Welsh*, 45 id. 345.

³ *Sweet v. Harding*, 19 Vt. 587.

⁴ *Wilson v. McVey*, 83 Ind. 108; *Collier v. White*, 67 Miss. 133; *Wharton v. Morris*, 1 Dall. 124; *Moody v. Mahurin*, 4 N. H. 296; *Lee v. Biddis*, 1 Dall. 175; *Long v. Waters*, 47 Ala. 624; *Hallowell & A. Bank v. Howard*, 18 Mass. 235; *Lange v. Köhne*, 1 McCord, 115; *Smith v. Keels*, 15 Rich. 318; *Magraw v. McGlynn*, 26 Cal. 420. See *Tate v. Smith*, 70 N. C. 685; *Graves v. Hardesty*, 19 La. Ann. 186; *Parker v. Broas*, 20 id. 167; *Harris v. Jex*, 55 N. Y. 421.

⁵ *Cooley v. Weeks*, 10 Yerg. 141; *Ball v. Stanley*, 5 id. 199; *Fosdick v. Van Huse*, 21 Mich. 567; *Curtiss v. Greenbanks*, 24 Vt. 536; *Warren v. Mains*, 7 Johns. 476; *Holmes v. Holmes*, 12 Barb. 137; *Wheeler v. Knaggs*, 8 Ohio, 172; *Lockyer v. Jones*, Peake, 180, n.; *Wright v. Reed*, 3 T. R. 554; *Brown v. Saul*, 4 Esp. 267; *Polglass v. Oliver*, 2 C. & J. 15; *Tiley v. Courtier*, id. 16, n.; *Saunders v. Graham*, Gow, 121; *Brown v. Dysinger*, 1 Rawle, 408; *Snow v. Perry*, 9 Pick. 539; *Towson v. Havre de Grace Bank*, 6 H. & J. 53; *Williams v. Rorer*, 7 Mo. 555; *Seawell v. Henry*, 6 Ala. 226; *Noe v. Hodges*, 3 Humph. 162; *Cummings v. Putnam*, 19 N. H. 569; *Brown v. Simons*, 44 id. 475; *Snow v. Perry*, 9 Pick. 539.

for to invalidate a tender or to divest an offer to pay of [448] the legal effect of a tender, if the objection is to the medium or currency and not to the sum offered, the ground of it must be stated, or the right to object in that respect will be waived, and it cannot afterwards be taken advantage of in court on the score of the tender not being legal; in other words, an objection on a point of fact works a waiver of objection on points of law.¹ It is a general rule that if a tender is refused on a specified ground of objection no other can afterwards be relied upon.² This applies, however, only to such objections as could be obviated, and not to a tender made before a debt is due.³ An offer of depreciated bank notes without any explanation is in legal effect but an offer of compromise or of accord and satisfaction, and not a legal tender.⁴ Even a check for money handed the payee or sent by a letter is a good tender, where no objection is made on that ground, but only to the amount.⁵ But when the party entitled to payment is not present, and has no opportunity to urge the objection, he cannot be presumed to have waived it by his silence.⁶ A note for dollars payable in gold and silver is payable in money, and neither bullion, nor gold and silver in any other form than money, is a legal tender.⁷ In an action for the breach of a covenant of seizin a tender of the amount paid by the grantee

¹ Polglass v. Oliver, 2 C. & J. 15. See Waldron v. Murphy, 42 Mich. 668.

² In Moynahan v. Moore, 9 Mich. 9, it was said to be "a well established principle, that an objection made at the time of tender precludes all others, and if that be not well grounded the tender will be held good." See Perkins v. Dunlap, 5 Me. 268, 271; Hull v. Peters, 7 Barb. 331; Carman v. Pultz, 21 N. Y. 547; Keller v. Fisher, 7 Ind. 718; Stokes v. Recknagle, 38 N. Y. Super. Ct. 368.

³ Mitchell v. Cook, 29 Barb. 243.

⁴ Newberry v. Trowbridge, 13 Mich. 263.

A certified check was tendered and refused for insufficiency in amount; but the court found that it was suf-

ficient; the check was then deposited in court, and while there deposited the bank on which it was drawn failed. It was held that the check, if accepted, would have been only conditional payment, and the loss resulting from its non-payment must be borne by the drawer. Larsen v. Breene, 12 Colo. 480.

⁵ Jennings v. Mendenhall, 7 Ohio St. 258; Jones v. Arthur, 8 Dowl. P. C. 442; Shipp v. Stacker, 8 Mo. 145; Petrie v. Smith, 1 Bay, 115; Wyckoff v. Anthony, 9 Daly (N. Y.), 417; Hariman v. Meyer, 45 Ark. 37.

⁶ Sloan v. Petrie, 16 Ill. 262; Hubbard v. Chenango Bank, 8 Cow. 88; Ward v. Smith, 7 Wall. 447.

⁷ Hart v. Flynn's Ex'r, 8 Dana, 190.

and of the unpaid notes and mortgage executed by him to secure the balance of the purchase price is good.¹

§ 264. **By whom.** Of course it may be made by an authorized agent.² Where the tender is made in behalf of the debtor, strict authority at the time does not seem to be requisite; it being for his benefit and in his name, it may be effectual without such agency as would enable the person making it to do any act which would bind the debtor. Thus, a tender made for an infant by his uncle has been held good, though he was not at the time his guardian.³ So when an agent was sent to tender a sum less than that demanded, and he added of his own funds to the sum furnished by his principal and tendered the full amount required, it was held good.⁴ A tender made by an inhabitant of a school district to one having a claim against it was held good, though such inhabitant was not regularly authorized to do so.⁵ A corporation appointed three agents to tender a sum to B. and obtain from him a reconveyance of a certain estate conveyed to him by the corporation as security for a debt; one of the three made the tender and it was held good.⁶ A person having no interest in the tender has no right to make it in his own behalf.⁷ He should make it in behalf of the debtor and so inform the creditor.⁸ The creditor must object on the ground of a want of authority or the right to do so is waived.⁹ If a tender is made by the debtor's prior authority, or is subsequently ratified, it is good.¹⁰ Any person may make a tender for an idiot.¹¹ A tender of the amount due one who has purchased land at a tax sale is not good if it is made by several persons, one of whom has no right to redeem.¹² A mortgagee may refuse a tender of the amount due him made by one who is a stranger to him and to the mortgagor, and who is not acting in the

¹ *Conrad v. Trustees of Grand Grove*, 64 Wis. 258.

² *Eslow v. Mitchell*, 26 Mich. 500.

³ *Brown v. Dysinger*, 1 Rawle, 408. See *Coke*, Litt. 206b.

⁴ *Read v. Goldring*, 2 M. & S. 86.

⁵ *Kincaid v. School Dist.*, 11 Me. 188.

⁶ *St. Paul Division v. Brown*, 11 Minn. 356.

⁷ *Mahler v. Newbaur*, 32 Cal. 168.

⁸ *Id.*; *McDougald v. Dougherty*, 11 Ga. 570.

⁹ *Lampley v. Weed*, 27 Ala. 621.

¹⁰ *Harding v. Davies*, 2 C. & P. 77; *McIniffe v. Wheelock*, 1 Gray, 600; *Eslow v. Mitchell*, 26 Mich. 500.

¹¹ *Coke* Litt. 206b; *Brown v. Dysinger*, 1 Rawle, 408.

¹² *Bender v. Bean*, 52 Ark. 132.

interest or at the request of the latter, though he had tax titles on the mortgaged property, they not being subject to the mortgage.¹ One who has purchased mortgaged premises and mortgaged chattels thereon from the mortgagor, the former subject to existing liens, has no authority to make a tender of the amount due on the latter, the debt accrued thereby being payable on demand and none being made.² But it is otherwise where a tender is made by the mortgagor's grantee after the debt is due, the creditor having knowledge of the transfer.³ An executor has no authority to make a tender to a legatee in a jurisdiction in which his foreign letters have not been recognized although the funds tendered were realized from the personal property of the testator situated in the jurisdiction in which the tender was made. A tender so made is not validated by the subsequent issuance of letters from a court in the jurisdiction in which the legatee was at the time it was made.⁴

§ 265. **To whom.** A tender should, in general, be made direct to the creditor.⁵ But it may be made to his attorney⁶ or authorized agent,⁷ although such attorney falsely denies his authority,⁸ or such agent has been instructed not to receive it.⁹ A tender to an agent is good though it was made on the supposition that he continued to be the party in interest.¹⁰ An attorney, having a demand for collection, wrote the debtor requesting him to pay it at the attorney's office; the debtor subsequently made a tender in the absence of the attorney to his clerk in his office, and it was held good.¹¹ Such a request of payment gives the debtor a right to treat any person having charge of such office in the absence of the attorney as authorized to receive the money.¹² But a letter from the

¹ *Sinclair v. Learned*, 51 Mich. 335.

⁸ *McIniffe v. Wheelock*, 1 Gray,

² *Noyes v. Wyckoff*, 114 N. Y. 204; 600.

S. C., 30 Hun, 466.

⁹ *Muffatt v. Parsons*, 1 Marsh. 55;

³ *Yeager v. Groves*, 78 Ky. 278.

S. C., 5 Taunt. 307.

⁴ *Welch v. Adams*, 152 Mass. 74.

¹⁰ *Conrad v. Trustees of Grand Grove*, 64 Wis. 258.

⁵ *Hornby v. Cramer*, 12 How. Pr. 490; *Smith v. Smith*, 2 Hill, 351.

¹¹ *Wilmot v. Smith*, 3 C. & P. 453;

⁶ *Billiot v. Robinson*, 13 La. Ann. 529; *Wilmot v. Smith*, 3 C. & P. 453.

Kirton v. Braithwaite, 1 M. & W. 310.

⁷ *Hargous v. Lahens*, 3 Sandf. 213; *Goodland v. Blewith*, 1 Camp. 477; *Anonymous*, 1 Esp. 349.

¹² *Watson v. Hetherington*, 1 C. & K. 36; *Kirton v. Braithwaite*, 1 M. & W. 310.

attorney, demanding payment to him instead of at his office, will not warrant a tender to a writing clerk there who disclaims and has not authority to receive it.¹

When an instrument is payable at a bank, and is lodged there for collection, the bank becomes the agent of the payee to receive payment. The agency extends no further, and without special authority such agent can only receive payment of the debt due his principal in the legal currency of the country, or in bills which pass as money at their par value by the consent of the community.² A tender may be made to a clerk in a store for goods there purchased, and it will be equivalent to a tender made to the principal, even though prior thereto the claim has been lodged with an attorney for suit. Such clerk can also waive, either by implication or expressly, any objection to the validity of the tender on the ground of its being in bank bills and not in specie.³ Where there is no general agency to collect, but power simply to receive the sum demanded, a tender of a less sum to such special agent is invalid; as where the plaintiff sent his son to demand a specific sum for an unliquidated claim, it was held that an offer to him of a less sum could not be considered as a tender to the plaintiff.⁴ Where an agent of the defendants had been notified not to receive a tender, but to refer the plaintiff to a third person named, of which the plaintiff had notice, the latter was at liberty to seek the person to whom he had been so referred or the defendants, at his election, and could make the tender to either.⁵ A tender made to the holder of a note is good though he subsequently assigns it.⁶ A mortgagor or his assignee must make tender to the mortgagee or person claiming under him; it cannot be made to the assignee of the contract [451] secured by the mortgage.⁷ Money due to a *cestui que*

¹Id.; Bingham v. Allport, 1 N. & M. 398.

In New Hampshire a tender to an attorney with whom a demand is lodged for collection, before suit is brought, is unavailing; if made after suit is commenced the costs must be tendered. Thurston v. Blaisdall, 8 N. H. 367.

In Finch v. Boning, 4 C. P. Div. 143, the judges disagreed as to the

effect of a disclaimer by a solicitor's clerk who said that the solicitor was out of the office, and he, the clerk, had no instructions.

²Ward v. Smith, 7 Wall. 447.

³Hoyt v. Byrnes, 11 Me. 475.

⁴Chipman v. Bates, 5 Vt. 143.

⁵Hoyt v. Hall, 3 Bosw. 42.

⁶Abshire v. Corey, 118 Ind. 484.

⁷Smith v. Kelley, 27 Me. 237.

trust should be tendered to the trustee.¹ But a tender to an executor while in another state, before he had acted or qualified, will not stop interest.² If a tender is made to a clerk, agent, or other representative of the creditor, it must be shown that he had authority to receive the money.³ A debt due jointly to several persons may be tendered to either, but should be pleaded as tendered to all.⁴ If no place has been appointed for payment, a tender to the creditor wherever he may be found is good;⁵ but if it is made without notice at an unusual or unfit place it may be declined if it is necessary for the creditor to examine the account between him and his debtor.⁶

§ 266. **It must be sufficient in amount.** The tender must include the full amount due. A tender of part of a debt is inoperative.⁷ The creditor is not obliged to receive it. The debtor must, at his peril, tender enough; if his tender is less it will be of no avail, though the deficiency is small and oc-

¹ Chahoon v. Hollenback, 16 S. & R. 425; Cook v. Kelley, 9 Bosw. 358.

² Todd v. Parker, 1 N. J. L. 45.

³ Hargous v. Lahens, 3 Sandf. 213; Goodland v. Blewith, 1 Camp. 477; Anonymous, 1 Esp. 349; Jewett v. Earle, 53 N. Y. Super. Ct. 349.

⁴ Wyckoff v. Anthony, 9 Daly, 417; Douglas v. Patrick, 8 T. R. 683; Southard v. Pope, 9 B. Mon. 264; Beebe v. Knapp, 28 Mich. 58. See Dawson v. Ewing, 16 S. & R. 371.

⁵ Slingerland v. Morse, 8 Johns. 474; Hunter v. Le Conte, 6 Cow. 728.

⁶ Waldron v. Murphy, 42 Mich. 668; Chase v. Welsh, 45 id. 345; Root v. Bradley, 49 id. 27.

⁷ Elderkin v. Fellows, 60 Wis. 339; Dixon v. Clark, 5 C. B. 365; Baker v. Gasque, 3 Strobb. 25; Patnote v. Sanders, 41 Vt. 66; Boyden v. Moore, 5 Mass. 365. In the last case Parsons, C. J., said: "It is a well-known rule that the defendant must take care at his peril to tender enough; and if he does not, and if the plaintiff replies that there is more due than is ten-

dered, which is traversed, the issue will be against the defendant, and it will be the duty of the jury to assess for the plaintiff the amount due on the promise; and if not covered by the money tendered, he will have judgment for the balance. . . . In calculating, there may be, and probably must arise, fractions not to be expressed in the legal money of account; these fractions are trifles, and may be rejected. . . . If any sum large enough to be discharged in the current coin of the country is a trifle, which, although due, the jury are not obliged to award to the plaintiff, the creditor, it will be difficult to draw a line and say how large a sum must be not to be a trifle. The law fixes no such rule."

Under the code of California a tender is not ineffectual because it is insufficient in amount unless it is objected to for that reason at the time it is made. *Oakland Bank v. Applegarth*, 67 Cal. 86.

curred by mistake.¹ But this rule does not require the debtor [452] to tender a sum to cover all demands his creditor may have against him. He may tender for the payment of any one of several debts which is distinct and separable.² A tender of a gross sum upon several demands, without designating the amount tendered upon each, is sufficient.³ Where, however, there are several separate demands sued for, and there has been a tender made of a less sum than the amount demanded for the whole, but not specifically applied to any separable portion of it, it has been held that it cannot be applied in pleading to either.⁴ A tender of the amount justly due by the condition of a bond is good although less than the penalty.⁵ The penalty is only nominally the debt, and the tender of that sum which if paid would satisfy the bond will be effectual.⁶ A tender is not invalidated by being of a larger

¹ *Id.*; *Helphrey v. Chicago, etc. R. Co.*, 29 Iowa, 480.

In *Harris v. Jex*, 55 N. Y. 421, a tender was made upon a debt contracted prior to the passage of the legal-tender law of 1862; and this tender was made in legal-tender notes after the decision in *Hepburn v. Griswold*, 8 Wall. 603, and before the reversal of that case in *Knox v. Lee*, 12 Wall. 457; it was refused because it was not the currency payable. And it was held that the plaintiff was justified in refusing the tender; he had a right to refuse on the decision of the highest judicial tribunal in the land; that decision, for the time being, was the law, and not merely the evidence of it; but it was intimated that if the tender had been kept good it would have been a defense to interest and costs, after the decision of *Knox v. Lee*.

² *East Tennessee, etc. R. Co. v. Wright*, 76 Ga. 532; 2 Par. on Cont. 641.

³ *Johnson v. Cranage*, 45 Mich. 14; *Thetford v. Hubbard*, 22 Vt. 440.

⁴ *Hardingham v. Allen*, 5 C. B. 793. If A., B. and C. have a joint demand,

and C. has a separate demand against D., and D. offers A. to pay him both the debts, which A. refuses, without objecting to the form of the tender, on account of being entitled only to the joint demand, D. may plead this tender in bar of an action on the joint demand, and should state it as a tender to A., B. and C. *Douglas v. Patrick*, 3 T. R. 688. But see *Strong v. Harvey*, 3 Bing. 304, where it is held that if a party has separate demands for unequal sums against several persons, an offer of one sum for the debts of all will not support a plea stating that a certain portion of this sum was tendered for the debt of one. It was held in *Hampshire Manuf. Bank v. Billings*, 17 Pick. 89, that a tender of the amount due on a joint and several promissory note by a surety, while an action brought by a holder against the principal was pending, will not discharge the surety from his liability unless he offers to indemnify the holder against the costs of such action.

⁵ *Tracy v. Strong*, 2 Conn. 659.

⁶ See *Fraser v. Little*, 13 Mich. 195; *Spencer v. Perry*, 18 Mich. 394.

sum than the amount it is offered to pay or is demanded, even though change is requested, unless objection is made to it on that account.¹ If the tender is made after action is begun it must include a sufficient sum to pay the costs.²

¹ In *Dean v. James*, 4 B. & Ad. 546, it was held that a tender of 20*l.* 9*s.* 6*d.* in bank notes is sufficient to support a plea of tender of 20*l.* Taunton, J., referring to *Watkins v. Robb*, 2 Esp. 710, said: "There the defendant tendered a 5*l.* note and demanded 6*d.* change, which the defendant was not bound to give." *Betterbee v. Davis*, 8 Camp. 71. Littledale, J., said: "This case falls within the third resolution in *Wade's Case*, 5 Co. 115, that if a man tender more than he ought to pay it is good, for *omnemajus continet in se minus*, and the other is bound to accept so much of it as is due to him." The argument against the tender was that a subsequent demand must be of the specific sum tendered, and if that sum is more than the plaintiff's demand, it would be inapplicable. Referring to this Littledale, J., continues: "As to replying a demand it is not the plaintiff's business to demand more than is actually due; it is enough if in his replication he admits that the sum due was tendered, but alleges that he afterwards demanded that and it was refused."

Lord Abinger said in *Bevans v. Rees*, 5 M. & W. 806: "I am prepared to say that if the creditor knows the amount due to him, and is offered a larger sum, and without any objection of a want of change makes quite a collateral objection, that will be a good tender." *Black v. Smith*, Peake, 88; *Cadman v. Lubbuck*, 5 D. & Ry.

289; *Hubbard v. Chenango Bank*, 8 Cow. 89; *Patterson v. Cox*, 25 Ind. 261; *Douglas v. Patrick*, 3 T. R. 683; *Dean v. James*, 4 B. & Ad. 546; *Astley v. Reynolds*, 2 Str. 916; *Strong v. Harvey*, 3 Bing. 804; *Robinson v. Cook*, 6 Taunt. 336; *Blow v. Russell*, 1 C. & P. 365.

Cadman v. Lubbuck, 5 D. & Ry. 289. Where the defendant, who owed the plaintiff 108*l.* for principal and interest on two promissory notes, in consequence of an application from the plaintiff's attorney for the amount sent a person to the attorney, who told such attorney that he came to settle the amount due on the notes, and desired to be informed what was due, and laid down 150 sovereigns on a desk, out of which he desired the attorney to take what was due for such principal and interest, but the attorney refused to do so, unless a shop account due from the plaintiff to the defendant was fixed at a certain amount, held to be a good tender. *Bevans v. Rees*, 5 M. & W. 806. A tender has been held vitiated by delivering a counter-claim at the same time. Thus, where a defendant tendered seven sovereigns in payment of a demand of 6*l.* 17*s.* 6*d.*, and said to the plaintiff, "There, take your demand," and at the same time delivered a counter-claim upon the plaintiff of 1*l.* 5*s.*, who said you must go to my attorney: Held, not a good tender to an action for the

² *Emerson v. White*, 10 Gray, 351; *People v. Banker*, 7 How. Pr. 258; *Collier v. White*, 67 Miss. 133. But in Connecticut a tender made before

the defendant has been served with process is good though costs are not included. *Ashburn v. Poulter*, 85 Conn. 553.

[453] § 267. **Same subject.** The creditor is entitled to payment in money made legal tender by law; and the debtor has a right to make payment in that currency. Debts made payable in the denominations of the legal tender currency are solvable in that currency at par, without regard to when or where they were contracted, or the relative value of [454] the denominations in that currency at and after the contract was made. The legal tender currency for the time being, when the contract is performed or enforced, is the currency applicable to it.¹ If money be payable in the legal currency of another country, the legal rather than the market equivalent is the amount to be paid. A contract to pay in "dollars" may require payment in either coin or legal tender currency provided by the government, according to the intention of the parties. Treasury notes, commonly called "greenbacks," are the currency payable, unless the contract itself indicates the intention that the debt be paid in coin.² A contract to pay in "dollars" in gold and silver is a contract for the direct payment of money. Neither bullion, gold dust, gold and silver bars, old spoons and rings, are a proper tender in satisfaction.³ But current bank notes, which pass as money,

6L 17s. 6d. *Brady v. Jones*, 2 D. & R. 305; and see *Holland v. Phillips*, 6 Esp. 46. See, also, *Laing v. Meader*, 1 C. & P. 257.

In *Saunders v. Frost*, 5 Pick. 259, 269, there was a tender of a mortgage debt which was not due, and bearing interest, and of which only interest was due. Objection was made by counsel that the tender was made of a debt not due. The tender was of a sum equal to the interest and the principal. Parker, C. J., said: "But it appears to us that, in order to avail himself of this objection, the defendant ought to have shown a willingness to take what was due, and to have stated that he claimed to hold possession only for the non-payment of interest." *Odom v. Carter*, 36 Tex. 281.

A tender of \$5 by a street-car passenger who has no smaller money

is reasonable, and his ejection from the car thereafter is unlawful. *Barrett v. Market Street Ry. Co.*, 81 Cal. 296.

¹ Story on Prom. Notes, § 390 and note; *George v. Concord*, 45 N. H. 434; *Wood v. Bullens*, 6 Allen, 516; *Pong v. De Lindsey*, 1 Dyer, 82a; *Dooley v. Smith*, 13 Wall. 604; *Legal Tender Cases*, 12 id. 457; *Trebilcock v. Wilson*, id. 687; *Vorges v. Giboney*, 38 Mo. 458; *Warnibold v. Schlichting*, 16 Iowa, 243; *Murray v. Harrison*, 47 Barb. 484; *Wilson v. Morgan*, 4 Robt. 58; *Strong v. Farmers*, etc. Bank, 4 Mich. 350; *Wills v. Allison*, 4 Heisk. 385; *Bond v. Greenwald*, id. 453; *Caldwell v. Craig*, 22 Gratt. 340.

² *Trebilcock v. Wilson*, 13 Wall. 687.

³ *Hart v. Flynn*, 8 Dana, 190. See *Lang v. Waters*, 47 Ala. 624; *McCune v. Erfort*, 43 Mo. 134.

offered in payment and not objected to on that ground, will constitute a good tender.¹ When a debtor tenders a bank check in payment of a debt, and the creditor expressly waives all objection to that mode of payment and only objects to the amount, it is good.² Where a note is payable to a bank [455] in which the debtor has a deposit, his check on such bank is a good tender;³ but a note or other obligation of the creditor is not legal tender. A tender for part of an entire demand and set-off for the residue cannot be pleaded.⁴

§ 268. **How made.** As a general rule the money must be actually produced and placed within the power of the creditor to receive it, unless he dispense with its production by express declaration or other equivalent act.⁵ A mere verbal offer to

¹ *Brown v. Simons*, 44 N. H. 475; *Ball v. Stanley*, 5 Yerg. 199; *Noe v. Hodges*, 8 Humph. 162; *Seawell v. Henry*, 6 Ala. 226; *Cummings v. Putnam*, 19 N. H. 569; *Williams v. Rorer*, 7 Mo. 556; *Cooley v. Weeks*, 10 Yerg. 141; *Snow v. Perry*, 9 Pick. 539; *Wheeler v. Knaggs*, 8 Ohio, 169; *Fosdick v. Van Huse*, 21 Mich. 567; *Curtiss v. Greenbanks*, 24 Vt. 536; *Petrie v. Smith*, 1 Bay, 115; *Brown v. Dysinger*, 1 Rawle, 408. See *Ward v. Smith*, 7 Wall. 447.

² *Jennings v. Mendenhall*, 7 Ohio, St. 258. The court say in this case: "On a somewhat extensive examination of the cases, it seems to us that mere silence is held to be a waiver of objection in the case of current bank notes, for the reason that they constitute the common currency of the country, and are by all classes paid out and received as money, which is a reason that does not fully apply to bank checks. All the cases, however, proceed on the principle that where all objection to the proposed medium of payment is waived, the tender is good, though not made in coin; and the only difference between them is on the question as to what shall be held to be conclusive of such waiver."

² *Shipp v. Stacker*, 8 Mo. 145. "Lawful current money" of a state is construed to mean money issued by congress. *Wharton v. Morris*, 1 Dall. 124; *McChord v. Ford*, 8 T. B. Mon. 166. "Current lawful money" is the same. *Lee v. Biddis*, 1 Dall. 175. But "currency," where bank notes are the only currency, does not mean money. *McChord v. Ford*, *supra*; *Lange v. Kohne*, 1 McCord, 115.

A tender in confederate money is not good, although it was at the time the circulating currency in the community. *Graves v. Hardesty*, 19 La. Ann. 186. See *Parker v. Broas*, 20 id. 167; but see, also, *Phillips v. Gaston*, 37 Ga. 16; *Tate v. Smith*, 70 N. C. 685.

⁴ *Cary v. Bancroft*, 14 Pick. 815; *Hallowell & A. Bank v. Howard*, 13 Mass. 235; *Searles v. Sadgrove*, 85 Eng. C. L. 639; S. C., 5 El. & Bl. 639.

⁵ *Brown v. Gilmore*, 8 Me. 107; *Ladd v. Patten*, 1 Cranch C. C. 268; *Thomas v. Evans*, 10 East, 101; *Liebrandt v. Myron Lodge*, 61 Ill. 81; *Dickinson v. Shee*, 4 Esp. 68; *Walker v. Brown*, 12 La. Ann. 266; *Sands v. Lyon*, 18 Conn. 18; *Strong v. Blake*, 46 Barb. 227; *Matheson v. Kelly*,

pay a certain sum does not constitute a tender.¹ The cases concur in the foregoing rule but differ somewhat in its application. [456] Where there is a verbal offer of a particular sum, and the creditor insists on more being due in such manner as amounts to a declaration that the offered sum would not be received, the actual production of the money is not necessary.² The immediate departure of the creditor on such an offer being made, or any intentional evasion of the debtor, would seem to be equivalent to an express refusal of it, and equally to excuse the production of the money.³ So on a verbal offer of a specified sum in legal tender notes in which the debt might be paid, a declaration by the creditor that he would receive nothing but gold or silver would dispense with

24 Up. Can. C. P. 598; *Holmes v. Holmes*, 12 Barb. 137; *Bakeman v. Pooler*, 15 Wend. 637; *Breed v. Hurd*, 6 Pick. 356; *Gilmore v. Holt*, 4 id. 258; *Eastland v. Longshorn*, 1 N. & McC. 194; *Southworth v. Smith*, 7 Cush. 391; *Lohman v. Crouch*, 19 Gratt. 331; *Dunham v. Jackson*, 6 Wend. 22; *McIntire v. Clark*, 7 id. 330; *Sargent v. Graham*, 5 N. H. 440. See *Champion v. Joslyn*, 44 N. Y. 653; also *Hill v. Place*, 5 Abb. (N. S.) 18; S. C., 7 Robt. 389; *Borden v. Borden*, 5 Mass. 67; *Slingerland v. Morse*, 8 Johns. 474; *Blight v. Ashley*, 1 Pet. C. C. 15; *Thayer v. Brackett*, 12 Mass. 450; *Cary v. Bancroft*, 14 Pick. 315.

¹ *De Wolfe v. Taylor*, 71 Iowa, 648; *Eastman v. Rapids*, 21 id. 590; *Camp v. Simon*, 34 Ala. 126; *Steele v. Biggs*, 22 Ill. 643; *Hornby v. Cramer*, 12 How. Pr. 490; *Sheredine v. Gaul*, 2 Dall. 190; *Bacon v. Smith*, 2 La. Ann. 441; *Hunter v. Warner*, 1 Wis. 141. See *Harris v. Mulock*, 9 How. Pr. 402; *Hill v. Place*, 7 Robt. 389.

² *Bender v. Bean*, 52 Ark. 132; *Pinney v. Jorgerson*, 27 Minn. 26; *Black v. Smith*, Peake, 88; *Jackson v. Jacob*, 3 Bing. N. C. 869; *Sands v. Lyon*, 18 Conn. 18; *Read v. Goldring*,

2 M. & S. 86; *Finch v. Brook*, 1 Scott, 70; *Danks, Ex parte*, 2 De Gex, M. & G. 936; *Murray v. Roosevelt*, Anth. 101; *Vaupell v. Woodward*, 2 Sandf. Ch. 143; *Stone v. Sprague*, 20 Barb. 509; *Dana v. Fiedler*, 1 E. D. Smith, 463; *Slingerland v. Morse*, 8 Johns. 474; *Everett v. Saltus*, 15 Wend. 474; *Warren v. Mains*, 7 Johns. 476; *State v. Spicer*, 4 Houst. (Del.) 100; *Hazard v. Loring*, 10 Cush. 267; *Strong v. Blake*, 46 Barb. 227; *Appleton v. Donaldson*, 3 Pa. St. 381.

In *Dunham v. Jackson*, 6 Wend. 22, it was held that a hesitating refusal, based on a claim of more than is due, will not dispense with the actual production of the money. *Sargent v. Graham*, 5 N. H. 440; *Harding v. Davies*, 2 C. & P. 77.

³ *Gilmore v. Holt*, 4 Pick. 257; *Southworth v. Smith*, 7 Cush. 391; *Judd v. Ensign*, 6 Barb. 258; *Houbie v. Volkening*, 49 How. Pr. 169; *Sands v. Lyon*, 18 Conn. 18; *Raines v. Jones*, 4 Humph. 490; *Littell v. Nichols*, Hard. 66; *Holmes v. Holmes*, 12 Barb. 137. But see *Leatherdale v. Sweepstone*, 3 C. & P. 342; *Knight v. Abbott*, 30 Vt. 577; *Thorne v. Mosher*, 20 N. J. Eq. 267.

the actual production of the offered money.¹ An absolute refusal to receive the amount, or, in case of mutual executory contracts, to do the act in consideration of which it is to be paid, is a waiver of production.¹ But the debtor must have the money to immediately comply with his offer; having it in a bag is no objection.² In some cases it is held that [457] such a refusal will not dispense with the actual production of the money; that there must be some declaration or equivalent act to the effect that the debtor need not offer it.⁴ The sight of the money may tempt the creditor to accept it.⁵ The question whether the production has been dispensed with is for the jury; and if they find the facts specially and do not find the fact of dispensation, the court will not infer it.⁶ The money must be actually at hand and ready to be produced immediately if it should be accepted. It is not enough that a third person has it on the spot and is willing to loan it, unless he actually consents to do so for the purpose of the tender.⁷ At an interview between the plaintiff and the defendant the latter was willing to pay £10, and a third person offered to go upstairs and fetch that sum, but was prevented by the plaintiff saying "he cannot take it." Such offer was held a

¹ Chinn v. Bretches, 42 Kan. 816; Hanna v. Ratekin, 43 Ill. 462; Hayward v. Munger, 14 Iowa, 516; Wynkoop v. Cowing, 21 Ill. 570.

² Murray v. Roosevelt, Anth. 101; Hazard v. Loring, 10 Cush. 267; Vaupell v. Woodward, 2 Sandf. Ch. 148; Strong v. Blake, 46 Barb. 227; Stone v. Sprague, 20 id. 509; Appleton v. Donaldson, 3 Pa. St. 381; Dana v. Fiedler, 1 E. D. Smith, 463; Slingerland v. Morse, 8 Johns. 474; Everett v. Saltus, 15 Wend. 474; Warren v. Mains, 7 Johns. 476.

³ Conway v. Case, 22 Ill. 127; Breed v. Hurd, 6 Pick. 856; Davis v. Stonestreet, 4 Ind. 101; Harding v. Davies, 2 C. & P. 77; Borden v. Borden, 5 Mass. 67; Sucklinge v. Coney, Noy, 74; Behaly v. Hatch, Walk. (Miss.) 369. Compare Sharp v. Todd, 88 N. J. Eq. 234.

⁴ Thomas v. Evans, 10 East, 101; Douglas v. Patrick, 3 T. R. 683; Dickinson v. Shee, 4 Esp. 68; Finch v. Brook, 1 Bing. N. C. 253; Leatherdale v. Sweepstone, 3 C. & P. 342; Firth v. Purvis, 5 T. R. 482; Kraus v. Arnold, 7 Moore, 59; Brown v. Gilmore, 8 Me. 107; Bakeman v. Pooler, 15 Wend. 637.

⁵ Finch v. Brook, *supra*.

⁶ Id.; 2 Greenlf. Ev., § 603.

The burden of proving readiness and ability to pay is upon the debtor. Ladd v. Mason, 10 Ore. 308; Park v. Wiley, 67 Ala. 310.

⁷ Sargent v. Graham, 5 N. H. 440; Bakeman v. Pooler, 15 Wend. 637; Breed v. Hurd, 6 Pick. 856; Eastland v. Longshorn, 1 N. & McC. 194.

good tender.¹ A tender made by holding an unstated sum [458] in hand, peremptorily rejected without inquiry as to amount, is good.²

¹ *Harding v. Davies*, 2 C. & P. 77. But in *Kraus v. Arnold*, 7 Moore, 59, the defendant ordered A. to pay the plaintiff £7 12s., and the clerk of the plaintiff demanded £8, on which A. said he was only ordered to pay £7 12s., which sum was in the hands of B., and B. put his hand to his pocket with a view to pulling out his pocket-book to pay £7 12s., but did not do so, by the desire of A.; but B. could not say whether he had that sum about him, but swore he had it in his house, at the door of which he was standing at the time. Held, not a legal tender, because the money was not produced.

And in *Glasscott v. Day*, 5 Esp. 48, it was held the tender was not good because the money was not in sight; the witness supposed it was in the desk, but never saw it produced; and it did not appear that if the creditor had been willing to accept the money it could be immediately paid; the money should be at hand and capable of immediate delivery.

In *Breed v. Hurd*, 6 Pick. 356, a witness told the plaintiff that the defendant had left money with him to pay his bill, and that if the plaintiff would make it right by deducting a certain sum he would pay it, at the same time making a motion with his hand towards his desk, at which he was then standing; he swore that he believed, but did not know, that there was money enough in his desk; but if there was not, he would have obtained it in five minutes if the plaintiff would have made the deduction; but the plaintiff replied that

he would deduct nothing. Held, not a tender.

² *State v. Spicer*, 4 Houst. (Del.) 100. It appeared in this case that the parties met, and the debtor, in his wagon, which stopped on meeting the creditor, said, "I've got the money to pay you," specifying the claim, and put his hand into his pocket to take out the bag which contained the money; while he was doing this the creditor said, "I want nothing to do with such a cut-throat as you," and walked rapidly away. The jury found that the debtor was thereby prevented from producing the money and offering it to the creditor, and it was held a good tender. *Sands v. Lyon*, 18 Conn. 18. In *Knight v. Abbott*, 30 Vt. 577, the defendant, desiring to make a tender, said to the plaintiff as he was passing in a wagon, "I want to tender you this money for labor you have done for me," at the same time holding a sum in his hand equal to his indebtedness, but not mentioning any amount; the plaintiff did not reply, nor stop his team. Held, not a good tender.

In *Thorne v. Mosher*, 20 N. J. Eq. 257, A. offered to pay money to B., holding her purse in her hand in sight of B., who saw the purse, but not the bills. A. opened the purse, and was in the act of taking out the bills, but stopped on account of the refusal of B. to receive the money. Held, that the offer was neither payment nor tender, but the refusal was an excuse for not making a tender.

§ 269. Where to be made. If a debt is payable at a particular place the creditor has a right to receive the money there.¹ When payable at a bank, the designation of place imports a stipulation that the holder will have the instrument on which the money is payable at the bank to receive payment, and that the debtor will have the funds there to pay it; and it is the general usage in such cases to lodge the instrument with the bank for collection. If the instrument be not there lodged, and the debtor is there at maturity with the necessary funds to pay it, he so far satisfies the contract that he cannot be made responsible for any future damages, either in costs of suit or interest for the delay.² Having money, however, in a bank where a note is payable is not a tender unless it is in some way appropriated to the note.³ A tender to the cashier of the amount of a note payable at his bank, coupled [459] with a demand of the note, is not good, it not being there at the time, and the money not being deposited nor afterwards offered.⁴ Where no place of payment is appointed the debt is payable anywhere; and it is the duty of the debtor to seek the creditor if within the state.⁵

§ 270. Must be unconditional. A tender must be unconditional,⁶ or at least cannot be clogged by any condition to

¹ *United States v. Gurney*, 4 Cranch, 333; *Adams v. Rutherford*, 13 Ore. 78. See § 214.

² *Ward v. Smith*, 7 Wall. 447.

³ *Myers v. Byington*, 34 Iowa, 205.

⁴ *Balme v. Wambaugh*, 16 Minn. 116; *Hill v. Place*, 7 Robt. 389. See *Rowe v. Young*, 2 Brod. & Bing. 165; *Bacon v. Dyer*, 12 Me. 19; *Wallace v. McConnell*, 13 Pet. 136.

⁵ *Littell v. Nichols*, Hardin, 66; *Houbie v. Volkening*, 49 How. Pr. 169; *Harris v. Mulock*, 9 id. 402. In this case it appeared that the creditor went to the debtor's office to receive payment. While in the act of counting one of several packages of bank bills delivered to him by the debtor as payment, he suddenly left the office by reason of insulting language addressed to him by the latter. It

was held that the money not being current coin, it would not be a tender if the creditor objected to it for that reason; therefore to constitute that money a tender, the debtor was obliged to give the creditor time sufficient to ascertain whether the money was such as he would be willing to receive instead of coin; and the creditor having cause to leave on account of the insulting language before such examination was completed, the tender was not sufficient; the debtor must seek the creditor for that purpose. See *Mathis v. Thomas*, 101 Ind. 119; *ante*, § 214.

⁶ *Rose v. Duncan*, 49 Ind. 269; *Jennings v. Major*, 8 C. & P. 61; *Holton v. Brown*, 18 Vt. 224; *Wagenblast v. McKean*, 2 Grant's Cas. (Pa.) 393; *Cothren v. Scanlan*, 34 Ga. 555; *Pul-*

which the creditor can have reasonable objection;¹ so that if he takes the money and there is more due, he may still bring an action for the residue.² An offer of a certain sum in full [460] of a demand is not a good tender.³ But a tender is not

sifer v. Shepard, 86 Ill. 513; Shaw v. Sears, 8 Kan. 242; Hunter v. Warner, 1 Wis. 141.

¹ Bevens v. Rees, 5 M. & W. 306; Richardson v. Jackson, 8 id. 298; Wheelock v. Tanner, 39 N. Y. 481; Foster v. Drew, 39 Vt. 51; Dedekam v. Vose, 3 Blatchf. 44. See Moynahan v. Moore, 9 Mich. 9; Hepburn v. Auld, 1 Cranch, 821.

² Mitchell v. King, 6 C. & P. 237; Hartings v. Thorley, 8 id. 573; Jennings v. Major, id. 61; Peacock v. Dickerson, 2 id. 51, n.; Benkard v. Babcock, 27 How. Pr. 391; Henwood v. Oliver, 1 G. & D. 25; 1 Q. B. 409; Bowen v. Owen, 11 id. 130; Wood v. Hitchcock, 20 Wend. 47; Loring v. Cooke, 3 Pick. 48; Roosevelt v. Bull's Head Bank, 45 Barb. 579.

³ L'Hommedien v. The H. L. Dayton, 38 Fed. Rep. 926; Noyes v. Wyckoff, 114 N. Y. 204; Tompkins v. Batie, 11 Neb. 147; Boulton v. Moore, 14 Fed. Rep. 922; Shuck v. Chicago, etc. Ry. Co., 78 Iowa, 333; Griffith v. Hodges, 1 C. & P. 419; Strong v. Harvey, 3 Bing. 304; Cheminant v. Thornton, 2 C. & P. 50; Thayer v. Brackett, 12 Mass. 450; Mitchell v. King, 6 C. & P. 237; Wood v. Hitchcock, 20 Wend. 47. In this case Cowen, J., said: "It was clearly a tender to be accepted as the whole amount due, which is holden to be bad by all the books. The tender was also bad because the defendant would not allow that he was ever liable for the full amount of what he tendered. His act was within the rule which says he shall not make a protest against his liability. He must also avoid all counter-claim, as of

set-off against part of the debt due. That this defendant intended to impose the terms, or raise the inference that the acceptance of the money should be in full, and thus conclude the plaintiff against litigating all further or other claim, the referees were certainly entitled to say. That the defendant intended to question his liability to part of the amount tendered is equally obvious, and his object was at the same time to adjust his counter-claim. It is not of the nature of a tender to make conditions, but simply to pay the sum tendered as for an admitted debt. Interlarding any other object will always defeat the effect of the act as a tender. Even demanding a receipt or an intimation that it is expected, as by asking, 'Have you got a receipt?' will vitiate. The demand of a receipt in full would of course be inadmissible."

The reason of this rule is obvious where the debtor does not in fact tender all that is due; for if a debtor tenders a certain sum as all that is due, and the creditor receives it, under these circumstances it might compromise his rights in seeking to recover more; but if the same sum was tendered *unconditionally*, no such effect would follow. Sutton v. Hawkins, 8 C. & P. 259. The reason why a tender has so often been held invalid when a receipt in full has been demanded seems not to have been merely because a receipt was asked for, but rather because a part was offered in full payment. See Sanford v. Bulkley, 30 Conn. 844.

In Holton v. Brown, 18 Vt. 224, it

vitiated by being an offer of payment under protest. If the debtor absolutely offers to pay he does not vitiate the offer by protesting.¹ There have been some intimations that even asking a receipt would vitiate a tender; and it is prob- [461] able the requirement to give one stamped would have that effect;² but it is believed that the tenderer may ask a simple receipt for what is paid.³ At all events, if the creditor refuse the tender wholly on the ground of more being due he cannot afterwards object thereto because the debtor required a receipt.⁴ A tender, however, which is accompanied by a demand for a receipt in full is conditional, and of course invalid.⁵ A

was held that a tender to pay a note is vitiated by demand of it, and refusing to accept a discharge of the mortgage and a receipt for the payment, the holder not being able at the time to find the note. See *Wilder v. Seelye*, 8 Barb. 408; Story on Prom. Notes, § 106 *et seq.*; §§ 243, 244; *Balme v. Wambaugh*, 16 Minn. 116.

In *Robinson v. Ferreday*, 8 C. & P. 752, it was held that a tender was not vitiated by the person making it saying, at the time, that it was all that the debtor considered was due; but if he offers the sum "as all that is due," it is different. *Sutton v. Hawkins*, 8 C. & P. 259; *Field v. Newport, etc. R. Co.*, 8 H. & N. 409; *Thorpe v. Burgess*, 8 Dowl. P. C. 603. And in *Bowen v. Owen*, 11 Q. B. 130, a tenant sent to his landlord 26*l.* with a letter in these words: "I have sent with the bearer 26*l.* to settle one year's rent of Nant-y-pair." The landlord refused to take it, saying that more was due. Held, a good tender.

¹ *Manning v. Lunn*, 2 C. & K. 13; *Scott v. Uxbridge & R. Ry. Co.*, L. R. 1 C. P. 596; *Sweny v. Smith*, L. R. 7 Eq. 324. But see *Wood v. Hitchcock*, 20 Wend. 47, quoted from in the preceding note.

An offer to the effect that "I am willing to pay you the named sum to

avoid litigation; it is not due you, but I am willing to pay," if accompanied by the money (which is not necessary in Iowa) is not a good tender. *Kuhns v. Chicago, etc. Ry. Co.*, 65 Iowa, 528.

² *Laing v. Meader*, 1 C. & P. 257. See *Ryder v. Townsend*, 7 D. & R. 119.

³ See 2 Par. on Cont. 645, note *m*; *Jones v. Arthur*, 8 Dowl. P. C. 442; *Bowen v. Owen*, 11 Q. B. 130.

⁴ *Richardson v. Jackson*, 8 M. & W. 298; *Cole v. Blake, Peake*, 179.

⁵ *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165; *Noyes v. Wyckoff*, 114 id. 204; *Frost v. Yonkers Savings Bank*, 70 id. 558; *Bowen v. Owen*, 11 Q. B. 130; *Griffith v. Hodges*, 1 C. & P. 419; *Glasscott v. Day*, 5 Esp. 48; *Higham v. Baddely, Gow*, 218; *Foord v. Noll*, 2 Dowl. (N. S.) 617; *Finch v. Miller*, 5 C. B. 428; *Sanford v. Bulkley*, 30 Conn. 344; *Richardson v. Boston Chemical L.*, 9 Met. 42; *Perkins v. Beck*, 4 Cranch C. C. 68; *Hart v. Flynn*, 8 Dana, 190; *Holton v. Brown*, 18 Vt. 224; *Siter v. Robinson*, 2 Bailey, 274; *Brooklyn Bank v. De Grauw*, 23 Wend. 342; *Wood v. Hitchcock*, 20 id. 47; *Eddy v. O'Hara*, 14 id. 221; *Clark v. Mayor*, 1 Keyes, 9; *Thayer v. Brackett*, 12 Mass. 450; *Wagenblast v. McKean*, 2 Grant Cas. (Pa.) 393; *Pulsifer v. Shepard*, 36 Ill.

[462] tender of money in payment of a debt, to be available, must be without qualification; that is, there must not be anything raising an implication that the debtor intends to cut off

513; *Cotthran v. Scanlan*, 34 Ga. 555; *Shaw v. Sears*, 3 Kan. 242; *Hunter v. Warner*, 1 Wis. 141; *Rose v. Duncan*, 49 Ind. 269.

Where a tender was made in "greenbacks," and refused because payment in coin was demanded, it was considered a valid tender, if the court should be of opinion that the debtor was entitled to pay in such money. The money was paid into court, to be drawn only on its order "or by the plaintiff, if he shall accept the same as tendered." The plaintiff obtained an order of the court and drew the money, and the order recited that he should not be prejudiced by his acceptance and appropriation of the amount. *Lindsay, J.*, said: "So long as the legal tender notes remained in the hands of the court, or its agent, the Farmers' Bank, they constituted a standing and continuous offer to Robb, which he had the option at any time to accept 'as tendered.' But he could not of his own volition take out and appropriate such notes upon any other conditions than those upon which the tender was made. Nor had the court the power to change or modify these conditions. If it should finally be adjudged that the tender was sufficient in law, the appellant would be entitled to his costs, and the title to the money on deposit would be vested in Robb. Upon the other hand, if the court should adjudge that Robb was entitled to have his note paid in gold coin, a judgment specifically enforcing his contract would be rendered, and Wells would have the right to withdraw from the hands of the court the legal tender notes on de-

posit. The rule is different where there is no controversy as to the character of the money tendered, but where the plaintiff claims a larger amount than the defendant concedes to be due. In such cases the tender establishes the liability of the party sued for the amount tendered, and the plaintiff has a right to accept that amount as a payment *pro tanto*, and continue the litigation for the balance claimed, he being responsible for costs subsequently accruing, in case he fails to recover judgment for such balance or some part thereof. Here it was all the time in the power of Robb to waive his objection to the character of the money tendered and accept it in satisfaction of his debt; but as it was lawful money, as held recently by the supreme court of the United States (*Knox v. Lee and Parker v. Davis*), it was not within the power of the circuit court to permit him to take possession of it as property, and account to appellant for its value in coin, nor to compel the latter to pay it out upon any debt for less than its face value. As the unauthorized order of the court under which Robb obtained possession of the money tendered was made at his instance, and contrary to the objections of his debtor, he occupies no better attitude than he would have done had he withdrawn the money from the bank, as he had a right to do, under the order directing the deposit to be made. He must be held to have waived objection to the character of the money tendered, and to have accepted it as a payment of his debt." *Wells' Adm'r v. Robb*, 9 Bush, 26.

or bar a claim for any amount beyond the sum offered.¹ A tender of money to pay negotiable paper may be so far conditional as to be accompanied by a demand for its surrender.² The rule as to such paper is exceptional, to withdraw it from circulation and for recourse to other parties.

The general doctrine in respect to tender is that no condition can be annexed which by acceptance would preclude any question which would otherwise be open to the creditor. He should be at liberty to accept the tender, and to say he does not take it in full satisfaction of his demand; or that he [463] does not forego any right by its acceptance except to deny that so much was paid, and such benefits to the tenderer as are consequent by legal intendment. The party making the tender should be content to allow the creditor to take the money, and get more if the jury find him entitled to it; or to assert any other right consistent with the mere acceptance of the money, and applying it to the subject.³ If, however, there

¹ Wood v. Hitchcock, 20 Wend. 47; Roosevelt v. Bull's Head Bank, 45 Barb. 579; Wilder v. Seelye, 8 id. 408; Sanford v. Bulkley, 30 Conn. 344; Perkins v. Beck, 4 Cranch C. C. 68; Brooklyn Bank v. De Grauw, 23 Wend. 342; Holton v. Brown, 18 Vt. 224; Hart v. Flynn, 8 Dana, 190; Eddy v. O'Hara, 14 Wend. 221; Clark v. Mayor, 1 Keyes, 9; Cheminant v. Thornton, 2 C. & P. 50; Strong v. Harvey, 3 Bing. 304; Mitchell v. King, 6 C. & P. 237; Brady v. Jones, 2 Dow. & Ry. 305; Benkard v. Babcock, 27 How. Pr. 391; Rose v. Duncan, 49 Ind. 269; Finch v. Miller, 5 C. B. 428; Sutton v. Hawkins, 8 C. & P. 259.

² Bailey v. County of Buchanan, 115 N. Y. 297; Strafford v. Welch, 59 N. H. 46; Cutler v. Gould, 43 Hun, 516; Wilder v. Seelye, 8 Barb. 408; Rowley v. Ball, 3 Cow. 303; Smith v. Rockwell, 2 Hill, 482; Hansard v. Robinson, 7 B. & C. 90. See Story on Bills, §§ 448-9; Chitty on Bills, 423; Story on Prom. Notes, §§ 106, 112,

143, 244; Storey v. Krewson, 55 Ind. 397; Dooley v. Smith, 13 Wall. 604.

³ See Jennings v. Major, 8 C. & P. 61; Thayer v. Brackett, 12 Mass. 450.

A party qualifies his tender when he demands in return what, according to his own theory of his rights, he is strictly entitled to for the money he pays, and even though such theory is legally correct, if that theory is questioned. This is illustrated by Loring v. Cooke, 3 Pick. 48. A tender was made to redeem from an execution sale. The amount tendered was not the subject of dispute; but the debtor demanded a release which was not necessary to cancel the sale, and the purchaser's inchoate title; and a release had been prepared by the tenderer ready for execution. The purchaser refused to execute it, and claimed to hold his purchase to secure other debts. This right was held not to exist, as the English doctrine of tacking was not recognized; but the tender was invalidated by the demand of a release, though if ex-

is no dispute as to the amount of the debt a tender may always be restricted by such conditions as by the terms of the contract are precedent to or simultaneous with the payment of

ecuted it would have extinguished no right which the purchaser could have asserted. In the subsequent case of *Saunders v. Frost*, 5 Pick. 259, 275, a tender was made on a mortgage debt after the mortgagee had taken possession to foreclose for interest in arrear, the principal not being due. The tender was of the whole mortgage debt, including interest computed to the date of the tender, and not to the maturity of the debt. The court held that as to the principal the tender was not good; for the creditor had a right to keep his debt at interest until the time appointed for payment. But it was no objection to the tender in respect to interest due that a larger sum was tendered; nor that a discharge of the mortgage was demanded; for since the statute entitled the mortgagor to a discharge on payment of the mortgage debt the demand of such discharge was only of the performance of a duty imposed by law. So it seems that the tender, as to interest, was not rendered nugatory by being accompanied by a condition which was only admissible when a tender could rightfully be made of the mortgage debt. It was sustained because it was the duty of the mortgagee to inform the mortgagor that possession was held only for the interest due; and the mortgagee should have shown a willingness to accept payment of such interest.

In *Storey v. Krewson*, 55 Ind. 397, the court held that under a statute which requires a mortgagee of lands to discharge a mortgage of record, after having received full payment, a mortgagor is not entitled to de-

mand such discharge when tendering such full payment; that the mortgagee could not be required to do so merely upon a tender of the amount as a condition to his right to receive the amount. Biddle, J., said: "When one party is to perform an act, whose right does not depend upon any act to be performed by the other party, the tender must be without condition, as where money is to be paid without condition. The current of authorities — indeed we believe it to be quite uniform — holds that the party bound to pay the money cannot make a good tender upon the condition that the party to whom the money is to be paid shall give him a written receipt therefor; and in the case of a non-commercial promissory note the authorities are in conflict whether a good tender can be made upon the condition that the note shall be surrendered; but in the case of commercial paper the authorities seem to be uniform that a tender upon condition that the paper shall be surrendered is good, because such paper might be put in circulation after payment, and innocent parties become liable; not so, however, with non-commercial paper; after payment by the maker it becomes harmless against him, wherever it may go."

A tender to be good must not be upon any condition prejudicial to the party to whom it is made. See *Wheelock v. Tanner*, 39 N. Y. 481; *Hepburn v. Auld*, 1 Cranch, 321. D. purchased some oats of F., who took goods worth \$41.78 in part payment. D. tendered \$170 to F., telling him that if he took \$180 of the amount it

the debt or proper to be performed by the tenderee;¹ as that he shall discharge a mortgage;² return collateral security;³ give a release;⁴ or surrender mortgaged chattels, if a reasonable time be given.⁵ But if a tender is made upon condition its acceptance is an acceptance of the condition.⁶

When mutual acts are to be done by two parties at the [464] same time and the right of each depends upon the performance of the other, either may tender his part of the performance upon the condition that the other discharges his duty; and neither is compelled to perform unless the other does so also; as when land is bargained and sold to be conveyed upon payment of the purchase-money. In such a case neither can be compelled to perform his part of the agreement except on the performance by the other of his part; that is, the vendee cannot demand the conveyance without tendering the purchase-money; and the vendor cannot demand the purchase-money without tendering the conveyance; and either may make a good tender to the other upon the condition that he will perform his part of the agreement.⁷ If the performance of precedent or contemporaneous conditions is refused the person whose duty it is to pay has done all that is required of him when he has made a tender; he is thereby excused from keeping it good.⁸

closed the whole business; and if he took the \$170 it settled the oat business and left the account for the goods standing; held not conditional; D. merely explained his tender. *Foster v. Drew*, 39 Vt. 51.

A tender of the amount due upon a judgment, accompanied by a demand for the assignment of the security or writ, will not entitle the person making it to be subrogated to the plaintiff's rights therein. *Forest Oil Co.'s Appeals*, 118 Pa. St. 138.

¹ *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165; *Johnson v. Cranage*, 45 Mich. 14; *Lamb v. Jeffrey*, 41 id. 719; *Brink v. Freoff*, 40 id. 614.

² *Halpin v. Phenix Ins. Co.*, *supra*; *Wheelock v. Tanner*, 39 N. Y. 481; *Salinas v. Ellis*, 26 S. C. 337. See

Jewett v. Earle, 58 N. Y. Super. Ct. 849; *Werner v. Tuch*, 52 Hun, 269.

³ *Cass v. Higgenbotam*, 100 N. Y. 253; *Ocean Nat. Bank v. Fant*, 50 id. 474; *Loughborough v. McNevin*, 74 Cal. 250.

⁴ *Saunders v. Frost*, 5 Pick. 259.

⁵ *Brink v. Freoff*, 40 Mich. 610.

⁶ *Adams v. Helm*, 55 Mo. 468; *Kronenberger v. Binz*, 56 id. 121; *Lee v. Dodd*, 20 Mo. App. 284.

⁷ *Englander v. Rogers*, 41 Cal. 420; *Heine v. Treadwell*, 72 id. 217; *Storey v. Krewson*, 55 Ind. 397.

⁸ *Cannon v. Handley*, 72 Cal. 133; *Washburn v. Dewey*, 17 Vt. 92; *White v. Dobson*, 17 Gratt. 262; *McDanel v. Kimbrell*, 3 G. Greene (Iowa), 335.

§ 271. **Effect of accepting.** Acceptance of a tender, when made as full payment, has the effect of entire satisfaction in case of a disputed claim.¹ But the acceptance of a proper [465] tender, accompanied by no such condition, does not preclude the creditor from proceeding for more.² An appeal is not waived by the receipt of a payment. The acceptance of a sum tendered on account of a claim only extinguishes it when it is all that the creditor is entitled to, or when it is received as being so.³

§ 272. **Must be kept good.** Unless the conduct of the party who is entitled to payment excuses the other from so doing⁴ he must keep his tender good; that is, the debtor must at all times be prepared to meet a demand for money tendered; if he fails to do so he places himself in default and loses the benefit of his tender.⁵ And the rule applies in chancery and at

¹ Jenks v. Burr, 56 Ill. 450; Miller v. Holden, 18 Vt. 337; Gassett v. Andover, 21 Vt. 342; Towslee v. Healey, 39 Vt. 522; Draper v. Pierce, 29 Vt. 250; Cole v. Champlain T. Co., 26 Vt. 87; McDaniels v. Bank of Rutland, 29 Vt. 230; Goslin v. Hodson, 24 Vt. 140; Adams v. Helm, 55 Mo. 468.

It is held in some cases that an unaccepted tender is an admission that there is a sum due the tenderee equal to it, and this although it be defective or be made in a case where it is not binding and cannot be pleaded. Denver, etc. R. Co. v. Harp, 6 Colo. 420; Cilley v. Hawkins, 48 Ill. 309. These cases are of doubtful authority, because the legal effect of such a tender is no more than a mere offer of compromise. No doubt is entertained that where a tender is made under a mistaken belief by the party who made it that the sum tendered was due evidence is admissible to rebut the inference that a debt was thereby admitted. Ashuelot R. Co. v. Cheshire R. Co., 60 N. H. 356.

² Higgins v. Halligan, 46 Ill. 173;

Ryal v. Rich, 10 East, 47; Slegt v. Rhinelander, 1 Johns. 192.

³ Benkard v. Babcock, 2 Robt. 175.

⁴ See § 268, *ante*.

⁵ Crain v. McGoon, 86 Ill. 431; Sanders v. Peck, 131 id. 407; Aulger v. Clay, 109 id. 487; Wyckoff v. Anthony, 9 Daly, 417; Rainwater v. Hummell, 79 Iowa, 571; Wilson v. McVey, 83 Ind. 108; Park v. Wiley, 67 Ala. 310; 1 Saund. 33, n. 2; Wilder v. Seelye, 8 Barb. 408; State v. Briggs, 65 N. C. 159; Bronson v. Rock Island, etc. R. Co., 40 How. Pr. 48; Mohn v. Stoner, 14 Iowa, 115; 11 id. 30; Warrington v. Pollard, 24 id. 281; Kortright v. Cady, 23 Barb. 490; S. C., 5 Abb. 358; Kortright v. Blunt, 12 How. Pr. 424; Brooklyn Bank v. DeGrauw, 23 Wend. 342; Pulsifer v. Shepard, 36 Ill. 513; Nelson v. Oren, 41 Ill. 18; Cullen v. Green, 5 Harr. 17; Clark v. Mullenix, 11 Ind. 532; Jarboe v. McAtee, 7 B. Mon. 279; Livingston v. Harrison, 2 E. D. Smith, 197; Call v. Scott, 4 Call, 402; Mason v. Croom, 24 Ga. 211; DeWolf v. Long, 7 Ill. 679; Brock v. Jones, 16 Tex. 461; Webster v. Pierce, 85

law.¹ It is not necessary to keep for the creditor the identical money tendered. The tenderer is at liberty to use it as his own; all he is under obligation to do is to be ready at all times to pay the debt in current money when requested.²

A refusal by the debtor after a tender to pay the money [466] tendered on demand of the creditor deprives the offer of all legal availability and effect.³ For this purpose the debtor should keep the money in his own possession; he may use it as his own so far as consistent with constant readiness to pay.⁴ A deposit of it with a third person for the creditor, with or without giving him notice thereof, will not exempt him from this necessity; for the creditor will be under no obligation to apply to the depositary for it. If he thinks proper to accept the tender he may call on the debtor himself for it. In that case, unless the debtor pays or tenders the sum, he will lose the benefit of the previous tender.⁵ Hence the debtor is entitled to the benefit of his tender if he is ready with the money on a demand made to himself personally, although he may have made the tender by his attorney.⁶

The demand for the money after a tender and refusal must be of the precise sum tendered,⁷ and must be made by some

Ill. 158; *Marine Bank v. Rushmore*, 28 Ill. 463; *Sloan v. Petrie*, 16 Ill. 262; *Stow v. Russell*, 36 Ill. 18; *Wright v. McNeely*, 11 Ill. 241; *Wood v. Merchants', etc. Co.*, 41 Ill. 267; *Suver v. O'Riley*, 80 Ill. 104; *Haynes v. Thom*, 28 N. H. 386; *Nantz v. Lober*, 1 Duv. 304; *Hayward v. Hague*, 4 Esp. 98; *Peirse v. Bowles*, 1 Stark. 323; *Spybey v. Hide*, 1 Camp. 181; *Rivers v. Griffiths*, 1 D. & Ry. 215; *Coles v. Bell*, 1 Camp. 478, note; *Coore v. Callaway*, 1 Esp. 115.

¹ *De Wolf v. Long*, 7 Ill. 679; *Doyle v. Teas*, 5 Ill. 202; *Brooklyn Bank v. De Grauw*, 23 Wend. 842; *Stow v. Russell*, 36 Ill. 18.

A plaintiff failing in his suit in equity after tender and deposit of money in court brought error; and pending the proceedings in error withdrew the deposit; held, not a

waiver of error. *Vail v. McMillan*, 17 Ohio St. 617.

² *Curtiss v. Greenbanks*, 24 Vt. 536. But see *Quynn v. Whetcroft*, 3 Har. & McH. 352; *Roosevelt v. Bull's Head Bank*, 45 Barb. 579.

³ *Nantz v. Lober*, 1 Duval, 304; *Rose v. Brown*, Kirby, 298.

⁴ *Curtiss v. Greenbanks*, 24 Vt. 536. But see *Roosevelt v. Bull's Head Bank*, 45 Barb. 479.

⁵ *Rainwater v. Hummell*, 79 Iowa, 571; *Town v. Trow*, 24 Pick. 168.

⁶ *Berthold v. Reyburn*, 87 Mo. 586. A defendant's attorney having made a tender the plaintiff's attorney subsequently agreed to take it, but it was held this assent was not such a demand as would avoid the tender. The demand for such a purpose must be made upon the debtor personally.

⁷ *Spybey v. Hide*, 1 Camp. 181; *Rivers v. Griffiths*, 1 Dow. & Ry. 215.

one authorized to receive it and give the debtor a discharge.¹ Where the tender had been made by two persons, demand on one was sufficient.² If money is tendered with which the debtor has a right then to discharge the debt, and sufficient to satisfy it, he is not to bear the loss of its subsequent depreciation.³

[467] § 273. **Waiver and omission of tender on sufficient excuse.** There is probably no difference in respect to the effect of stopping interest as damages, based on default, between an actual tender or tender with some punctilio waived and a readiness to pay, and a tender altogether prevented by the conduct of the creditor; as, for example, by his absence or concealment. For this effect it is only needful to negative default.⁴ Where, however, the debt bears interest by agreement of the parties after it is payable, an actual tender is doubtless essential to stop interest unless the creditor prevents it by some fraudulent evasion.⁵ Where a tender is made to the creditor not in currency which he is bound to receive, but in bank bills current at par as money, and not objected to on that account; or is made by a check on a bank assented to as a mode of payment, the offer is a sufficient tender. And where there is a verbal offer to pay and the debtor is prepared to make his offer good, but omits to produce the money to the view of the creditor because the latter says it need not be produced as he will not receive it, the proffer is in substance and legal effect a tender.⁶ The law interprets the con-

¹ *Coles v. Bell*, 1 Camp. 478, n.; *defense. Terrell v. Walker*, 65 N. C. Coore v. Calloway, 1 Esp. 115. 91.

² *Peirse v. Bowles*, 1 Stark. 523.

A letter demanding payment of a debt sent to the debtor's house, to which an answer is returned that the demand should be settled, was held to be sufficient evidence of a demand on an issue of a subsequent demand and refusal to a plea of tender. *Hayward v. Hague*, 4 Esp. 93.

A tender may lose its effect by mutual waiver, as where afterward the debtor, at the suggestion of the creditor, consents to retain the money. He cannot afterwards set it up as a

³ *Anonymous*, 1 Hayw. 183. See *Jeter v. Littlejohn*, 3 Murph. 186.

⁴ *Thorne v. Mosher*, 20 N. J. Eq. 257.

⁵ *Gilmore v. Holt*, 4 Pick. 258; *Southworth v. Smith*, 7 Cush. 391.

⁶ *Holmes v. Holmes*, 9 N. Y. 525; *Hall v. Norwalk F. Ins. Co.*, 57 Conn. 105; *Roe v. State*, 82 Ala. 68; *McDanel v. Kimbrell*, 3 G. Greene (Iowa), 335; *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156; *Mathis v. Thomas*, 101 Ind. 119; *Hoffman v. Van Die-men*, 62 Wis. 362; *Sharp v. Todd*, 88 N. J. Eq. 324; *Duffy v. Patten*, 74 Me.

duct of the parties in the ceremony of tender according to their apparent intentions; and determines its sufficiency upon the objections then stated. We have seen that certain incidents, such as demanding a receipt for what is paid, or change where there is an offer of a larger amount, or bank bills instead of money which is legal tender, must be specially objected to at the time. Silence is a tacit waiver of such objections. Other objections may also be waived by implication on the maxim of *expressio unius est exclusio alterius*. A general rule on this subject is that if a tender is refused on a specific ground the creditor will not be permitted afterwards to raise any other objection which if stated at the time it was made could have been obviated.¹

§ 274. Tender must be pleaded and money paid into court. If the money tendered is not demanded by the creditor, [468] and he brings suit, the defendant must plead the tender, and his plea must be accompanied by payment of the money into court for the creditor,² unless the effect of the tender is merely

396; Koon v. Snodgrass, 18 W. Va. 320.

¹ Hull v. Peters, 7 Barb. 331; Carman v. Pultz, 21 N. Y. 547; Keller v. Fisher, 7 Ind. 718; Mitchell v. Cook, 29 Barb. 243; Haskell v. Brewer, 11 Me. 258; Hayward v. Munger, 14 Iowa, 516; Graves v. McFarlane, 2 Cold. 167; Bradshaw v. Davis, 12 Tex. 336; Nelson v. Robson, 17 Minn. 284; Rudolph v. Wagner, 36 Ala. 698; Stokes v. Recknagel, 88 N. Y. Super. Ct. 368; Ricker v. Blanchard, 45 N. H. 39; Abbot v. Banfield, 43 id. 152.

If a tender of money which the creditor refused is left with him against his wish, and he declines to give it up when called for, it will be sufficient. Rogers v. Rutter, 11 Gray, 410.

² Colby v. Reed, 99 U. S. 560; Matthews v. Lindsay, 20 Fla. 962; Allen v. Cheever, 61 N. H. 32; Halpin v. Phenix Ins. Co., 118 N. Y. 165; Coghlen v. South Carolina R. Co., 32

Fed. Rep. 316; Morrison v. Jacoby, 114 Ind. 84; Roberts v. White, 146 Mass. 256; Park v. Wiley, 67 Ala. 310; Frank v. Pickens, 69 id. 369; Goss v. Bowen, 104 Ind. 207; Fernald v. Young, 76 Me. 356; Jenkins v. Briggs, 65 N. C. 159; Claflin v. Hawes, 8 Mass. 261; Roosevelt v. New York & H. R. R. Co., 30 How. Pr. 226; Harvey v. Hackley, 6 Watts, 264; Nelson v. Oren, 41 Ill. 18; Brown v. Ferguson, 2 Denio, 196; Halsey v. Flint, 15 Abb. 367; Sheridan v. Smith, 2 Hill, 538; Bronson v. Chicago, etc. R. Co., 40 How. Pr. 48; Livingston v. Harrison, 2 E. D. Smith, 197; Robinson v. Gaines, 3 Call, 243; Hume v. Peploe, 8 East, 168; Giles v. Hartis, 1 Ld. Raym. 254; Becker v. Boon, 61 N. Y. 317; Karthaus v. Owings, 6 Har. & J. 134; Griffin v. Tyson, 17 Vt. 35; Cullen v. Green, 5 Harr. 17; Mason v. Croom, 24 Ga. 211; Brock v. Jones, 16 Texas, 461; Clark v. Mullenix, 11 Ind. 532; De Wolf v. Long, 7 Ill. 679; Marine

the extinguishment of a lien without discharging the debt, in which case payment into court is not necessary.¹ The payment made before trial is final; the debtor cannot speculate on the effect of the evidence and add to the sum paid after the trial has begun.² If the pleadings do not object to the failure to allege payment into court the money may be paid in during the trial, and in the absence of an objection in the record the appellate court will assume that it was so paid.³

§ 275. Effect of plea of tender. The plea of tender is a conclusive admission that so much is due;⁴ and if the money is not paid into court the plaintiff may sign judgment.⁵ But the tender and plea go no further than to admit the contract or duty sued upon, and the right of the plaintiff to the sum paid in. The defendant may contest the plaintiff's right to anything beyond that sum upon any ground consistent with an admission of the original contract or transaction. He may insist upon the statute of limitations, payment beyond the sum tendered or other defense.⁶ He cannot claim in a motion for arrest of judgment that the complaint is so defective as not to

Bank v. Rushmore, 28 Ill. 463; *Webster v. Pierce*, 35 Ill. 158; *Mohn v. Stoner*, 11 Iowa, 30; *Hayden v. Anderson*, 17 id. 158; *Warrington v. Pollard*, 24 id. 281; *Jarboe v. McAtee*, 7 B. Mon. 279; *De Goer v. Kellar*, 2 La. Ann. 496; *Alexandrie v. Saley*, 14 id. 327; *Call v. Scott*, 4 Call, 402; *State v. Briggs*, 65 N. C. 159. See *Terrell v. Walker*, id. 91. And for a construction of the code of Oregon, see *Holladay v. Holladay*, 13 Ore. 523, 536.

¹ *Cass v. Higenbotam*, 100 N. Y. 248. See § 277, *post*.

² *Frank v. Pickens*, 69 Ala. 369.

A payment at the time of filing the answer will not affect the costs unless there is a specification of the amount paid on the claim and for costs. *The Good Hope*, 40 Fed. Rep. 608.

³ *Halpin v. Phenix Ins. Co.*, 118 N. Y. 165.

⁴ *Taylor v. Brooklyn E. R. Co.*, 119

N. Y. 561; *Voss v. McGuire*, 26 Mo. App. 452; *Kansas City T. Co. v. Neiswanger*, 27 id. 356; *Schnur v. Hickox*, 45 Wis. 200; *Monroe v. Chaldeck*, 78 Ill. 429; *Roosevelt v. New York & H. R. Co.*, 30 How. Pr. 226; *Currier v. Jordan*, 117 Mass. 260; *Ruble v. Murray*, 4 Hayw. 27; *Huntington v. American Bank*, 6 Pick. 340; 2 Pars. on Cont. 638, note. But see *Clarke v. Lyon Co.*, 7 Nev. 75.

⁵ *Chapman v. Hicks*, 2 Dowl. P. C. 641; *Monroe v. Chaldeck*, 78 Ill. 429. See *Knox v. Light*, 12 Ill. 86; *Sloan v. Petrie*, 16 Ill. 262; *Marine Bank v. Rushmore*, 28 Ill. 463; *Webster v. Pierce*, 35 Ill. 158; *Stow v. Russell*, 36 Ill. 35; *Reed v. Woodman*, 17 Me. 43.

⁶ *Cox v. Parry*, 1 T. R. 464; *Reid v. Dickons*, 5 B. & Ad. 499; *Meager v. Smith*, 4 id. 673; *Spalding v. Vandercook*, 2 Wend. 431; *Wilson v. Doran*, 110 N. Y. 101; *Griffin v. Harriman*, 74 Iowa, 436.

authorize the recovery of any sum.¹ It has been held that an answer under the code must allege that the money has been brought into court; and if it omits this allegation it does not state facts sufficient to constitute a defense, and the plaintiff may avail himself of the objection on the trial.² And if issue be joined on the plea of tender where the money has not [469] been brought into court, it has been held that judgment should be given for the plaintiff, notwithstanding a verdict in favor of the defendant on that issue.³ But in other cases the omission to pay the money into court has been treated as an irregularity. And if the plaintiff accept the plea and reply thereto without receiving notice that the money has been paid in he waives the irregularity.⁴

The plaintiff is entitled to the money paid into a court of law, with a plea of tender, in any event.⁵ He may take it out,

¹ *Wilson v. Chicago, etc. Ry. Co.*, 68 Iowa, 673.

² *Becker v. Boon*, 61 N. Y. 317. See last section.

The notice of payment into court after suit which is required by the New York code is not waived by failing to return an answer pleading tender before suit or to otherwise raise the question before trial. *Wilson v. Doran*, 110 N. Y. 101.

³ *Claffin v. Hawes*, 8 Mass. 261.

⁴ *Woodruff v. Trapnall*, 12 Ark. 640; *Sheriden v. Smith*, 2 Hill, 538; *Shepherd v. Wyson*, 8 W. Va. 46; *Roosevelt v. New York & H. R. Co.*, 30 How. Pr. 226. In this case the defendant set up in the answer a tender without paying the money into court. This answer was accepted, and the plaintiff afterwards applied to the court for an order requiring the defendant to pay to the plaintiff the sum tendered, under a provision of the code that "when the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the court, on motion, may order defendant to satisfy that part of the claim, and may enforce

the order as it enforces a judgment or provisional remedy." The tender was held to be such an admission. The court say: "The money tendered in this case was not paid into court, and it is to be inferred from the fact that the answer is treated as part of the pleadings that it is accepted without the money being paid in. On the facts before me I must treat the plea of tender as sufficient, although the money has not been paid into court. But if the tender was irregular for the reason stated, the admission of the justice of the plaintiff's claim would be none the less distinct and unequivocal." See, also, *Merritt v. Thompson*, 10 How. Pr. 428; *Thurston v. Marsh*, 5 Abb. 389.

⁵ *Foster v. Napier*, 74 Ala. 393; *Taylor v. Brooklyn E. R. Co.*, 119 N. Y. 561; *Kansas City T. Co. v. Neiswanger*, 27 Mo. App. 356; *Dillenback v. The Rossend Castle*, 30 Fed. Rep. 462; *Supply Ditch Co. v. Elliott*, 10 Colo. 327; *Sweetland v. Tuthill*, 54 Ill. 215. See *Ruble v. Murray*, 4 Hayw. 27.

If money paid into court in a suit for unliquidated damages is taken out in good faith by the plaintiff's

though he replies that the tender was not made before action brought.¹ But the rule that the plaintiff is entitled absolutely to the amount tendered and paid into court has been held not to apply to an action brought to recover a penalty or other fixed amount, where, unless the plaintiff recovers the amount of the penalty or fixed sum, he is not entitled to judgment.² Nor is it applicable to money paid into court by the plaintiff on a bill in equity to redeem, where the defendant for whom such money is paid successfully contests the right to redeem.³ By withdrawing money paid into court the

solicitor and paid to his client the solicitor cannot be compelled to repay it after his client's death. *Davys v. Richardson*, 21 Q. B. Div. 202.

¹ *Le Grew v. Cooke*, 1 Bos. & Pul. 332.

² *Canastota & M. Plank R. Co. v. Parkill*, 50 Barb. 601.

³ *Putnam v. Putnam*, 13 Pick. 129. In this case Shaw, C. J., said: "There is no analogy between the payment of money into court in a common-law action of debt or *assumpsit* and a like payment upon a bill in equity to redeem under our statute, and hence the authorities applicable to the former case afford no rule governing the present. By payment into court, in an action claiming debt or damages, the defendant admits, in the most formal manner, his absolute liability to that sum, and by the form of the rule or plea offers it in satisfaction and discharge of such admitted liability. If not accepted it is paid into court for the plaintiff's use, and the defendant derives the full benefit of it as if paid to and accepted by the plaintiff himself, because it operates as a bar *pro tanto* to all claims in respect to such sum. It is therefore upon the strongest reason held that such payment shall be deemed absolute, and the party shall not be permitted to draw it in

question on the ground of equity or mistake, or any ground except fraud or imposition.

"But the character of a payment of money into court on a bill in equity to redeem a mortgage is entirely different. It is in its nature entirely provisional; it is an offer to pay in discharge of a debt secured by mortgage on real estate, the purpose of which is to release such real estate from the incumbrance. But the defendant contests the right to redeem; alleges that, by force of law and the lapse of time, the mortgage is foreclosed, that she has become the absolute owner of the estate, and of course that there is no longer any debt secured by mortgage, and, consequently, that she has no claim to the money offered in satisfaction of such debt. This defense prevails, and the conclusion of law is that the defendant was right in rejecting the money tendered and not releasing the estate. She cannot now be allowed to claim this money against her own formal act showing that she has no title to it. Nor ought the plaintiffs to be bound by a provisional offer of money to redeem an estate, where it appears that they cannot redeem, and the payment cannot avail them for the only purpose for which the money was offered."

plaintiff accepts it for the purposes for which it was paid; he cannot claim that it was merely payment on account.¹

§ 276. Effect of tender when money paid into court. [470] A mere tender of a sufficient sum only has the effect to stop interest and protect the debtor against subsequent costs. It does not discharge the debt.² But when the debtor has kept the tender good, and on being sued regularly pleads it and brings the money into court, it accomplishes such discharge whether the action proceeds to judgment or not. If the [471] action abate or be withdrawn, the defendant in a subsequent action may plead the tender and payment into court in the first action; and if these facts are established he will be entitled to judgment.³

§ 277. Effect of tender on collateral securities. A sufficient tender, however, will discharge all liens and collateral securities; and for this effect it need not be kept good, nor be brought into court.⁴ Thus, where a mortgage of real estate is a mere security for the debt and the legal title remains in the mortgagor precisely the same after as before the debt is due, and until there is a foreclosure, the tender of the amount

¹ *Haeussler v. Duross*, 14 Mo. App. 108.

² *Bac. Abr.*, Tender, F.; *Coke*, Litt. 207; *Law v. Jackson*, 9 Cow. 641; *Carley v. Vance*, 17 Mass. 889; *Haynes v. Thom*, 28 N. H. 386, 400; *Barnard v. Cushman*, 35 Ill. 451; *Raymond v. Bearnard*, 12 Johns. 274; *Coit v. Houston*, 3 Johns. Cas. 243; *Jackson v. Law*, 5 Cow. 248; *Cornell v. Green*, 10 S. & R. 14. See *Jeter v. Littlejohn*, 8 Murph. 186; *Staat v. Evans*, 35 Ill. 455; *Teass' Adm'r v. Boyd*, 29 Mo. 181; *Wheeler v. Woodward*, 66 Pa. St. 158; *Pennsylvania Co. v. Dovey*, 64 id. 260; *Dixon v. Clark*, 5 C. B. 865; *Waistell v. Atkinson*, 3 Bing. 289; *Johnson v. Triggs*, 4 G. Greene, 97; *Freeman v. Fleming*, 5 Iowa, 460; *Shant v. Southern*, 10 id. 415; *Mohn v. Stoner*, 11 id. 30; *Hayward v. Munger*, 14 id. 516.

³ *Robinson v. Gaines*, 8 Call, 243. See *Warder v. Arell*, 2 Wash. (Va.)

282. *Keys v. Roder*, 1 Head, 19, was an action of debt commenced in a justice's court. It was held that a mere offer by the defendant to the plaintiff of the sum claimed before the issuance of the warrant could not be pleaded as a valid tender in bar of the action. The money should have been produced and offered also at the time of the trial before the justice; and upon appeal to the circuit court, it should have been brought into that court at the time of filing the papers, and still held ready and produced as a continuous offer. A mere offer of the amount to the plaintiff by the defendant's counsel, in the progress of the argument in the circuit court, was not sufficient.

⁴ *Willard v. Harvey*, 5 N. H. 252; *Swett v. Horn*, 1 id. 832; *Maynard v. Hunt*, 5 Pick. 240.

due after the law day and before foreclosure will discharge the mortgage; and if the mortgagee is in possession the mortgagor may recover in ejectment.¹ But to establish a tender and refusal such as will discharge the lien of a mortgage without the tender being kept good, the proof must be clear that the tender was fairly made and deliberately and intentionally refused by the owner of the mortgage, and that sufficient opportunity was afforded to ascertain the amount due; at least it should appear that a sum was absolutely and unconditionally tendered sufficient to cover the whole amount due.² Though the tender be sufficient, yet if the mortgagor asks for affirmative relief, even for extinguishment of the lien, he must do equity; this obliges him to keep the tender good; he must pay the amount equitably due the mortgagee.³ Where the incidents attached to a mortgage of real estate are those which prevailed at the common law, the mortgagee having an estate on condition which becomes absolute by reason of non-payment on the day named, a tender will not discharge the lien unless it is made punctually and is kept good.⁴ A tender will discharge a mechanic's lien for the repair of personal prop-

¹ Kortright v. Cady, 21 N. Y. 343; S. C., 5 Abb. 358; Jackson v. Crafts, 18 Johns. 110; Edwards v. Farmers' F. Ins. & L. Co., 21 Wend. 467; Farmers' F. Ins. & L. Co. v. Edwards, 26 id. 541; Arnot v. Post, 6 Hill, 65; Post v. Arnot, 2 Denio, 344; Tiffany v. St. John, 5 Lans. 153; S. C., 65 N. Y. 314; Hartley v. Tatham, 1 Robt. 246; S. C., 1 Keyes, 222; Trimm v. Marsh, 54 N. Y. 599; McDaniels v. Reed, 17 Vt. 674; Eslow v. Mitchell, 26 Mich. 500; Caruthers v. Humphrey, 12 id. 270; Van Huse v. Kanouse, 13 id. 303; Saltus v. Everett, 20 Wend. 267; Salinas v. Ellis, 26 S. C. 337; Thornton v. Nat. Exchange Bank, 71 Mo. 221. See Harris v. Jex, 66 Barb. 232; Merritt v. Lambert, 7 Paige, 344; Ketchum v. Crippen, 37 Cal. 223; Bryan v. Maume, 28 Cal. 238; Wilson v. Keeling, 1 Wash. (Va.) 194; Werner v. Tuch, 52 Hun, 269.

² Tuthill v. Morris, 81 N. Y. 94; Parks v. Allen, 42 Mich. 82; Jewett v. Earle, 53 N. Y. Super. Ct. 849; Waldron v. Murphy, 42 Mich. 668.

³ Tuthill v. Morris, 81 N. Y. 94; Landis v. Saxton, 89 Mo. 375. See Salinas v. Ellis, 26 S. C. 337.

⁴ Crain v. McGoon, 86 Ill. 431; Matthews v. Lindsay, 20 Fla. 962; Schearff v. Dodge, 33 Ark. 340; Alexander v. Caldwell, 61 Ala. 543; Greer v. Turner, 36 Ark. 17; Currier v. Gale, 9 Allen, 523; Holman v. Bayley, 8 Met. 55; Phelps v. Sage, 2 Day (Conn.), 151; Shields v. Lozeau, 84 N. J. L. 496; Rowell v. Mitchell, 68 Me. 21; Storey v. Krewson, 55 Ind. 397; Collins v. Robinson, 33 Ala. 91; Slaughter v. Swift, 67 id. 494; Frank v. Pickens, 69 id. 369; Tompkins v. Batie, 11 Neb. 147.

erty;¹ an attorney's lien;² a pledge or mortgage of personal property;³ the right to distrain for rent;⁴ and will re- [472] lease a surety.⁵

Whether a judgment which is a lien on land, or under which an execution has been levied, will be discharged by a tender is not very clearly settled. It has been held that to make a tender effectual for this purpose the money should be brought into court and the judgment satisfied of record. Being a debt of record, and a tender not discharging it, the lien being a legal consequence, must subsist while the debt continues in that form.⁶ But the weight of reason, if not authority, is in favor of holding an execution lien discharged by a tender the same as a conventional lien would be. In each case the lien exists as a collateral advantage to the creditor. It is incidental to the debt. In each case, if the lien is not satisfied, there is a power to sell. Payment will extinguish one as well as the other.⁷

A plea of tender should conclude by praying judgment [473] whether the plaintiff ought to recover any damages by rea-

¹ *Moynahan v. Moore*, 9 Mich. 9.

² *Stokes on Lien of Att'ys*, 81, 172; *Jones v. Tarleton*, 9 M. & W. 675; *Scarfe v. Morgan*, 4 id. 280; *Irving v. Viana*, 2 Y. & Jer. 71.

³ *Loughborough v. McNevin*, 74 Cal. 250; *McCalla v. Clark*, 55 Ga. 53; *Wildman v. Radenaker*, 20 Cal. 615; *Ball v. Stanley*, 5 Yerg. 199; *Cooley v. Weeks*, 10 id. 141; *Coggs v. Bernard*, 2 Ld. Raym. 909; *Comyn's Dig.*, tit. Mortgage, A. But not after the day it is due. *Tompkins v. Batie*, 11 Neb. 147. See *Frank v. Pickens*, 69 Ala. 369.

⁴ *Hunter v. Le Conte*, 6 Cow. 728; *Davis v. Henry*, 63 Miss. 110.

⁵ *Spurgeon v. Smitha*, 114 Ind. 453; *Joslyn v. Eastman*, 46 Vt. 258; *White v. Life Ass'n of America*, 63 Ala. 419; *McQuesten v. Noyes*, 6 N. H. 19; *Sailly v. Elmore*, 2 Paige, 497; *Fisher v. Stockebrand*, 26 Kan. 565; *Hayes v. Josephi*, 26 Cal. 535; *Solomon v. Reese*, 34 id. 28. Compare *Clark v.*

Sickler, 64 N. Y. 231; *Second Nat. Bank v. Poucher*, 56 id. 348.

⁶ *Jackson v. Law*, 5 Cow. 248; *Law v. Jackson*, 9 id. 641; *Halsey v. Flint*, 15 Abb. 367. See *Shumaker v. Nichols*, 6 Gratt. 592; *Flower v. Elwood*, 66 Ill. 447, 449; *Redington v. Chase*, 34 Cal. 666. But see also *Mason v. Sudam*, 2 Johns. Ch. 172; *Tiffany v. St. John*, 5 Lans. 153; S. C., 65 N. Y. 314.

⁷ *Tiffany v. St. John*, 65 N. Y. 314. In this case Dwight, C., said: "There is, undoubtedly, a stage in a proceeding in an action where property is in the custody of the law, that a tender will not destroy the lien, as that might interfere with the proper disposition of the case. After the action is over, and judgment obtained, and execution levied, the case becomes clearly assimilated to that of an ordinary lien; and if tender is made and not accepted the lien will be extinguished. This distinction

son of the non-payment of the sum alleged to have been tendered.¹ If upon the trial the sum tendered and brought into court is found by the jury to be less than was due at the

was settled as far back as the time of Lord Coke, and is clearly stated in the Six Carpenters' Case (8 Coke, 146a). The point there discussed was the effect of a tender in the case of a distress for rent, or of cattle doing damage — an instance of a lien created by the act of the law. Coke considers the distinction between a tender made upon the land before distress, after the distress and before impounding, after impounding and before the determination of the litigation, and contrasts these with a tender made after the law has determined the rights of the parties. He says: 'Note, reader, this difference: that tender upon the land before the distress makes the distress tortious; tender after the distress and before the impounding makes the detainer, and not the taking, wrongful; tender after the impounding makes neither one nor the other wrongful, for then it comes too late, because then the cause is put to the trial of the law, to be there determined. But after the law has determined it, and the avowant has return irreplevisable, yet if the plaintiff makes him a sufficient tender he may have an action of detinue for the detainer after, or he may, upon satisfaction made in court, have a writ for the redelivery of his goods.' He adds: 'And therewith agree all the books, and Pelkington's Case, in the fifth part of my reports (fol. 76), and so all the books which, *prima facie*, seem to disagree, are, upon full and pregnant reason, well reconciled and agreed.'

"There is here a clear statement of the principle applicable to the case

at bar. Here the law has already determined the right which has become final in analogy to the 'return irreplevisable' of Lord Coke, and the tender having been made and refused, if it were sufficient in amount, an action of replevin in the *detinet* will lie in analogy to the action of *detinue* referred to by him. It should also be observed that Lord Coke's rule provides that the owner of goods has his election to make an application to the court for relief.

"The defendant cites in opposition to these views the case of Jackson v. Law, 5 Cow. 248; S. C., 9 id. 641. That case, however, has no bearing upon the present controversy. The point there decided was that a tender of money due upon a judgment by a junior judgment creditor did not discharge it, nor take away the lien of the senior judgment creditor upon lands, but that the latter might still redeem upon his judgment within the terms of the statute applicable to that subject. The ground of this decision briefly was that a judgment, being a debt of record, is not discharged by a tender, and it is, in no case, the effect of a tender to discharge the debt. The judgment could only be extinguished by actual satisfaction. As long as it remained in force, it must, by its very nature, as prescribed by statute, be a lien on the land. If its existence continued it could not be deprived of its ordinary and usual characteristics. The case is very different with a pledge or mortgage, or lien of any kind collateral to the debt. To this class of collateral liens an execution belongs,

¹ Karthaus v. Owings, 6 Har. & J. 184.

time of the tender the verdict and judgment should be for the whole amount of the plaintiff's demand, without any deduction on account of the money brought into court. The defendant, however, is entitled to the benefit of the payment by indorsement upon the judgment or execution.¹

§ 278. **Paying money into court.** A practice was [474] introduced into England in the time of Charles II. of paying money into court where no previous tender had been made. This is supposed to have been adopted to avoid the hazard and difficulty of pleading a tender.² The money was paid in on a rule of court, and thereafter the plaintiff proceeded for more at the hazard of paying subsequent costs. The amount paid in was stricken from the declaration, and no evidence given of that part of the claim.³ It was at first required to be paid in before plea, but later was allowed afterwards by withdrawing the plea. The rule allowing the defendant to pay money into court was granted generally on condition of paying costs, directing that sum to be stricken out of the declaration, if refused by the plaintiff, and for that sum that no evidence be received on the trial. This reduced the controversy to the *quantum* of damages; and the consequence was that if the plaintiff did not prove a greater sum due than that paid in, a verdict passed for the defendant and he had judgment for subsequent costs. If the plaintiff proved that more was due, he had a verdict and judgment for the balance and subsequent costs.⁴ The payment of money into court was proved by production of the rule.⁵ But when the tender is found sufficient and the money has been brought into court the verdict should be for the defendant.⁶

and on general principles a tender destroys it. Even in the case of a judgment a tender may have such an effect as to make it inequitable to enforce the lien; and a court of equity may set aside a sale under it as irregular and void. *Mason v. Sudam*, 2 Johns. Ch. 172." See *Crozer v. Pilling*, 6 D. & R. 129.

¹ *Dakin v. Dunning*, 7 Hill, 80; *Huntington v. Zeigler*, 2 Ohio St. 10; *Bennett v. Odom*, 80 Ga. 940; *Baker*

v. Gasque, 8 Strobb. 25; *Reed v. Woodman*, 17 Me. 43; 1 Tidd's Pr. 569.

² 2 Arch. Pr. 199; *Boyden v. Moore*, 5 Mass. 365; *Reed v. Woodman*, 17 Me. 43.

³ *Id.*

⁴ 1 Bac. Abr. 473c. See *Ruble v. Murray*, 4 Hayw. 27.

⁵ *Id.*

⁶ *Pennypacker v. Umberger*, 22 Pa. St. 492. In *Hill v. Smith*, 34 Vt.

SECTION 6.

STIPULATED DAMAGES.

[475] § 279. **Contracts to liquidate damages valid.** After damages have been sustained an agreement to pay such sum therefor as shall be ascertained in a particular way is binding.¹ And parties in making contracts are at liberty to stipulate the amount which shall be paid by either to the other as compensation for the anticipated actual loss or injury which they foresee or concede will result from a breach if it should occur.² Without express statutory authority officers who are authorized by law to make contracts for a state or municipality have power to fix a sum as liquidated damages for their violation.³ The sum designated in the contract or subsequently agreed upon becomes, on the happening of the event on which its payment depends, the precise sum to be recovered, and the jury are confined to it.⁴ Nor will equity relieve from the payment of it.⁵ As will more fully appear hereafter, there are limitations on the power thus to contract. As a general rule, where the injury resulting from the breach of a contract is susceptible of definite measurement, as where the breach consists in the non-payment of money, the parties will not be sustained in the enforcement of stipulations for a further sum, whether in the form of a penalty or liquidated damages; but

535, the defendant, before the new counts, upon which alone the plaintiff recovered, were filed, paid into court a sum of money sufficient to satisfy all the damages the plaintiff could have recovered under the original declaration and costs to the time of such payment, and the plaintiff took the money; it was held that in the absence of proof that the plaintiff took it in satisfaction of his claim, he was not thereby precluded from filing new counts and recovering an additional sum thereon.

¹ Longridge v. Dorville, 5 B. & Ald. 117. See Hosmer v. True, 19 Barb. 106.

² Holmes v. Holmes, 12 Barb. 137; Fasler v. Beard, 39 Minn. 32.

³ Little v. Banks, 86 N. Y. 258; Parr v. Greenbush, 42 Hun, 232.

⁴ Welch v. McDonald, 85 Va. 500; Stanley v. Montgomery, 102 Ind. 102; Lowe v. Peers, 4 Burr. 2225; Beale v. Hayes, 5 Sandf. 640; Tardeveau v. Smith's Ex'r, Hardin, 175. See Bradshaw v. Craycraft, 3 J. J. Marsh. 79; Keeble v. Keeble, 85 Ala. 552.

⁵ Wibaux v. Grinnell Live Stock Co., 9 Mont. 154, 162; 2 Story's Eq. § 1818; 3 Lead. Cas. in Eq. 671 *et seq.*; Westerman v. Means, 12 Pa. St. 97; Downey v. Beach, 78 Ill. 53.

where the damages sustained are uncertain and not susceptible of being reduced to a certainty by a legal computation they may be determined before a breach occurs.¹

§ 280. Damages can be liquidated only on a valid contract. A valid contract must exist on which damages could be recovered. If void for not being in writing,² or if impeached for fraud,³ the stipulation for damages will share the fate of the contract. And it has been held that an agreement to pay a sum as liquidated damages in case a court in which an action was pending should fail to make an order containing a specified provision is void, for being against public policy, or in the nature of a wager.⁴

§ 281. Modes of liquidating damages. The stipula- [476] tion for the adjustment of the amount of damages is usually embraced in the contract for the violation of which they are to be paid; but not always so. A deposit may be made with a third person or with the party, of money, a note, or something else of value to be paid, delivered over or retained on the happening of the breach.⁵ Agreements are of this nature and valid which provide a particular method of proof; as that

¹ *Fasler v. Beard*, 39 Minn. 32; *Whitfield v. Levy*, 85 N. J. L. 149.

² *Newman v. Perrill*, 73 Ind. 153; *Scott v. Bush*, 26 Mich. 418.

³ *Wambaugh v. Bimer*, 25 Ind. 368. See *Fruin v. Crystal Ry. Co.*, 89 Mo. 397.

⁴ *Cowdrey v. Carpenter*, 1 Robt. 429. A party to an action for the foreclosure of a mortgage of real estate on assigning a junior mortgage of only a part of the premises stipulated with his assignee that the order of sale should direct the property not covered by the junior mortgage to be first sold for the payment of the mortgage being foreclosed; it was held that, the stipulation being void, the assignee could not recover the liquidated damages specified in it upon its breach by the making of an order without the designated provision. See *Voorhees v. Reed*, 17 Ill. App. 21.

⁵ *Wallis v. Smith*, 21 Ch. Div. 243; *Lea v. Whitaker*, L. R. 8 C. P. 70; *Magee v. Lavell*, 9 id. 107; *Swift v. Powell*, 44 Ga. 123; *Kellogg v. Curtis*, 9 Pick. 634; *Stillwell v. Temple*, 28 Mo. 156; *Reilly v. Jones*, 1 Bing. 302; *Betts v. Burch*, 4 H. & N. 506; *Hinton v. Sparkes*, L. R. 3 C. P. 160.

In *White v. Dingley*, 4 Mass. 433, the plaintiff had given the defendant a license for two years, and covenanted not to sue him within that time, and that if he should sue him he should be wholly discharged from the claim. The creditor brought suit in violation of the covenant, and the debtor was imprisoned upon the writ, whereupon he brought suit upon the covenant for damages. It was held that the action could not be maintained; the forfeiture was a liquidation of the damages. *Upham v. Smith*, 7 Mass. 265.

In an action to recover damages

property covered by insurance, if afterwards destroyed by [477] fire, shall be estimated by a particular standard,¹ or by a designated person.²

§ 282. **Alternative contracts.** These are such as by their terms may be executed by doing either of several acts at the election of the party from whom performance is due. Completion in one of the modes is a performance of the entire contract, and no question of damages arises. Such a contract, therefore, is not one for liquidated damages.³ Where by the condition of a bond the obligor might, by paying \$600 in twelve or \$400 in six months, become the owner of a patent right for a specified district, or otherwise should account for a certain share of the profits, he had a choice of those alternatives for those periods.⁴ Stipulating the damages and promis-

for breaking up a highway the defendant gave the plaintiff a *cognovit* to confess judgment for £200, with a defeasance that no execution should issue if the defendant, within a limited time, should reinstate the road according to certain specifications. The road not being completely reinstated within the time prescribed, the plaintiff sued out execution and levied the £200 and costs. Held, that the £200 was in the nature of a penalty, and not of stipulated damages; and the court referred it to a prothonotary to ascertain what damages the plaintiff had actually sustained, and what sum he was entitled to recover from the defendant for his failure to reinstate the road. *Charrington v. Laing*, 3 M. & P. 587.

Where the intention of the parties is potential, the circumstance that the sum is deposited with a stakeholder to be paid over, or in the hands of the opposite party, with stipulation that it is to be forfeited in the event of a breach, is pointed out as stronger evidence of an intention to make it liquidated damages than the words or nature of the contract otherwise would. *Magee v. Lavell*, L. R. 9 C. P.

107; *Betts v. Burch*, 4 H. & N. 508; *Hinton v. Sparkes*, L. R. 3 C. P. 160; *Wallis v. Smith*, 21 Ch. Div. 243.

A contract which provides that if it shall be broken by either of the parties to it the party who commits the breach shall pay such sum as the other party would have received if it had been observed, and that the average yearly receipts shall be the basis on which the sum to be paid shall be determined, does not provide for liquidated damages, but fixes the basis on which the actual damages shall be ascertained. *Tufts v. Atlantic Tel. Co.*, 151 Mass. 269.

¹ *Ætna Ins. Co. v. Johnson*, 11 Bush, 537; *Commonwealth Ins. Co. v. Sennett*, 37 Pa. St. 208; *Lycoming Ins. Co. v. Mitchell*, 48 id. 367; *Bodine v. Glading*, 21 id. 50; *Irving v. Manning*, 6 C. B. 391.

² *Faunce v. Burke*, 16 Pa. St. 479; *Robinson v. Cropsey*, 2 Edw. Ch. 138; *Wells v. Smith*, id. 78; *Barnet v. Passumpsic T. Co.*, 15 Vt. 757; *City Bank v. Smith*, 3 G. & J. 265.

³ *Smith v. Bergengren*, 153 Mass. 236.

⁴ *McNitt v. Clark*, 7 Johns. 465; *Fisher v. Shaw*, 42 Me. 32; *Slosson v.*

ing to pay them in case of a default in the performance of an otherwise absolute undertaking do not constitute an alternative contract.¹ The promisor is bound to perform his contract, though there is generally a practical option to violate it and take the consequences; but he is not entitled to an election to pay the liquidated damages and thus discharge himself. A party agreed to pay \$350 for certain real estate, and paid down a small part. On full performance the promisee was to procure for the promisor, as purchaser, a deed from a third person; it was also agreed that if the purchaser should fail to perform the contract or any part of it, he should pay the other party \$25 as liquidated damages, and immediately surrender possession. A tender of that sum and of possession was made before suit brought for the remainder of the purchase-money, and it was unsuccessfully contended in behalf of the purchaser that he was entitled by the terms of [478] the contract to relieve himself by those acts from its obligation.² On entering the service of a bank the defendant executed a bond in the penal sum of 1,000*l.*, its condition being that it should be void if he discharged his duties in the manner stipulated, and if he should pay the plaintiffs a like sum in case he should at any time within two years after leaving their service accept employment in any other bank within a distance of two miles. This condition was violated. It was held that the obligation could not be satisfied by paying the sum mentioned; there was an agreement implied from the bond that the defendant should not enter the service of a rival bank, which agreement would be enforced by a court of

Beadle, 7 Johns. 72; Mercer v. Irving, 1 E. B. & E. 563; Reynolds v. Bridge, 6 E. & B. 528; Choice v. Moseley, 1 Bailey, 136.

¹ Stewart v. Bedell, 79 Pa. St. 336; People v. Central P. R. Co., 76 Cal. 29, 34; Crane v. Peer, 43 N. J. Eq. 553, quoting the text and examining a large number of cases. Compare Hahn v. Concordia Society, 42 Md. 460. And see Indianola v. Gulf, etc. Ry. Co., 56 Texas, 594.

² Ayres v. Pease, 12 Wend. 393; Phoenix Ins. Co. v. Continental Ins.

Co., 14 Abb. (N. S.) 266; Long v. Bowring, 33 Beav. 585; Howard v. Hopkyns, 2 Atk. 371; Dike v. Greene, 4 R. I. 285; Dooley v. Watson, 1 Gray, 414; Gray v. Crosby, 18 Johns. 219; Sainter v. Ferguson, 7 C. B. 716; Hobson v. Trevor, 2 P. Wms. 191; Chilliner v. Chilliner, 2 Ves. Sr. 528; Ingledew v. Cripps, 2 Ld. Raym. 814; Preble v. Boghurst, 1 Swanst. 580; Sloman v. Walter, 1 Brown Ch. 418; Lampman v. Cochran, 16 N. Y. 275; Ward v. Jewett, 4 Robt. 714; Robeson v. Whitesides, 16 S. & R.

equity.¹ Such courts may enforce performance, or enjoin those acts that would be a violation,² but in such cases the equitable is an elective, not a cumulative, remedy. Before granting such relief equity will require the plaintiff to forego the legal claim to the stipulated damages.³

§ 283. Liquidated damages contradistinguished from penalty. The most important and difficult question in respect to a sum stated in connection with a breach of contract is whether it is liquidated damages or penalty. If the latter, it is not an actual debt; it cannot be recovered, but only the real damages, which have to be proved; and the statement of the agreement in the contract is of very little consequence. If the former, it is the precise sum to be recovered on proof of a breach of the undertaking to which it refers, and no evidence of the manner and extent of the real injury, if it is beyond nominal, is necessary.⁴ The decision of this question is often intrinsically difficult, for judicial opinions, in the numerous cases on the subject, are very inharmonious; they furnish no universal test or guide. But, as was said by Christiancy, J.: "While no one can fail to discover a very great amount of apparent conflict, still it will be found on examination that most of the cases, however conflicting in appearance, have yet been decided according to the justice and equity of the particular case."⁵ "The question whether a sum named in a contract to be paid for a failure to perform," said Earl, J., "shall be regarded as stipulated damages or a penalty, has been frequently before the courts, and has given them much trouble. The cases cannot all be harmonized, and they furnish conspicuous examples of judicial efforts to make for parties wiser

320; Robinson v. Bakewell, 25 Pa. St. & W. 269; Long v. Bowring, 33 Beav. 424; Cartwright v. Gardner, 5 Cush. 585.

¹ National Provincial Bank v. Marshall, 40 Ch. Div. 112.

² Cases cited in the two preceding notes.

³ Howard v. Hopkyns, 2 Atk. 371; 1 Story's Eq., §§ 717a, 793f; 3 Par. on Cont. 356, note g; Gordon v. Brown, 4 Ired. Eq. 399; Dooley v. Watson, 1 Gray, 414; French v. Macale, 2 Drury

⁴ St. Louis, etc. Ry. Co. v. Shoemaker, 27 Kan. 677; Hathaway v. Lynn, 75 Wis. 186; Spicer v. Hoop, 51 Ind. 365.

The qualification that the damages must be more than nominal is held in the Wisconsin case cited. We regard the proposition as a doubtful one. *Contra*, Kelso v. Reid, 145 Pa. 606.

⁵ Jaquith v. Hudson, 5 Mich. 123.

and more prudent contracts than they have made for themselves. Courts of law have, in some cases, assumed the functions of courts of equity, and have relieved parties by forced and unnatural constructions from stipulations highly penal. Where an amount stipulated as liquidated damages would be grossly in excess of the actual damages, they have leaned to hold it a penalty. Where the actual damages were uncertain and difficult of ascertainment, they have leaned to hold the stipulated amount to have been intended as liquidated damages. No form of words has been regarded as controlling. But the fundamental rule, so often announced, is that the construction of these stipulations depends, in each case, upon the intent of the parties, as evidenced by the entire agreement construed in the light of the circumstances under which it was made.”¹

It has been often declared judicially that a stipulation [479] in a contract for the payment of a stated sum, in the event of a breach, should be interpreted, like all its other provisions, with a view to carrying into effect the intention of the parties. Referring to this subject Nelson, C. J., said: “A court of law possesses no dispensing power; it cannot inquire whether the parties have acted wisely or rashly in respect to any stipulation they may have thought proper to introduce into their agreements. If they are competent to contract, within the prudential rules the law has fixed as to parties, and there has been no fraud, circumvention or illegality in the case, the court is bound to enforce the agreement.”² Best, C. J., said at *nisi prius*: “The law relative to liquidated damages has always been in a state of great uncertainty. This has been

¹ *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 45; *Lennon v. Smith*, 14 Daly, 520. The question whether the amount stated in a conditional bond or contract is to be taken as a penalty or a liquidation of damages arising from a breach of the condition is to be determined by the intention of the parties, drawn from the words of the whole contract, examined in the light of its subject-matter and its surroundings; and in this examination will be considered the rela-

tion which the sum stipulated bears to the extent of the injury which may be caused by the several breaches provided against, the ease or difficulty of measuring a breach of damages, and such other matters as are legally or necessarily inherent in the transaction. The concurrent declarations of the parties are inadmissible, except to show mistake or fraud. *March v. Allabough*, 103 Pa. St. 335.

² *Dakin v. Williams*, 17 Wend. 447.

occasioned by judges endeavoring to make better contracts for parties than they have made for themselves. I think that parties to contracts, from knowing exactly their own situations and objects, can better appreciate the consequences of their failing to obtain those objects than either judges or juries. Whether the contract be under seal or not, if it states what shall be paid by the party who breaks it to the party to whose prejudice it is broken, the verdict in the action for the breach of it should be for the stipulated sum. A court of justice has no more authority to put a different construction on the part of the instrument ascertaining the amount of damages than it has to decide contrary to any other of its clauses."¹ Equally emphatic language is to be found in other cases.³

Such views have but a limited practical application. And cases abound in which strong language of a different tenor is employed. "They mistake," says Scott, J., "the object and temper of our system of jurisprudence, who, while maintaining that men in making all contracts have a right to stipulate for liquidated damages regardless of the disproportion to the sum resulting from a breach of the contract, insist that it would be hard if men were not permitted to make their own bargains. No system of laws would demand our respect, or [480] secure our willing obedience, which did not to some extent provide against the mischiefs resulting from improvidence, carelessness, inexperience and undue expectations on one side, and skill, avarice and a gross violation of the principles of honesty and fair dealing on the other. The folly of one making a wild and reckless stipulation will not justify gross oppression in another. A just man, when he sees one in a situation in which he is prepared to make a contract which must grind and oppress him, will not take advantage of his state of mind and enrich himself by his folly and want of experience. It has been remarked that in reason, in conscience, in natural equity, there is no ground to say because a man has stipulated for a penalty in case of his omission to do a particular act — the real object of the parties being the perform-

¹ *Crisdee v. Bolton*, 8 C. & P. 240. *Clement v. Cash*, 21 N. Y. 258; *Yetter*

² *Dwinel v. Brown*, 54 Me. 468; *v. Hudson*, 57 Texas, 604.

Brewster v. Edgerly, 13 N. H. 275;

ance of the act — that if he omits to do the act he shall suffer an enormous loss, wholly disproportionate to the injury to the other party.”¹

The intention of parties on this subject, under the artificial rules that have been adopted, is determined by very latitudinarian construction.² To be potential and controlling that a stated

¹ *Basye v. Ambrose*, 28 Mo. 89; *Jaquith v. Hudson*, 5 Mich. 123; *Schrimpf v. Tennessee Manuf. Co.*, 86 Tenn. 219.

² “In determining whether an amount named in a contract is to be taken as penalty or liquidated damages, courts are influenced largely by the reasonableness of the transaction, and are not restrained by the form of the agreement nor by the terms used by the parties, nor even by their manifest intent. Where the contract has expressly designated the amount named as liquidated damages, courts have held that it was a penalty; and conversely, where the contract has called it a penalty, it has been held to be liquidated damages; and again, where the parties have manifestly supposed and intended that an exorbitant and unconscionable amount should be forfeited, the courts have carried out the intent only so far as it was right and reasonable.” *Davis v. United States*, 17 Ct. of Cls. 201, 215.

The term “estimated damages” is equivalent to “liquidated damages.” *Gallo v. McAndrews*, 29 Fed. Rep. 715. The words “shall act as a forfeiture and shall be forfeited” have been construed to provide for liquidated damages. *Eakin v. Scott*, 70 Texas, 442. “To forfeit” is equivalent to “to pay.” *Streeper v. Williams*, 48 Pa. St. 450. “Forfeiture” is synonymous with “penalty.” *Muldoon v. Lynch*, 66 Cal. 536. But it will be presumed, in order to effectuate the intention of the parties, that the

word “forfeit” was used in a conversational sense. *Maxwell v. Allen*, 78 Me. 82; *Lynde v. Thompson*, 2 Allen, 456. A penalty is not necessarily to be understood from the use of the word “forfeit;” the circumstances must be considered. *Claude v. Shepard*, 122 N. Y. 397, 400; *Chatterton v. Crothers*, 9 Ontario, 683; *Tinkham v. Satori*, 44 Mo. App. 659. Nor is an instrument using the words “penalty” and “forfeit” to be always construed as providing for a penalty. *Lipscomb v. Seegers*, 19 S. C. 425, 434. In other cases “penalty” and “forfeit” have been given their usual signification. *Bagley v. Peddie*, 16 N. Y. 469; *Laurea v. Bernauer*, 33 Hun, 307. A penalty is implied from the language “and each party is hereby held and fully bound in the sum of \$300 for the faithful fulfillment of the above contract.” *Moore v. Colt*, 127 Pa. St. 289. A clause in a charter-party by which the parties bind themselves “in the penal sum of estimated amount of freight” is a penalty. *Watts v. Camors*, 115 U. S. 353. But if the sum is mentioned as a penalty and the instrument uses the words “which sum is hereby named as stipulated damages,” the latter expression will control. *Tode v. Gross*, 22 N. Y. St. Rep. 813; S. C., 4 N. Y. Suppl’t, 402; *Ward v. Hudson River B. Co.*, 24 N. Y. St. Rep. 847; S. C., 5 N. Y. Suppl’t, 319. And so where the language is that the parties “bind themselves in the penal sum” of “as fixed and settled damages to be paid by the failing

sum is liquidated damage, that sum must be fixed as the basis of compensation and substantially limited to it; for just compensation is recognized as the universal measure of damages not punitive. Parties may liquidate the amount by previous

party." *Parr v. Greenbush*, 43 Hun, 232. The use of the words "liquidated damages" will not control the construction if the court can find in the whole instrument reason to doubt that it was the intention of the parties to so contract. *Bagley v. Peddie*, 16 N. Y. 469; *Wolf v. Des Moines Ry. Co.*, 64 Iowa, 880; *Ex parte Pollard*, 2 Low. 411; S. C., 17 Nat. Bank. Reg. 229; *Condon v. Kemper*, 47 Kan. 126.

In *Pierce v. Jung*, 10 Wis. 80, Paine, J., said: "The opinions on this subject are conflicting. On the one hand, they lean towards treating such provisions as in the nature of penalties, and to do so have sometimes disregarded the positive and implicit language of the parties. On the other, they go for upholding contracts as made, treating the parties as equally competent to provide for the amount of damages to be paid in case of a failure to perform as to determine any other matter contained in them. The case of *Astley v. Weldon*, 2 Bos. & Pul. 346, and *Kemble v. Farren*, 6 Bing. 141, are strong illustrations of the first class; and in *Crisdee v. Bolton*, 3 C. & P. 240, the opposite doctrine is very clearly stated. But even the first class of cases concede the power of the parties to liquidate the damages by their agreement in case of a non-performance. And they profess also to go upon the intention of the parties. And perhaps the only real difference between the two is that the former takes greater liberties than the latter with the words of the parties in determining what the intention is. They pay more attention to the whole nature and object of the agreement

than to the precise words in determining whether the intent was to create a penalty or provide for liquidated damages."

In *Beale v. Hayes*, 5 Sandf. 640, Duer, J., said: "It is not always, however, that damages are to be construed as liquidated because the parties have declared them to be so. The language of the parties (to the agreement in question) is clear and emphatic that the sum of £3,000 shall be recoverable from the party making default as and for liquidated damages; yet no court of justice, without an entire disregard of prior decisions, can give effect to the apparent intention of the parties by adopting that construction of their agreement which the terms they have used so forcibly suggest. . . . When consequences so unreasonable would follow, the law presumes that they must have been overlooked by the parties, and therefore mercifully gives to their language an interpretation which excludes them. When it would be plainly unconscientious to exact a large sum for a trivial breach, even a court of law, acting upon a principle of equity, will release the parties from the literal obligation which their language imports."

In *Jaquith v. Hudson*, 5 Mich. 123, Christiancy, J., said: "It is true the courts in nearly all these cases profess to be construing the contract [482] with reference to the intention of the parties, as if for the purpose of ascertaining and giving effect to that intention; yet it is obvious from these cases that wherever it has appeared to the court from the face of

agreement. But when a stipulated sum is evidently not based on that principle, the intention to liquidate will either be found not to exist or will be disregarded and the stated sum treated as a penalty. Contracts are not made to be broken; and hence,

the contract and the subject-matter that the sum was clearly too large for just compensation, here, while they will allow any form of words, even those expressing the direct contrary, to indicate the intent to make it a penalty, yet no form of words, no force of language, is competent to the expression of the opposite intent. Here, then, is an intention incapable of expression in words; and as all written contracts must be expressed in words, it would seem to be a mere waste of time and effort to look for such an intention in such a contract. And as the question is between two opposite intents only, and the *negation* of one necessarily implies the *existence* of the *other*, there would seem to be no room left for construction with reference to the intent. It must, then, be manifest that the intention of the parties in such cases is not the governing consideration.

“But some of the cases attempt to justify this mode of construing the contract with reference to the intent, by declaring in substance that though the language is the strongest which could be used to evince the intention in favor of stipulated damages, still, if it appear clearly by reference to the subject-matter that the parties have made the stipulation without reference to the principle of just compensation, and so excessive as to be out of all proportion to the actual damage, the court must hold that they could not have intended it as stipulated damages though they have so expressly declared. See, as an example of this class of cases, *Kemble v. Farren*, 6 Bing. 141.

“Now this, it is true, may lead to the same result in the particular case as to have placed the decision upon the true ground, viz: that though the parties actually intended the sum to be paid as the damages agreed between them, yet it being clearly unconscionable, the court would disregard the intention and refuse to enforce the stipulation. But, as a rule of construction or interpretation of contracts, it is radically vicious and tends to a confusion of ideas in the construction of contracts generally. It is this, more than anything else, which has produced so much apparent conflict in the decisions upon this whole subject of penalty and stipulated damages. It sets at defiance all rules of interpretation, by denying the intention of the parties to be what they in the most unambiguous terms have declared it to be, and finds an intention directly opposite to that which is clearly expressed — ‘*divinatio, non interpretatio est, quæ omnino recedit a litera.*’

“Again, the attempt to place this question upon the intention of the parties, and to make this the governing consideration, necessarily implies that if the intention to make the sum stipulated damages should clearly appear the court would enforce the contract according to that intention. To test this, let it be asked whether in such a case if it were admitted that the parties actually *intended* the sum to be considered as *stipulated damages* and *not* as penalty, would a court of law enforce it for the amount stipulated? Clearly, they could not, without going back to the technical and long-exploded doctrine

when parties provide for the consequences of a breach, they proceed with less caution than if that event was certain, and they were fixing a sum to be paid absolutely. The intention in all such cases is material; but to prevent a stated sum from

which gave the whole penalty of the bond, without reference to the damages actually sustained. They would thus be simply changing the *names* of things, and enforcing *under the name of stipulated damages* what in [483] its *own nature* is but a *penalty*.

"The real question in this class of cases will be found to be, not what the parties *intended*, but whether the sum is *in fact in the nature* of a penalty; and this is to be determined by the magnitude of the sum, in connection with the subject-matter, and not at all by the words or the understanding of the parties. The intention of the parties cannot alter it. While courts of law gave the penalty of the bond, the parties intended the payment of the penalty as much as they now intend the payment of stipulated damages; it must, therefore, we think, be very obvious that the actual intention of the parties in this class of cases and relating to this point is wholly immaterial; and though the courts have very generally professed to base their decisions upon the intention of the parties, that intention is *not* and *cannot be made the real basis of these decisions*. In endeavoring to reconcile these decisions with the actual intention of the parties, the courts have sometimes been compelled to use language wholly at war with any idea of interpretation, and to say 'that the parties must be considered as not meaning exactly what they say.' Horner v. Flintoff, 9 M. & W. 678, per Parke, B. May it not be said, with at least equal propriety, that courts have sometimes *said* what they *did not exactly mean*? The foregoing remarks are

all to be confined to that class of cases where it was clear from the sum mentioned and the subject-matter that the principle of compensation had been disregarded."

In Dwinel v. Brown, 54 Me. 468, the defendant had bound himself, in the event of a failure to perform each and every condition and stipulation represented in a certain license and agreement for carrying on a lumbering operation upon the plaintiff's land, "in the full and liquidated sum of \$1,000 well and truly to be paid," on demand, "over and above the actual damages" which should be sustained by the non-performance. Dickerson, J., said: "The question presented for our determination is whether the sum named in the contract to be paid by the defendant on his failure to fulfill its conditions is penalty or liquidated damages. It is competent for the parties in making a contract to leave the damages arising from a breach of its provisions to be determined in a court of law, or to specify the amount of such damages in the contract itself. If the contract is silent in respect to damages, the law will allow only the actual or proximate damages. In order, however, to provide for consequential damages or secure the profits which are expected to arise from business, or contracts that depend upon the performance of the principal contract, or to save expense, or to render certain what would otherwise be difficult if not impossible to ascertain, it is sometimes desirable that the contract should fix the amount of damages. If, for instance, a party has a con-

being treated as a penalty the intention should be apparent to liquidate damages in the sense of making just compensation; it is not enough that the parties express the intention

tract for building a ship at a large profit, conditioned upon his having her completed at a specified time, it would be competent for him in contracting for the material to make the damages, in case of breach, sufficient to cover his prospective profits in building the ship. While to persons unacquainted with the circumstances [484] stances the damages stipulated in such a contract might seem greatly disproportionate to the loss sustained by a breach of it, they might, in fact, be insufficient to indemnify the party against the loss he might sustain by being prevented from completing the ship according to his contract. The parties themselves best know what their expectations are in regard to the advantages of their undertaking, and the damages attendant on its failure, and when they have mutually agreed upon the amount of such damages in good faith and without illegality, it is as much the duty of the court to enforce that agreement as it is the other provisions of the contract. As in construing the other parts of the contract, so in giving construction to the stipulation concerning damages, the intention of the parties governs. The inquiry is, what was the understanding of the parties; and when it is said in judicial parlance that certain language of the parties is held to mean liquidated damages and certain other language a penalty, this is affirmed of the intention of the parties, and not of the construction of the court, in contradistinction from such intention. It is the province of the court to uphold existing contracts, not to make new ones. It is not for the court to sit in judgment

upon the wisdom or folly of the parties in making a contract when their intention is clearly expressed, and there is no fraud or illegality. No judges, however eminent, can place themselves in the place or position of the parties when the contract is made, scan the motives and weigh the considerations which influenced them in the transaction so as to determine what would have been best for them to do; who was least sagacious, or who drove the best bargain. Courts of common law cannot, like courts where the civil law prevails, award such damages as they may deem reasonable, but must allow the damages, whether actual or estimated, as agreed upon by the parties. The bargain may be an unfortunate one for the delinquent party, but it is not the duty of courts of common law to relieve parties from the consequences of their own improvidence, where these contracts are free from fraud and illegality.

"The controversy in the courts, whether the particular language of a contract in regard to damages is to be construed as a penalty or liquidated damages, arises mainly from a desire to relieve parties from what, under a different construction, is assumed to be an imprudent and absurd agreement. When, however, it is considered how little courts know of the modifying circumstances of the case, how far the particular provision was framed with reference to the personal feelings of the parties, what fluctuations in the market were anticipated at the time and what effect the contract in question was expected to have upon other business engagements or negotia-

that the stated sum shall be paid in case of a violation of the contract. A penalty is not converted into liquidated damages by the intention that it shall be paid; it is intrinsically a dif-

tions, there is perhaps less cause for departing from the literal construction of the language used than might at first view be supposed. These considerations should at least admonish us that in straining the language of a contract to prevent a seeming disadvantage to one of the parties, we *may* impose upon the other party the very hardships which both intended to protect him against by the terms of their agreement. The interests of the public are quite as likely to be subserved in maintaining the inviolability of contracts as they are in contriving ways and means to make a contract mean [485] what is not apparent upon the face of it to save a party from some conjectural inequity growing out of his supposed inadvertence or improvidence." The judge stated three rules upon which he said the courts are substantially agreed, and the *third* he stated as follows: "If the instrument provides for the payment of a larger sum in future to pay a less sum, the larger will be regarded as penalty in respect to the excess over the legal interest whatever the language used; and if the contract consist of several stipulations, the damages for the breach of which independently of the sum named in the instrument are uncertain and cannot well be ascertained, the sum agreed upon is to be treated as liquidated damages. *Orr v. Churchill*, 1 H. Bl. 227; *Astley v. Weldon*, 2 B. & P. 346; *Mead v. Wheeler*, 13 N. H. 851; *Atkins v. Kinnier*, 4 Exch. 776. . . .

"In the case at bar the defendant bound himself 'in the full and liquidated sum of \$1,000 over and above

the actual damages' in the event of his failure to do and perform each and every condition and stipulation in his contract. Language can scarcely make the intention of the parties to fix the amount of the damages more clear and emphatic. The sum is not only 'liquidated,' but, as if to exclude all possibility of its being a penalty, it is declared to be 'over and above the actual damages.' Whether it was to afford an additional stimulus to secure the fulfillment of the contract, or to provide against all other losses, or compensate for other advantages contingent upon this contract, or from the difficulty of ascertaining the actual damages, or for some other reason, it is manifest that other damages than the legal damages were taken into the account by the parties when they incorporated this provision in their agreement. Besides, the contract contains several distinct conditions and requirements for the fulfillment of which, respectively, no sum is specified; and it is impossible to ascertain such damages from the very nature of these stipulations. What actual damages would result to the plaintiff solely from the defendant's omission to land the logs at a suitable place, or to notify the scaler seasonably, or to mark the logs, or drive them as early as practicable, or to cut clear without waste, or to perform the dozen other stipulations of the contract, is practically beyond the power of a judicial tribunal to ascertain with anything like accuracy. The case clearly comes within the second clause of the third rule of interpretation, that when parties incorporate several distinct stipulations

ferent thing, and the intention that it shall be paid cannot alter its nature. A bond, literally construed, imports an intention that its penalty shall be paid if there be default in

in a contract, the breach of which cannot be respectively measured, they must be taken to have meant that the sum agreed upon was to be liquidated damages and not a penalty. That such was the intention of the parties, moreover, as drawn from the particular language of the contract upon this point, cannot admit of a doubt."

The stipulation in this case is so expressed that it would seem not to have been intended to provide the fixed sum, in lieu of actual damages difficult of proof, but a comminatory sum in addition. The dissenting opinion of Appleton, C. J., is believed to contain a sounder exposition of the contract and the law applicable to it: "In case of a contract damages are the pecuniary satisfaction to which the injured party is entitled by way of compensation for its breach. *Liquidated damages are damages agreed upon by the parties, as and for a compensation for and in lieu of the actual damages arising from such breach.* They may exceed or fall short of the actual damages—but the sum thus fixed and determined binds the parties to such agreement. When this sum is paid all damages are paid. In the case at bar the sum of \$1,000 was not liquidated damages. It was not for damages at all. The contract so expressly and unqualifiedly states it. It was a sum 'over and above the actual damages.' The plaintiff, by its terms, was further entitled to recover the 'actual damage' which he might sustain by 'the non-performance of any agreement hereinafter contained.' Suppose the actual damages were \$5,000, would not the plaintiff

be entitled to recover that sum? Most assuredly. The actual damages are therefore excluded from the sum of \$1,000, and yet remain to be assessed. . . . Liquidated damages are fixed, settled and agreed upon in advance, to avoid all litigation as to those actually sustained. They are a compensation for and in lieu of actual damages, never in addition thereto. The language of the agreement leaves no room for any other conclusion than that the sum fixed is a penalty. It is not for damages by the terms of the contract. It is not, therefore, a sum agreed upon in liquidation of damages, but is a penalty and so must be regarded." *Gowen v. Gerrish*, 15 Me. 273; *Gammon v. Howe*, 14 Me. 250.

In *Chamberlain v. Bagley*, 11 N. H. 234, Upham, J., said: "Courts, from a desire to avoid cases of seeming hardship, have in many instances made decisions disregarding the evident intent and design of the parties to contracts; and a variety of reasons have been assigned for this course. . . . We see no reason why contracts of this kind should not be judged of by the same rules of construction as other contracts; or why a technical, restricted meaning should be given to particular phrases without reference to other portions of the instrument to learn the design of the parties. The modern decisions upon this subject have turned on the construction of the agreement according to the general intent. In *Reilly v. Jones*, 8 Moore, 244, it is said that where it may be fairly collected that the intent of the parties was that the damages stipulated for, as between themselves, were to be

the performance of the condition; and formerly that was the legal effect. Courts of law now, however, administer the same equity to relieve from penalties in other forms of con-

considered as liquidated they cannot be treated as a penalty although they might operate as such in a popular sense. . . . The words forfeit or forfeiture, penal sum or penalty, have in some instances been regarded as furnishing a very strong, if not conclusive, indication of the intention of the parties in an instrument of this description; but the weight to be given to such phraseology will depend entirely on its connection with other parts of the instrument. If an individual promises to pay the damage which may be incurred *under* a given penalty, or *under* a forfeiture, the *damage* only in such case is agreed to be paid. On the other hand, the penalty may be expressly agreed to be paid in such terms as to admit of no doubt that such was the intent of the parties; and where such is the case, notwithstanding it may be named as a forfeiture, or the parties are spoken of as bound in a certain sum, if it was clearly the design of the parties that such sum should [487] be paid, it is holden in the more modern decisions as liquidated damages."

In *Brewster v. Edgerly*, 18 N. H. 275, the same doctrine is affirmed. Gilchrist, J., said: "Many of the decisions of the judicial tribunals heretofore have been based upon what is now admitted to be an insecure foundation; for the judgments have often proceeded not upon the plainly expressed intention of the parties in a case free from fraud or illegality, but upon the view which the court entertained of what would have been on the whole just, considering such circumstances as were proved to exist. The dangerous uncertainty of

such a mode is manifest when the impossibility of placing any other person in the exact condition of the parties at the time the contract was made is considered. Many motives influence them, many considerations weigh with them which no other person could understand and appreciate unless he could thoroughly identify himself with the parties; and when the contract, reasonably construed, has a plain meaning that one party shall, in a certain contingency, pay the other party a definite sum, thus relieving him from that liability and making the contract mean something which on its face is not apparent, by assuming that we can place ourselves in the position of the parties, and can then know precisely what would have been equitable for them to do, is nothing else than a rescission of their contract, and a substitution for it of one made by the court. This result the cautious policy of the common law has never recognized as within its powers, nor have the courts ever in terms claimed the right to produce it; still it has sometimes been effected by the anxious desire of the tribunals that the law should not be made the instrument of injustice; forgetting sometimes, perhaps, in this laudable zeal that one of the greatest evils in the administration of justice, and one which brings numberless others in its train, is that feeling of social insecurity which will exist whenever the inviolability of contracts is trenched upon, however pure might have been the motive for so doing." The court seem inclined to think *Kemble v. Farren*, 6 Bing. 141, a case of liquidated damages by reason of the ob-

tract as from those in bonds. The evidence of an intention to measure the damage, therefore, is seldom satisfactory when the amount stated varies materially from a just estimate of

vious intent of the parties as expressed in the contract. *Mead v. Wheeler*, 13 N. H. 851.

But in *Davis v. Gillett*, 52 N. H. 126, Foster, J., said: "The substance of these principles (laid down by Sedgwick in his treatise on the Measure of Damages) is that the language of the agreement is not conclusive; and that the effort of the tribunal called to put a construction upon it will be to ascertain the true intent of the parties and to effectuate that intent. In order to do this courts will not be absolutely controlled by terms that may seem to be quite definite in their meaning, but will be at liberty to consider and declare a sum mentioned in the bond to be a penalty, even although it may be denominated liquidated damages, and *vice versa*, if manifest justice requires that a construction opposite to the expressed language of the instrument should be adopted. In such cases the court do not assume (as they certainly could not) to make a new contract for the parties; but they conclude that the parties have incorrectly and inconsiderately expressed their intention. The court, therefore, ascertain the intention and then give it effect to it"

[488] In *Williams v. Dakin* (court of errors), 22 Wend. 201, Walworth, J., said: "There is undoubtedly a class of cases in which courts have been in the habit of considering a certain specified sum as penalty, whatever may be the language of the agreement. Such is the case whenever such specified sum is evidently intended as a mere collateral security for the payment of a different sum which is the real debt; or where it

was evidently intended to be in the nature of a mere penalty; and there is another class where from the language of the agreement it was difficult to ascertain what the parties really intended, in which the courts have taken the reasonableness of the provision as liquidated damages into consideration for the purpose of determining whether it was intended as such or only as a comminatory sum."

In *Cotheal v. Talmage*, 9 N. Y. 551, the court recognize it as a general rule that courts in acting upon these stipulations should carry into effect the intent of the parties; but there is an intimation that this rule may be departed from when the party might be made responsible for the whole amount of damages supposed to be stipulated for breach of an unimportant part of his contract; "and so be made to pay a sum by way of damages grossly disproportionate to the injury sustained."

In *Lampman v. Cochran*, 16 N. Y. 275, a sum specially named in an agreement as "liquidated damages," in case either party shall fail to perform the contract, was nevertheless held a penalty, because on the face of the instrument it appeared that such sum would necessarily be an inadequate compensation for the breach of some of the provisions, and more than enough for the breach of others. The court say: "The parties to this contract must be regarded as having given a wrong name to the sum of \$500, and that it is in substance a penalty, and not liquidated damages."

In *Colwell v. Lawrence*, 88 N. Y. 71, Miller, J., said: "One of the rules of construction established is that

the actual loss finally sustained.¹ If a contract provides for a penalty for the breach of some of its provisions it must be regarded as so providing if there is a breach of them all; as

the courts are to be governed by the intention of the parties to be gathered from the language of the contract itself and from the nature of the circumstances of the case. And in all the cases the courts have treated it as a question as to the intention of the parties." In that case a contract had been made to build and place in a steamboat two steam-engines of a particular description on or before a day specified for \$8,000, and to have the same ready for steam on or before that day "under a forfeiture of \$100 per day for each and every day after the above date until the same is completed as above." Held, the amount being large and grossly disproportionate to the actual damage, it was not a reasonable inference that it was agreed on as liquidated damages.

In *Clement v. Cash*, 21 N. Y. 253, Wright, J., said: "When the sum fixed is greatly disproportioned to the presumed actual damage, probably a court of equity may relieve; but a court of law has no right to erroneously construe the intention of parties when clearly expressed, in the endeavor to make better contracts for them than they have made for themselves. In these, as in all other cases, the courts are bound to ascertain and carry into effect the true intent of the parties. I am not disposed to deny that a case may arise in which it is doubtful, from the language employed in the instrument, whether the parties meant to agree upon the measure of compen-

sation to the injured party in case of a breach. In such cases there would be room for construction, but certainly none where the meaning of the parties was evident and unmistakable. When they declare, in distinct and unequivocal terms, that they have settled and ascertained the damages to be \$500, or any other sum, to be paid by the party failing to perform, it seems absurd for a court to tell them that it has looked into the contract and reached the conclusion that no such thing was intended, but that the intention was to name a sum as a penalty to cover any damages that might be proved to have been sustained by a breach of the agreement; still, certain rules have crept into the law that are supposed to control the construction of contracts of this character, until in the view of some it has become difficult, if not impossible, to support an agreement for liquidated damages in cases where the amount ascertained by the parties seems disproportionate to the conjectured actual damage." *Rolf v. Peterson*, 2 Brown, P. C. 470.

If the sum would be very enormous and excessive, considered as liquidated damages, it should be taken to be a penalty though agreed to be paid. Lord Eldon, C. J., laments, in *Astley v. Weldon*, 2 B. & P. 346, the adoption of such a principle. *Hoag v. McGinnis*, 22 Wend. 163, per Cowen, J.; *Spencer v. Tilden*, 5 Cow. 144 and note; *Bagley v. Peddie*, 5 Sandf. 192; *Berry v. Wisdom*, 3 Ohio St. 241; *Esmond v. Van Ben-*

¹ *Scofield v. Tompkins*, 95 Ill. 190; *Myer v. Hart*, 40 Mich. 517; *Muldoon v. Lynch*, 66 Cal. 536, quoting the text and pronouncing it a clear state-

ment of the result of the decisions; *Glasscock v. Rosengrant*, 55 Ark. 376; *Condon v. Kemper*, 47 Kan. 126, quoting the text.

where the damages resulting from the breach of some of its stipulations are capable of being ascertained. It cannot provide for a penalty as to those and for liquidated damages as to the other clauses, though the consequences of their breach are uncertain.¹

§ 284. **The evidence and effect of intention to liquidate.** A bond is *prima facie* a penal obligation; but the sum [489] stated where a penalty is usually inserted has sometimes been held liquidated damages.² This has seldom been done, however, unless words were employed in connection with that sum to countervail the implication of penalty.³ And where the parties in any other form of contract designate the stated sum a penalty, or characterize it by other equivalent words, it is an indication that a penalty, in a strict or technical sense, is intended;⁴ but the inference is not so strong because the

schoten, 12 Barb. 366; Nash v. Hermosilla, 9 Cal. 585; Bright v. Rowland, 3 How. (Miss.) 398; Shreve v. Brereton, 51 Pa. St. 175; Streeper v. Williams, 48 id. 450; Powell v. Burroughs, 54 id. 329; Moore v. Anderson, 30 Tex. 224; Chase v. Allen, 13 Gray, 42; Gowen v. Gerrish, 15 Me. 273; Leggett v. Mutual L. Ins. Co., 53 N. Y. 394; Dennis v. Cummins, 3 Johns. Cas. 297; Hamilton v. Overton, 6 Blackf. 206; Lea v. Whitaker, L. R. 8 C. P. 70; Streeter v. Rush, 25 Cal. 67.

¹ Lansing v. Dodd, 45 N. J. L. 525; Whitfield v. Levy, 39 id. 149; Laurea v. Bernauer, 33 Hun, 307.

² Studabaker v. White, 21 Ind. 212; Fisk v. Fowler, 10 Cal. 512; Duffy v. Shockey, 11 Ind. 70.

It is not to be regarded as a universal rule that contracts in the ordinary form of penal bonds, designed as an indemnity between private persons for the non-performance of collateral agreements, are to be regarded as a penalty. It cannot correctly be said to be true in all such cases that the intention to treat the sum named in the bond as a penalty

to secure the performance of the condition and to be discharged on payment of damages arising from non-performance can be inferred as a rule of law or a conclusive presumption from the mere form of the obligation. Clark v. Barnard, 108 U. S. 436, 453. See *ante*, n. to 283.

³ Cotheal v. Talmage, 9 N. Y. 551; Shiell v. McNitt, 9 Paige, 101; Leary v. Laffin, 101 Mass. 334; Smith v. Wedgwood, 74 Me. 457.

If a bond which stipulates that the obligor shall abide by the determination of arbitrators contains no express agreement that the sum named in it is to be regarded as liquidated damages, and there is no evidence of an intention that it should be so stated, such sum will be regarded as a penalty. Henry v. Davis, 123 Mass. 345.

⁴ Dill v. Lawrence, 109 Ind. 564; March v. Allabough, 103 Pa. St. 335; Whitfield v. Levy, 35 N. J. L. 149; Yenner v. Hammond, 36 Wis. 277; Tayloe v. Sandiford, 7 Wheat. 13; White v. Arleth, 1 Bond, 319; Smith v. Dickenson, 3 B. & P. 630; Davies v. Penton, 6 B. & C. 216; Harrison v.

[490] obligation is in the form of a bond as may be inferred from the greater number of instances in which a sum called a penalty or forfeiture by the parties in contracts has been held, nevertheless, liquidated damages. The tendency and preference of the law is to regard a stated sum as a penalty, because actual damages can then be recovered, and the recovery be limited thereto.¹ This tendency and preference, however, do not exist where the actual damages cannot be ascertained by any standard. A stipulation to liquidate in such cases is considered favorably.² If the amount is not so large as to raise a doubt that it is proportionate to the injury, other circumstances being equal, it is believed the tendency of the judicial mind is to treat a fixed sum as liquidated damages by whatever name it may be mentioned in the contract.³ But wherever there is doubt as to the justice of the stipulation, if the sum be called a "penalty" in the contract, that circumstance is frequently referred to as a reason for holding it to be a penalty, on the ground of intention. The purpose in such cases, however, is commonly a deduction from the general effect of the contract, and the word "penalty" is alluded to to confirm a foregone conclusion.⁴ On the other hand, if the general effect of the contract otherwise leads to the con-

Wright, 13 East, 343; Brown v. Bel-
lows, 4 Pick. 179; Burr v. Todd, 41
Pa. St. 206; Robinson v. Cathcart, 2
Cranch C. C. 590; Bigony v. Tyson,
75 Pa. St. 157; Esmond v. Van Ben-
schoten, 12 Barb. 366; Clement v.
Cash, 21 N. Y. 253; Cheddick v.
Marsh, 21 N. J. L. 463; Hodges v.
King, 7 Met. 583; Salters v. Ralph,
15 Abb. 273; Bearden v. Smith, 11
Rich. 554; Heatwole v. Gorrell, 35
Kan. 692. Compare the last case
with Streeter v. Rush, 25 Cal. 67.

¹ Fisk v. Gray, 11 Allen, 132; Lan-
sing v. Dodd, 45 N. J. L. 525; Whit-
field v. Levy, 35 id. 149; Burrill v.
Daggett, 77 Me. 545; Smith v. Wedg-
wood, 74 id. 458; Henry v. Davis, 123
Mass. 345; Shute v. Taylor, 5 Met. 61;
Wallis v. Carpenter, 18 Allen, 19;
Cheddick v. Marsh, 21 N. J. L. 463;

Baird v. Tolliver, 6 Humph. 186;
Spear v. Smith, 1 Denio, 464.

² Jaquith v. Hudson, 5 Mich. 123;
Duffy v. Shockey, 11 Ind. 70; Spar-
row v. Paris, 7 H. & N. 594; Pierce v.
Jung, 10 Wis. 30; Cotheal v. Tal-
mage, 9 N. Y. 551; Boys v. Ancell, 5
Bing. N. C. 390; Richards v. Edick,
17 Barb. 260; Noyes v. Phillips, 60
N. Y. 408; Harris v. Miller, 6 Saw-
yer, 319; Knowlton v. Mackay, 29
Up. Can. C. P. 601; Iverson v.
Althrop, 1 Wyo. 71; Williams v.
Vance, 9 S. C. 344; Birdsall v.
Twenty-third St. Ry. Co., 8 Daly, 419.

³ Id.; Maxwell v. Allen, 78 Me. 32;
Holbrook v. Tobey, 66 id. 410; Lynde
v. Thompson, 2 Allen, 456.

⁴ Houghton v. Pattee, 58 N. H. 326;
Mathews v. Sharp, 99 Pa. St. 560;
Colwell v. Lawrence, 38 N. Y. 75.

clusion that the stipulated sum should be held to be a penalty, the circumstance that the parties have called it "liquidated damages," and said they do not mean it as penalty, and [491] even use very clear language that it is to be actually paid, will not control the interpretation; it will, notwithstanding, be considered a penalty.¹ Bonds given to secure the erection of public works pursuant to statutes are to be regarded as penal because it cannot be supposed that it was the intention of the legislature to fix the damages in every case for each and every breach of the contracts the bonds were given to secure the performance of, regardless of the resulting injury.² The penalty of a druggist's bond given to assure his observance of the law is not to be considered as liquidated damages.³ And so of bonds usually given to secure the performance of statutory duties.⁴

§ 285. **Stipulated sum where damages otherwise certain or uncertain.** There is a marked difference between contracts which relate to subjects within established rules for measuring damages, and those for infraction of which the damages are uncertain and difficult to be proved. A stipulated sum in a contract of the former class is generally unnecessary unless to restrict damages below the legal standard or extend them beyond it. The parties have the right to do either; and when the intention is clearly manifested to do so, it will be enforced in cases clear of fraud, oppression or unconscionable extravagance.⁵ But in such cases the disparity

¹ Higbie v. Farr, 28 Minn. 439; Horner v. Flintoff, 9 M. & W. 678; Dennis v. Cummins, 8 Johns. Cas. 297; Lindsay v. Anesley, 6 Ired. 188; Baird v. Tolliver, 6 Humph. 186; Jenner v. Hammond, 36 Wis. 277; Lampman v. Cochran, 16 N. Y. 275.

² Nevada County v. Hicks, 38 Ark. 557.

³ State v. Estabrook, 29 Kan. 789.

⁴ Clark v. Barnard, 108 U. S. 436; United States v. Montell, Taney, 47. See People v. Central P. R. Co., 76 Cal. 29.

⁵ Nielson v. Read, 15 Phila. 450;

S. C., 12 Fed. Rep. 441; Gallo v. McAndrews, 29 Fed. Rep. 715; Lipscomb v. Seegers, 19 S. C. 425.

In Cutler v. How, 8 Mass. 257, a party being liable to have his property taken to satisfy an execution, gave an obligation to pay the debt, and a certain amount for costs not incurred, in oats at twenty cents per bushel, when they were worth thirty-seven cents. It was held that the jury might disregard the contract because unconscionable and oppressive as to the sum added for costs; but otherwise valid, because within a specified time the debtor had the

between the agreed sum and the actual injury is readily seen, and may be supposed to have been equally apparent to the parties; and courts, proceeding upon the rational theory which all experience confirms, that large damages for small injury are never willingly stipulated to be actually paid, nor a small and disproportionate compensation accepted for a great injury, are seldom convinced that such unequal contracts are voluntarily entered into to liquidate damages. Of this nature are contracts for the payment of money, and all others [492] for the violation of which market values furnish the *data* ordinarily adequate for the ascertainment of due compensation. When such contracts provide for damages, either more or less than those due by the legal standard, they must be drawn with great clearness to express the intention; and in general there should appear on their face or otherwise some ground for departing from that standard; for the leaning of the court in case of doubt will be towards the construction that the provision is a penalty.¹ On the other hand, where a contract is of such a character that the damages which must result from a breach of it are uncertain in their nature and not susceptible of proof by reference to any pecuniary standard, it is deemed especially fit that the parties should liquidate them, and any stipulation they make ostensibly for that purpose receives favorable consideration.²

option to pay money at the rate of \$1 for five bushels. *Cutler v. Johnson*, 8 Mass. 266; *Baxter v. Wales*, 12 id. 365; *Leland v. Stone*, 10 id. 459; *James v. Morgan*, 1 Levinz, 111; *Earl of Chesterfield v. Jansen*, 1 Wils. 287; *Russell v. Roberts*, 3 E. D. Smith, 318.

In an action brought on a promise of £1,000 if the plaintiff should find the defendant's owl, the court declared, though the promise was proved, the jury might mitigate the damages. *Bac. Abr., Damages, D.* See *Thornborow v. Whitacre*, 2 Ld. Raym. 1164.

¹ *Lansing v. Dodd*, 45 N. J. L. 525; *Tinkham v. Satori*, 44 Mo. App. 659; *Fisk v. Gray*, 11 Allen, 132; *Baird v.*

Tolliver, 6 Humph. 186; *Foote v. Sprague*, 13 Kan. 155; *Tholen v. Duffy*, 7 id. 405; *Kurtz v. Sponable*, 6 id. 395.

² *Waggoner v. Cox*, 40 Ohio St. 539; *Berrinkott v. Traphagen*, 39 Wis. 219; *Wooster v. Kisch*, 26 Hun, 61; *Jones v. Binford*, 74 Me. 439; *Geiger v. Western Maryland R. Co.*, 41 Md. 4; *Pennsylvania R. Co. v. Reichert*, 58 id. 261, 277; *Wolf Creek Diamond Coal Co. v. Schultz*, 71 Pa. St. 180; *Kemble v. Farren*, 6 Bing. 141; *Sainter v. Ferguson*, 7 C. B. 716; *Fletcher v. Dyche*, 2 T. R. 32; *Sparrow v. Paris*, 7 H. & N. 594; *Mundy v. Culver*, 18 Barb. 336; *Bagley v. Peddie*, 16 N. Y. 469; *Dakin v. Williams*, 17 Wend. 447; *Knapp v. Maltby*.

§ 286. **Contracts for the payment of money.** These are contracts of the highest degree of certainty. Interest is the universal measure of damages for delay of payment.¹ But some latitude is allowed for modifying the rate by contract. Stipulations as to rate before maturity, not exceeding any statutory limit, are uniformly enforced in cases free from fraud or oppression. There is no reason why a party may not stipulate the rate after maturity as freely and effectually as before, except that such stipulations are made with less caution, for they are made only to be operative in case of default, an event not then anticipated to occur. When, therefore, the rate is made very much higher immediately after maturity than that reserved before, there is a departure from the standard of compensation fixed by the parties for the period of credit, and it has been held in some cases that [493] such increased rate as damages is in the nature of a penalty;² and in other cases that anything above the legal rate is a penalty, even though parties are by law at liberty to stipulate for any rate of interest proper without restriction.³ But the general current of authority is that any rate which parties may lawfully agree to pay before maturity may be fixed as the rate afterwards, though the debt, before it becomes due, bears no interest or a lower rate.⁴ If, however, a rate is fixed for in-

18 Wend. 587; *Price v. Green*, 16 M. & W. 346; *Jaquith v. Hudson*, 5 Mich. 123; *Cotheal v. Talmage*, 9 N. Y. 551; *Dennis v. Cummins*, 3 Johns. Cas. 297.

¹ *Orr v. Churchill*, 1 H. Black. 227; *Fisk v. Gray*, 11 Allen, 132; *Watkins v. Morgan*, 6 C. & P. 661; *Hughes v. Fisher*, Walk. (Miss.) 516.

² *Waller v. Long*, 6 Munf. 71. In *Astley v. Weldon*, 2 B. & P. 346, Heath, J., said: "It is a well-known rule in equity that if a mortgage covenant be to pay 5*l.* per cent., and if the interest be paid on certain days then to be reduced to 4*l.* per cent., the court will not relieve if the early days be suffered to pass without payment; but if the covenant be to pay

4*l.* per cent., and if the party do not pay at a certain time it shall be raised to 5*l.* per cent. there the court of chancery will relieve." See *Gully v. Remy*, 1 Blackf. 69; *Herbert v. Salisbury*, etc. Ry. Co., L. R. 2 Eq. 221; *Aylet v. Dodd*, 2 Atk. 238; *Watts v. Watts*, 11 Mo. 547.

³ *Mason v. Callender*, 2 Minn. 350; *Talcott v. Marston*, 3 id. 339; *Daniels v. Ward*, 4 id. 168; *Robinson v. Kinney*, 2 Kan. 184; *Watkins v. Morgan*, 6 C. & P. 661.

⁴ *Palmer v. Leffler*, 18 Iowa, 125; *Phinney v. Baldwin*, 16 Ill. 108; *Fisher v. Bidwell*, 27 Conn. 863; *Downey v. Beach*, 78 Ill. 53; *Funk v. Buck*, 91 Ill. 575; *Wernwag v. Mothershead*, 3 Blackf. 401; *Latham v. Dar-*

terest as damages which is above the highest that may be reserved by agreement to be paid during the period of credit, it is not usurious, because the debtor can at any time relieve [494] himself by payment.¹ But such excessive rate will be held a penalty if it exceeds any which the law recognizes as compensation.² In Illinois even a rate above that allowed by law to be contracted for before maturity may be fixed as liquidated damages after maturity, if not intended as an evasion of the statute against usury.³ No damages for the mere non-payment of money can be so liquidated between the parties as to evade that statute.⁴

Where there are special circumstances which require punctuality in the payment of moneys when due, or which cause special loss, or necessitate a particular outlay in consequence of default, a stipulated forfeiture on that default equity has refused to relieve against, and stipulated compensations therefor have been sanctioned. Thus costs and expenses of making collection, including attorney's fees, are sometimes imposed on the debtor by the terms of the contract, and when reason-

ling, 2 Ill. 203; Young v. Fluke, 15 Up. Can. C. P. 360; Witherow v. Briggs, 67 Ill. 96; Davis v. Rider, 53 Ill. 416; Brewster v. Wakefield, 22 How. (U. S. 118); Wyman v. Cochran, 35 Ill. 152; Gould v. Bishop Hill Colony, 35 Ill. 324; Lawrence v. Cowles, 13 Ill. 577; Smith v. Whitaker, 23 Ill. 367; Young v. Thompson, 2 Kan. 83; Dudley v. Reynolds, 1 Kan. 285; Wilkinson v. Daniels, 1 Greene (Iowa), 179; Taylor v. Meek, 4 Blackf. 388. See title Interest.

¹ Lawrence v. Cowles, 13 Ill. 577; Gould v. Bishop Hill Colony, 35 Ill. 324; Davis v. Rider, 53 Ill. 416; Witherow v. Briggs, 67 Ill. 96; Wilday v. Morrison, 66 Ill. 532; Cutler v. How, 8 Mass. 257; Call v. Scott, 4 Call, 402; Wilson v. Dean, 10 Iowa, 432; Gower v. Carter, 3 Iowa, 244; Moore v. Hylton, 1 Dev. Eq. 433;

Campbell v. Shields, 6 Leigh, 517; Gambril v. Doe, 8 Blackf. 140; Fisher v. Otis, 3 Pin. (Wis.) 78; Shuck v. Wight, 1 G. Greene (Iowa), 128; Wight v. Shuck, Morris (Iowa), 425; Fisher v. Anderson, 25 Iowa, 28; Jones v. Berryhill, id. 299; Rogers v. Sample, 33 Miss. 310; Roberts v. Tremayne, Croke's James, 507; Floyer v. Edwards, 1 Cowp. 112; Wells v. Girling, 1 Brod. & Bing. 447; Caton v. Shaw, 2 H. & G. 13; Bac. Abr., title Usury.

² Gower v. Carter, 3 Iowa, 244; Shuck v. Wight, 1 G. Greene (Iowa), 128; Wilson v. Dean, 10 Iowa, 432; Wight v. Shuck, Morris (Iowa), 425.

³ Smith v. Whitaker, 23 Ill. 367; Downey v. Beach, 78 Ill. 53; Funk v. Buck, 91 Ill. 575.

⁴ Orr v. Churchill, 1 H. Black. 227; Gray v. Crosby, 18 Johns. 219.

able in amount have been sustained as valid in some states,¹ but held void as against public policy in others.²

§ 287. Same subject. Where there is a stipulation in [495] public undertakings that shareholders, on non-payment of

¹ *Peyser v. Cole*, 11 Ore. 89; *Imler v. Imler*, 94 Pa. St. 372; *Darly v. Maitland*, 88 id. 384 (the amount provided as attorney's fee in a mortgage is rather in the nature of a penalty than stipulated damages, and may be reduced); *Miner v. Paris Exchange Bank*, 53 Texas, 559; *Parham v. Pulliam*, 5 Cold. (Tenn.) 497; *Smith v. Silvers*, 82 Ind. 321; *First Nat. Bank v. Larsen*, 60 Wis. 206 (the stipulation is not conclusive as to the amount to be recovered); *Robinson v. Loomis*, 51 Pa. St. 78; *Huling v. Drexell*, 7 Watts, 126; *Fitzsimons v. Baum*, 44 Pa. St. 32; *M'Allister's Appeal*, 59 Pa. St. 204; *Tallman v. Truesdell*, 8 Wis. 443; *Mosher v. Chapin*, 12 id. 453; *Billingsley v. Dean*, 11 Ind. 331; *Kuhn v. Myers*, 37 Iowa, 351; *Nelson v. Everett*, 29 id. 184; *Williams v. Meeker*, id. 292; *Wilson S. M. Co. v. Moreno*, 6 Sawyer, 35; *Bank of British North America v. Ellis*, id. 96; *Merck v. American Freehold L. M. Co.*, 79 Ga. 213, 233; *Reed v. Miller*, 1 Wash. St. 426.

² *State v. Taylor*, 10 Ohio, 368; *Shelton v. Gill*, 11 id. 417; *Witherspoon v. Musselman*, 14 Bush (Ky.), 214; *Bullock v. Taylor*, 39 Mich. 137; *Dow v. Updike*, 11 Neb. 95.

In *Foote v. Sprague*, 18 Kan. 155, a stipulation in a mortgage for \$50 as liquidated damages for its foreclosure was held void. *Valentine, J.*, said: "The stipulation in the mortgage in this case . . . is for a certain sum to be paid by the debtor as liquidated damages over and above the debt and interest and all legitimate costs. Now what was the term 'liquidated damages' in this mortgage designed to cover? If

it was designed to cover attorney fees, why did not the parties say so in the mortgage? If it was designed to cover any legitimate charge or expense, why did they not say so? . . . If the damages were for usurious interest they could not be allowed. And would it be proper to allow an issue to be framed and a trial had to determine whether these 'liquidated damages' were intended to cover some legitimate charge or expense, or to cover usurious interest?"

In *Johnsons v. Anderson*, 8 N. J. L. 983, the defendant was indebted to the plaintiff in the sum of \$500; and the plaintiff was indebted to two other persons in the sum of \$100, which would come due May 1, 1810. In consequence of plaintiff being in danger of suit and costs for these debts, the defendant promised that he would pay the debt due from him to the plaintiff to enable him to discharge in time these debts, and in case of failure to do so, and the plaintiff should be sued and put to costs and expenses, the defendant would pay them. The defendant failed to pay the money at the time, whereupon the plaintiff was sued in two actions and put to \$80 costs, for recovery of which from the defendant this suit was brought. It was held that the plaintiff was not entitled to recover. The court say, "there is no legal consideration on which the promise can attach. If this was law, usury and oppression would take a wide range. The creditor in most cases suffers an inconvenience in the case of a want of punctuality in his debtor; he can-

calls, shall forfeit their shares, equity, upon grounds of public policy and from the necessity of punctuality in payment in such cases, will refuse to interfere and grant relief from forfeiture.¹ Sir William Grant, M. R.,² refused to relieve against a forfeiture under a by-law of an incorporated company which provided that the members receiving notice of default in paying a call should incur a forfeiture by non-payment ten days after, although the non-payment arose from ignorance of the call, absence from the town where the notice was sent and other accidental circumstances. He said: "This bill is founded on forfeiture, and upon the ground that the plaintiff did not consider himself as a partner, and offering compensation, and praying to be relieved from the forfeiture. The parties might contract upon any terms they thought fit, and might impose terms as arbitrary as they pleased. It is essential to such transactions. This struck me as not like the case of individuals. If this species of equity is open to parties engaged in those undertakings, they could not be carried on. It is essential that the money should be paid, and that they should [496] know what is their situation. Interest is not an adequate compensation, even among individuals, much less in these undertakings. In particular cases interest might be a compensation, but in a majority of cases it is no compensation from the uncertainty in which they may be left. The effect is the same whether the money has been paid or not. They know the consequence; the party making default is no longer a member; but if a party can, in equity, enter into a discussion of the circumstances each may bring his suit. They must remain a considerable time to see whether a suit will be begun, and before the suit can be decided. They do not know when any member will sue. If a bill is to be permitted there cannot be any certainty that every member who has made de-

not, however, recover more than the debt, interest and costs; nor will a promise to pay more help his case."

A. being indebted to B. and not being able to raise the money himself directed B. to raise it and promised to pay him whatever he had to pay for it. B. raised it at an exorbitant interest for three years; held,

that B. was the mere agent of A. in raising the loan and was entitled to recover the whole amount paid by B. for the use of the money. *Shirley v. Spencer*, 9 Ill. 583.

¹ 3 Lead. Cas. in Eq. 917.

² *Sparks v. Liverpool Water Works*, 13 Ves. 428.

fault may not file a bill. Can the court impose a limitation of the period when bills may be filed? If the court ever began to deal with these cases the number must be infinite. This is the mode which a party has to withdraw from a losing concern. Why is not this equity open to contractors for the government loans? Why may not they come here to be relieved, when they have failed in making their deposit? And if they could have their relief, how could the government go on? It would be just as difficult for these undertakings to go on. If compensation cannot be effectually made, it ought not to be attempted. It would be hazardous to entertain such a bill. Accident here is only the want of precaution.”¹

A sum greater than interest may be fixed by the parties as compensation for paying a debt at an earlier time or at a different place.² It is obvious that the omission to pay money pursuant to agreement in particular situations, or for specific purposes which would otherwise miscarry, followed by loss or injury of uncertain amount, and for which interest would be no adequate compensation, may be the subject of a different measure of reparation by agreement, as it often is without such agreement.³

¹ See *Georgia Land and Cotton Co. v. Flint*, 35 Ga. 226; *Hughes v. Fisher*, Walk. (Miss.) 516; *Fowler v. Word*, Harp. (S. C.) 372.

² *Plummer v. McKean*, 2 Stew. 423; *Jordan v. Lewis*, id. 426; *Thompson v. Hudson*, L. R. 4 Eng. & Ir. App. 1, reversing S. C., L. R. 2 Eq. 612; *Lord Ashtown v. White*, 11 Irish L. 400. See *United States v. Gurney*, 4 Cranch, 833.

³ *Woodbridge v. Bropley*, 2 West. L. Monthly, 274; *Hardee v. Howard*, 33 Ga. 533; *Sutton v. Howard*, id. 536. See *ante*, § 76. In *Parfitt v. Chambre*, L. R. 15 Eq. 36, an action at law was by consent referred, and the arbitrator awarded and ordered that the defendant should pay to the plaintiff in the action an annuity of £1,200 a year for life, and that in order to secure the annuity the defendant should, within two months, pur-

chase and convey to trustees on behalf of the plaintiff a government annuity of £1,200 a year, and that if for any reason the annuity should not have been legally secured before the last day of the second month from the date of the award, then, in addition to the annuity, a further sum of £100 should become due and payable by the defendant to the plaintiff on the last day of the second month, and a like sum of £100 on the last day of each successive month, until such annuity should be legally secured; and the award added: “These monthly payments are to be considered as additional to the payments due in respect of the annuity, and as a penalty for delay in the legal settlement of the same.” No annuity as directed by the award having been purchased the plaintiff having been adjudicated a bankrupt,

[497] The duty of a bank to pay the checks, drafts and orders of a depositor, so long as it has in its possession funds of his sufficient to do so, and which are not incumbered by any earlier lien in its favor, is but a legal obligation to pay money. It is implied from the usual course of business, if it is not express; and it usually is not.¹ The customer may draw out his funds in such parcels as he may see fit, both as regards number and amount. The rule of law forbidding a creditor to split up his demand does not affect this principle, which is based upon a custom of the banking business.² This duty of the bank is of such importance that if it refuses without sufficient justification to pay the check of the customer, he has his action, and may recover substantial damages, though no actual loss or injury be shown.³

§ 288. Large sum to secure payment of a smaller. Where a large sum, which is not the actual debt, is agreed to be paid [498] in case of a default in the payment of a less sum, which is the real debt, such larger sum is always a penalty.⁴ This rule has often been loosely stated, and its true scope and operation overlooked by following too rigidly the letter. A contract may be framed so as apparently to secure the payment

the defendant having died, and the £1,200 a year and £100 a month having been regularly paid to the plaintiff and her assigns up to the defendant's death, but not since, upon claim by the assignees to prove against the defendant's estate for the payment due in respect of the annuity, and of the monthly payments accrued due since his death: Held, that the £100 per month, though called a penalty, was not to be regarded strictly as such, and that the assignees were entitled to prove for the arrears both of the annuity and the £100 a month."

¹ Downes v. Phoenix Bank, 6 Hill, 297; Marzetti v. Williams, 1 B. & Ad. 415; Watson v. Phoenix Bank, 8 Met. 217; Morse on Banking, 29.

² Id.; Munn v. Burch, 25 Ill. 85; Chicago, etc. Ins. Co. v. Stanford, 28 Ill. 168.

³ Rollin v. Steward, 14 C. B. 595; Morse on Banking, 453; § 77, ante.

⁴ Bradstreet v. Baker, 14 R. L. 546; Bryton v. Marston, 33 Ill. App. 211; Clements v. Railroad Co., 132 Pa. St. 445; Astley v. Weldon, 2 B. & P. 346; Taul v. Everet, 4 J. J. Marsh. 10; Bagley v. Peddie, 5 Sandf. 192; Beale v. Hayes, id. 640; Cairnes v. Knight, 17 Ohio St. 69; Morris v. McCoy, 7 Nev. 399; Tiernan v. Hinman, 16 Ill. 400; Fitzpatrick v. Cottingham, 14 Wis. 219; Haldeman v. Jennings, 14 Ark. 329; Mead v. Wheeler, 13 N. H. 358; Chamberlain v. Bagley, 11 id. 234; Kemble v. Farren, 6 Bing. 141; Mason v. Callender, 2 Minn. 350; Niver v. Rossman, 18 Barb. 50; Kuhn v. Myers, 37 Iowa, 351; Davis v. Hendrie, 1 Mont. 499; Wallis v. Carpenter, 13 Allen, 19; Gray v. Crosby, 18 Johns. 219; Brockway v. Clark, 6 Ohio, 45.

of a less sum by a greater, when it is in substance but an alternative or conditional agreement to accept a stipulated part in full satisfaction if paid at a particular time or in a specified manner.¹ A demise of land was made at a yearly rent of £187, with the usual clauses for distress and entry on non-payment; and it contained an agreement that so long as the lessee performed the covenant the lessor would be content with the yearly rent of £93, payable on the same day [499] as the first reserved rent. It was held that the larger rent was not penal; that ejectment could be maintained on its non-payment.²

Such cases must be determined on the true intent of the transaction. If the larger sum is in truth the actual price or debt, and the smaller only agreed upon as a satisfaction if paid under stated conditions, the omission to comply with the terms of payment in the easier mode will preserve to the creditor the right to exact the larger sum.³ A recent case in Wisconsin was correctly decided on this principle. A bond was made in a penalty of \$900, conditioned that if the obligor should pay to the obligee one year after the death of her hus-

¹ In *Thompson v. Hudson*, L. R. 2 Eq. 612, a creditor had agreed with his debtor to remit part of his debt upon having a mortgage to secure the payment of the balance in two years, without prejudice to his right to recover the whole debt if such balance was not paid within that time. The debtor executed a mortgage for such balance, containing a proviso that if the mortgage debt be not paid within two years, the whole of the original should be recovered; and it was held that the proviso was of the nature of a penalty from which the mortgagor was entitled to be relieved in equity; that the mortgagee could only recover the smaller sum. But on appeal to the house of lords (L. R. 4 Eng. & Ir. App. 1), this decision was reversed; and it was held if the larger sum is actually due, and the creditor agrees to take a lesser sum, provided that sum is secured in

a certain way and paid on a certain day, and that, if these stipulations be not performed, he shall be entitled to recover the whole of the original debt, such remitter to such original debt does not constitute a penalty, and a court of equity will not relieve against it. *Mayne on Dam.* 101. Lord Westbury said that any plain man walking the streets of London would have said that it was in accordance with common sense; and if he were told that it would be requisite to go to three tribunals before getting it accepted, would have held up his hands with astonishment at the state of the law. *Carter v. Corley*, 23 Ala. 612.

² *Lord Ashtown v. White*, 11 Irish L. 400; *McNitt v. Clark*, 7 Johns. 465.

³ *Waggoner v. Cox*, 40 Ohio St. 539, 543, quoting the text.

band, and annually thereafter during her natural life, the sum of the interest on \$464 at the rate of seven per cent. per annum, the bond should be void, otherwise of force; and it was also provided in the condition that should any default be made in the payment of the said interest or any part thereof on any day wherein the same was made payable by the bond, and the same should remain unpaid and in arrear for thirty days, then and in that case the principal sum of \$464, with arrearages of interest thereon, should at the option of the obligee become immediately payable; and that if the payments of said interest were promptly made, then at the obligee's death the debt and the mortgage given to secure the bond should cease and be null. A default occurred in the payment of the annuities of interest; and the obligee gave notice of her option to consider the principal with the arrears of interest presently due and payable. The question was what sum was due on the bond which the mortgage in suit was given to secure. A decree had been made adopting the sum of \$464 mentioned in the condition as the principal that became due on its breach, and for that sum with the delinquent interest the judgment was rendered. The defendant contended that the sum the plaintiff was entitled to recover was not \$464, but only the value of a life annuity of \$32.48 at the time the plaintiff declared her option; at which time she was fifty-two or fifty-three years of age. Such value, computed by the Northampton tables, was then a little less than \$300. Lyon, J., said: "The covenant was voluntarily [500] made by the obligor, and, so far as appears, he received therefor full value for the sum which he agreed to pay at the option of the obligee in case of default. The most that can be said against the justice of it is that the damages would be the same if default were made and the option declared at a much later period in the life of the obligee. But that is a contingency which may be fairly presumed the obligor took into consideration when he made his covenant; and it was always in his power to prevent the happening of such contingency by paying the annuity which he covenanted to pay." The learned judge added: "It follows that the sum named in the bond is to be regarded as stipulated damages unless the gross value of the life annuity can be

ascertained by some exact pecuniary standard." He discusses this question and arrives at the conclusion that the value is uncertain. It may be observed that that method of determining whether the sum mentioned in the condition was penalty or not would be very proper if it be assumed that the annuity was the primary object of the arrangement, and that no sum was originally fixed which represented the value of the defendant's undertaking, or of the consideration received; and that the gross sum was stipulated as the valuation put by the parties on the annuity; and equally so if the case was that \$464 was a sum arising in the transaction which they agreed might be withheld so long as the interest on it was promptly paid, and with the further benefit that the debt should cease at the creditor's death, otherwise to be paid at once; then the case stands on the principle of *Thompson v. Hudson*,¹ and the conditional method of discharge not having been strictly followed, the dispensation depending on it failed, and the original debt remained unsatisfied and absolute.² Where a large sum is stipulated to be paid on [501]

¹ L. R. 2 Eq. 612, stated *supra*.

² *Berrinkott v. Traphagen*, 89 Wis. 219.

Longworth v. Askren, 15 Ohio St. 870, does not appear to be consistent with these views. An action was brought to foreclose a mortgage made to secure a payment of this note: "For value received, I promise to pay N. L., or order, one thousand dollars, with interest yearly till paid, and payable as follows: In two, three, four, five, six, seven, eight, nine and ten years, equal instalments, with interest yearly, as aforesaid, *being the contract price of a lot*. But if each and every payment is made punctually as due, or before due, or within ten days after each is due, as an inducement to punctuality, two hundred dollars of the amount will be released. And eight hundred dollars and its yearly interest accepted in full payment, but not otherwise." Before the ten years expired full

\$800 and annual interest on that sum had been paid; but the payments had not been made according to the terms of the contract as to time and amount. The court held that the sum of \$1,000 was penalty, and \$800 the actual debt according to the face of the note. White, J., said: "This case presents the single legal question: whether, upon the true construction of the mortgage note sued on, the one thousand dollars therein mentioned is to be regarded as a penalty. If that be its character, the judgment of the superior court should be affirmed; otherwise, it should be reversed. This is not the case of an agreement for the composition of a subsisting, independent indebtedness. The instrument in question creates the only debt on which the plaintiff relies for a recovery. Nor can the claim made by the plaintiff's counsel be supported, that the stipulation for the discharge of the obligation by

the non-payment of a less amount made payable by the same instrument, the former is *prima facie* a penalty. If the question is to be determined by construction of the instrument alone it would be deemed a penalty. May the real transaction be investigated, and upon proper facts a different interpretation and effect be given to the agreement? No

the punctual payment of \$800 in instalments is a privilege given to the payer, and inserted for his exclusive benefit. This claim is based on the assumption that the \$1,000 was the sole consideration for the lot, and consequently is the amount of the actual debt. But it is fair to presume that the omission of the stipulation in regard to the \$800 would have defeated the sale as that the insertion of the \$1,000 secured it. The transaction was the sale of the lot; and the instrument in question contains the terms upon which it was made. All the stipulations, on the part of Ricords, are supported by the same identical consideration. It is not to be presumed that the sale would have been concluded had any of the terms actually agreed to been omitted; and, as the terms of the sale were satisfactory to the parties, the presumption is they were acquiesced in, not as a special favor to either, but for the mutual benefit of both. Nor, in our view, does the order in which the sums are stated change their character, or the legal effect of the instrument; for whether the amount to be paid is to be reduced upon compliance with the terms of payment, or to be increased as a default, is only a different mode of expressing the same thing.

"All that the plaintiff, at the time of making the contract, had a right to expect was the payment of \$800, with the interest, in the instalments and at the times stipulated. These payments Ricords had promised to

make punctually. A default occurred; and in such a contract, in our opinion, interest is to be regarded as a compensation for the injury caused by the delay. All beyond must be regarded either as penalty or liquidated damages; but under neither form can the plaintiff be allowed to recover more than what the law deems adequate compensation for the breach.

"It is to be noted that the only evidence of the terms of the sale is what appears from the instrument itself. There is nothing to show that the contract for the purchase of the lot was originally made, in fact, at \$1,000; and that the remission of the contract price to \$800 was the gratuitous act of the vendor. If the abatement stood on this footing, it would devolve on the party seeking its benefit to show that he had complied with the conditions upon which it was offered."

This opinion bases the right of the debtor to discharge the bond by payment of \$800 on its being reserved in the agreement of purchase; it, however, concedes that it was equally a part of the contract of sale that \$1,000 should be paid if all the instalments should not be punctually paid. It would seem to be a reciprocal right to enforce the bond according to its terms; that there was as ample a consideration for the agreement in either alternative as in the cases of *Lord Ashtown v. White, supra*, and *McNitt v. Clark*, 7 Johns. 465.

language of the contract can be adopted which will shelter a penalty so that inquiry may not be made into the sub- [502] ject-matter and surroundings to ascertain if it be such. The principle is often declared in terms that permits inquiry to go to the intrinsic nature of the transaction; and a large sum promised as a consequence of the non-payment of a small one will be held a penalty whatever may be the language describing it.¹ Wright, C. J., said in an Iowa case: "From all, however, we may deduce one point as settled. Whether the sum mentioned shall be considered as a penalty or as liquidated damages is a question of construction, on which the court may be aided by circumstances existing extraneous to the writing. The subject-matter of the contract, the intention of the parties, as well as other facts and circumstances may be inquired into, although the words are to be taken as proved exclusively by the writing."²

§ 289. Stipulations where damages certain and easily proved. On general principles, an agreement to pay a [503] fixed sum as damages for non-performance of a contract, where the loss or injury might without it be easily determined by proof of market values, or by a precise pecuniary standard, is subject to nearly the same criticism as a contract to liquidate damages for non-payment of money. There are no peculiar reasons why a stipulated sum should be treated as a penalty for exceeding just compensation for a default in the

¹ *Bryton v. Marston*, 83 Ill. App. 211; *Bagley v. Peddie*, 5 Sandf. 192; *Niver v. Rossman*, 18 Barb. 55; *Morris v. McCoy*, 7 Nev. 399.

² *Foley v. McKeegan*, 4 Iowa, 1; *Perkins v. Lyman*, 11 Mass. 76; *Hodges v. King*, 7 Met. 583; *Dennis v. Cummins*, 8 Johns. Cas. 297.

In *Morris v. McCoy*, 7 Nev. 399, Lewis, C. J., said: "Although, as a general rule, it is acknowledged that the intention of the parties as expressed in the contract should be enforced, still, it is clearly ignored in that class of cases where the parties stipulate for the payment of a large sum of money as damages for the non-payment of a smaller sum at a given

day. In such cases, it is said, no matter what may be the language of the parties, the large sum will be deemed a penalty, and not liquidated damages." But upon an exception to the exclusion of parol testimony to affect the question where the agreement was apparently of this nature, and such extrinsic evidence was offered to rebut the inference that the larger sum was a penalty, the learned judge said "that was not admissible, because there was no ambiguity; and it must be supposed that the agreement was fully embodied in the written instrument. 1 Greenlf. Ev., § 275."

payment of money, and not be so treated in case of a different agreement where the excess is capable of being made equally manifest.¹ In money contracts any rate of interest not prohibited by statute may be contracted to be paid as interest proper; that is, during the period of credit; so any sum may be contracted to be paid for property or services in a contract of purchase or hiring. But when parties contract for the same thing in advance as damages for a considerable excess above the customary rate of interest, or the market value of property or other thing, the agreement will raise the inquiry whether such excessive sum was intended to be paid; or whether, even if it was, it is not a penalty. It would be such if not intended to be paid in case of default; it would be such if not fixed on the basis of compensation. In such cases courts generally arrive at harmonious conclusions by diverse modes of reasoning. One will say the sum fixed is so flagrantly excessive it was evidently not the intention of the parties that it should be paid or enforced, and therefore it is a penalty. Another will say the excess, *per se*, makes the stated sum a penalty, and the intention of the parties is simply immaterial. It generally occurs that where there is an agreement to pay a gross sum in the event of the non-performance of a contract, [504] and the case is such that a jury can ascertain with reasonable certainty how much damages the injured party has actually sustained by the non-performance, courts are strongly inclined to regard the gross sum as a penalty, and not as

¹ Fisher v. Bidwell, 27 Conn. 363.

Section 1670 of the Civil Code of California provides that "every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided" in section 1671, which says: "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." It has been ruled un-

der these provisions that a stipulation by a building contractor to pay the owner a specified sum for each day's delay in completing the building is not of itself sufficient to authorize a recovery. Patent Brick Co. v. Moore, 75 Cal. 205. There is no difficulty in fixing the actual damages which one sustains by being deprived of the use of land to which he is entitled. Eva v. McMahon, 77 Cal. 467. Nor in ascertaining the damage resulting from the breach of a warranty of the fitness of a harvesting machine. Greenleaf v. Stockton H. & A. Works, 78 Cal. 606.

liquidated damages.¹ If the intention, however, is clear to liquidate damages, and the amount is either not greatly above or below the sum which would otherwise be recoverable; or, if above, was fixed specially to cover contemplated consequential losses, not provable under legal rules, and is not an unreasonable provision therefor, the sum fixed may be sustained as liquidated damages.² But if the intention be doubtful, or the amount materially vary from a just estimate of compensation, the stated sum will be considered a penalty.³

§ 290. **Stipulation when damages uncertain.** If a contract does not afford any *data* from which actual damages can be calculated this circumstance has been held to afford a reason for regarding a stipulated sum as liquidated damages.⁴ This

¹Claude v. Shepard, 122 N. Y. 397; March v. Allabough, 103 Pa. St. 335; Brennan v. Clark, 45 N. W. Rep. 472; S. C., 29 Neb. 385; Lansing v. Dodd, 45 N. J. L. 525; Bradstreet v. Baker, 14 R. I. 546; Davis v. United States, 17 Ct. of Cls. 201; Spear v. Smith, 1 Denio, 464; Dennis v. Cummins, 3 Johns. Cas. 297; Streeter v. Rush, 25 Cal. 67; Bright v. Rowland, 3 How. (Miss.) 398; Scofield v. Tompkins, 95 Ill. 190; In re Newman, 4 Ch. Div. 724.

In Spencer v. Tilden, 5 Cow. 144, the defendant had agreed in writing not under seal, for value received, to pay \$360, or twelve cows and calves, to be paid or delivered at a place mentioned in four years. It was held that the value of the consideration, and of the cows and calves, might be inquired into to see whether the sum expressed was intended by the parties as penalty or liquidated damages; and it appearing that that sum was much beyond the value of either, it was considered in the nature of a penalty, and the plaintiff's recovery was confined to the value of the cows and calves. See note at end of the case.

²Jaqua v. Headington, 114 Ind.

309; Nielson v. Read, 12 Fed. Rep. 441; Gallo v. McAndrews, 29 id. 715; Hodges v. King, 7 Met. 583; Manice v. Brady, 15 Abb. 173; Durst v. Swift, 11 Tex. 278; Walker v. Engler, 30 Mo. 130; Cotheal v. Talmage, 9 N. Y. 551; Fitzpatrick v. Cottingham, 14 Wis. 219; Easton v. Pennsylvania & O. C. Co., 13 Ohio, 80; Tardeveau v. Smith's Ex'r, Hardin, 175; Bradshaw v. Craycraft, 3 J. J. Marsh. 79; Hodges, Ex parte, 24 Ark. 197; Talcott v. Marston, 3 Minn. 339; Shreve v. Brereton, 51 Pa. St. 175; Knapp v. Maltby, 13 Wend. 587; Powell v. Burroughs, 54 Pa. St. 329; Johnston v. Cowan, 59 id. 275; Keeble v. Keeble, 85 Ala. 552.

³Dennis v. Cummins, 3 Johns. Cas. 297; Lindsay v. Anesley, 6 Ired. 188; Mills v. Fox, 4 E. D. Smith, 220; Esmond v. Van Benschoten, 12 Barb. 366; Baird v. Tolliver, 6 Humph. 186.

⁴Fletcher v. Dyche, 2 T. R. 34; Waggoner v. Cox, 40 Ohio St. 539; Wolf v. Des Moines Ry. Co., 64 Iowa, 380; Ward v. Hudson River B. Co., 125 N. Y. 230; Tode v. Gross, 127 id. 480; De Graff v. Wickham (Iowa), 52 N. W. Rep. 503; Talkin v. Anderson (Texas), 19 S. W. Rep. 852.

[505] test would include among those deemed uncertain all contracts which require any extrinsic evidence to ascertain the extent of the actual injury. Expressions may be found in some cases favoring this criterion of uncertain damages.¹ But where the damages cannot be calculated by market values, nor by any precise pecuniary standard, or where from the peculiar circumstances which the contract contemplates there must be other uncertainty affecting the practical ascertainment of the amount of the actual loss, the law favors any fair adjustment of it by stipulation.² The damages resulting from breach of a marriage promise;³ of an agreement not to engage in a particular occupation or business;⁴ from delay in completing particular works, or in doing some other act on which ulterior transactions depend;⁵ or damages from the dis-

¹ Bagley v. Peddie, 16 N. Y. 469; Streeter v. Rush, 25 Cal. 67; Esmond v. Van Benschoten, 12 Barb. 366; Craig v. Dillon, 6 Up. Can. App. 116.

² Wooster v. Kisch, 26 Hun, 61; Kemp v. Knickerbocker Ice Co., 69 N. Y. 45; Indianola v. Gulf, etc. Ry. Co., 56 Texas, 594; Jones v. Binford, 74 Me. 439; Lipscomb v. Seegers, 19 S. C. 425; 1 Dane's Abr. 549, § 18; Gammon v. Howe, 14 Me. 250; Tingley v. Cutler, 7 Conn. 291; Cotheal v. Talmage, 9 N. Y. 551; Bagley v. Peddie, 16 N. Y. 469; Mundy v. Culver, 18 Barb. 336; Wolf Diamond Coal Co. v. Shultz, 71 Pa. St. 180; Ringham v. Richardson, 1 Winston (N. C.), 217; De Groff v. American L. T. Co., 24 Barb. 375; Fisk v. Fowler, 10 Cal. 512. In this case an ordinary bond with condition for delivery of title to a boat within a specified time was held to liquidate the damages at the sum stated as a penalty.

³ Lowe v. Peers, 4 Burr. 2225. See Abrams v. Kounts, 4 Ohio, 214.

⁴ Newman v. Wolfson, 69 Ga. 764; Mueller v. Kleine, 27 Ill. App. 473; Stevens v. Pillsbury, 57 Vt. 205; Tode v. Gross, 127 N. Y. 480; Grasselli v.

Lowden, 11 Ohio St. 349; Applegate v. Jacoby, 9 Dana, 206; Mott v. Mott, 11 Barb. 127; Rawlinson v. Clarke, 14 M. & W. 187; Hitchcock v. Coker, 6 Ad. & El. 438; Galesworthy v. Strutt, 1 Exch. 659; Green v. Price, 13 M. & W. 695; Dakin v. Williams, 17 Wend. 447; Williams v. Dakin, 22 id. 210; Lange v. Werk, 2 Ohio St. 519; Cushing v. Drew, 97 Mass. 445; Atkyns v. Kinnier, 4 Exch. 776; Mercer v. Irving, 1 E. B. & E. 563; Reynolds v. Bridge, 6 E. & B. 528; Nobles v. Bates, 7 Cow. 307; Pierce v. Fuller, 8 Mass. 223; California Steam N. Co. v. Wright, 6 Cal. 258; De Groff v. American L. T. Co., 24 Barb. 375; Stewart v. Bedell, 79 Pa. St. 336; Horner v. Flintoff, 9 M. & W. 678; Lightner v. Menzel, 35 Cal. 452; Sainter v. Ferguson, 7 C. B. 716; Davis v. Penton, 6 B. & C. 216; Bigony v. Tyson, 75 Pa. St. 157; Holbrook v. Tobey, 66 Me. 410; Reilly v. Jones, 1 Bing. 302; Leighton v. Wales, 8 M. & W. 545; Crisdee v. Bolton, 8 C. & P. 240.

⁵ Ward v. Hudson River B. Co., 125 N. Y. 230; O'Brien v. Anniston Pipe-works, 93 Ala. 582; Law v. Local Board of Redditch [1892], 1 Q. B. 127; De Graff v. Wickham (Iowa), 53

closure of the secrets of business,¹ or from breach of an [506] agreement to abate a nuisance,² are manifestly of that nature, and stipulations fixing the damages for the total loss of a bargain for the purchase or leasing of lands and real estate,³ or personal property,⁴ have also been frequently sustained.

There is more or less uncertainty in everything which depends upon the opinions or memories of witnesses; it may be increased, in the sense of furnishing a motive for stipulating damages, if the testimony under the circumstances contemplated by the contract would be at a great distance;⁵ or must come solely from the defendant.⁶ In a contract for the purchase of several city lots from one having still a large number to sell, the purchaser, in consideration of having the property conveyed to him for \$21,000, covenanted that he would by a certain day erect on the lots so conveyed two brick houses of specified dimensions, or in default thereof would pay on demand to the seller the sum of \$4,000. This sum was held to be liquidated damages. Whether the vendors would be better off if they got the money than they would have been had the houses been erected must from the nature of the case be a difficult question to decide; and that is one reason why the

N. W. Rep. 508; *Hall v. Crowley*, 5 Allen, 804; *Curtis v. Brewer*, 17 Pick. 518; *Fletcher v. Dyche*, 2 T. R. 32; *Hamilton v. Moore*, 33 Up. Can. Q. B. 100 and 520; *Gaskin v. Wales*, 9 Up. Can. C. P. 314; *McPhee v. Wilson*, 25 Up. Can. Q. B. 169; *Bergheim v. Blaenavon Iron & S. Co.*, L. R. 10 Q. B. 319; *Folsom v. McDonough*, 6 Cush. 208; *Harmony v. Bingham*, 12 N. Y. 100; *Dunlop v. Gregory*, 10 N. Y. 241; *Weeks v. Little*, 47 N. Y. Super. Ct. 1; *Worrell v. McClinagan*, 5 Strob. 115; *Young v. White*, 5 Watts, 460; *O'Donnell v. Rosenberg*, 14 Abb. (N. S.) 59; *Pettis v. Bloomer*, 21 How. Pr. 317; *Crux v. Aldred*, 14 W. R. 656; *Legge v. Harlock*, 12 Q. B. 1015. But see *Wilcus v. Kling*, 87 Ill. 107.

¹ *Nessle v. Reese*, 29 How. Pr. 382; *Reindel v. Schell*, 4 C. B. (N. S.) 97; *Bagley v. Peddie*, 16 N. Y. 469.

² *Grasselli v. Lowden*, 11 Ohio St. 349.

³ *Leggett v. Mutual L. Ins. Co.*, 50 Barb. 616; S. C., 53 N. Y. 394; *Heard v. Bowers*, 23 Pick. 455; *Tingley v. Cutler*, 7 Conn. 291; *Knapp v. Maltby*, 18 Wend. 587; *Slosson v. Beadle*, 7 Johns. 72; *Lynde v. Thompson*, 2 Allen, 456; *Lampman v. Cochran*, 19 Barb. 388; S. C., 16 N. Y. 275; *Mundy v. Culver*, 18 Barb. 386; *Clement v. Cash*, 21 N. Y. 253; *Hasbrouck v. Tappen*, 15 Johns. 200; *Harris v. Miller*, 6 Sawy. 319.

⁴ *Peirce v. Jung*, 10 Wis. 30; *Allen v. Brazier*, 2 Bailey, 55; *Main v. King*, 10 Barb. 59; *Knowlton v. Mackay*, 29 Up. Can. C. P. 601.

⁵ *Cotheal v. Talmage*, 9 N. Y. 551.

⁶ *Bagley v. Peddie*, 10 N. Y. 469.

parties should be left to settle the matter for themselves.¹ In another case an agreement was made simultaneously with a sale of village lots by the purchaser, that he would not sell [507] spirituous liquors on the premises purchased, or in the buildings erected thereon; and if he did so he should be liable to pay the vendor in the first case a fine of \$10, in the second case a fine of \$20, and for each subsequent selling \$50. It was held that the contract was not invalid for being in restraint of trade;² but the "fine" was held to be a penalty and not liquidated damages.³

§ 291. **Same subject.** The damages for breach of contracts for the purchase of the good will of an established trade or business, or for the withdrawal of competition, are so obviously uncertain that courts have recognized the fullest liberty of parties to fix beforehand the amount thereof in that class of cases. In the decision of such cases the strongest expressions are to be found to the effect that the intention of the parties is all-controlling, and that courts have no power to defeat it on the pretext of relieving from a bad bargain. Referring to such a stipulation, Sedgwick, J., in an early Massachusetts case, said: "The parties were competent in law to make a contract imposing a limited restraint on the defendant's trade for the plaintiff's benefit and without injury to the public. They were competent to determine on what consideration it should be made; and to liquidate the damages if it should be broken. The consideration of one dollar is a valuable consideration. It would be sufficient to pass by sale the defendant's stage and stage horses, where no fraud or imposition was practiced. The parties have considered it reasonable and adequate, and the defendant, by honestly fulfilling his agreement, might have protected himself from the forfeiture. But he has broken it, and he shall not be permitted to say that, although the contract was fairly and honestly made, and for a valuable consideration to which he assented, the consideration was inadequate; that he made a bad bargain; and that when the plaintiff has suffered by a breach of it, he shall be relieved from the terms to which he

¹ *Pearson v. Williams*, 26 Wend. 630; S. C., 24 id. 244. See *Chase v. Allen*, 13 Gray, 42.

² *Laubenheimer v. Mann*, 17 Wis.

542.

³ S. C., 19 Wis. 519.

had voluntarily submitted.”¹ The tendency, however, of more recent decisions is against holding any contract [508] for liquidated damages to be binding in this absolute sense. Courts generally assume jurisdiction to declare an excessive sum mentioned in connection with the breach of any contract a penalty. If the disproportion between the consideration and the undertaking, and the disparity between the probable advantages of performance and the sum agreed to be paid in the event of failure, negative the intention to limit the amount to just or reasonable compensation, it should be deemed a penalty, however uncertain the damages. The same principles govern this stipulation in all contracts, but courts will, in general, enforce such stipulations where the damages are uncertain;² because the parties, when no fraud or oppression is practiced, know better their situations, and can form a more correct estimate of the injury than a court or jury. Because the damages are not susceptible of precise measurement the judgment and agreement of the parties should have large scope; but when, as sometimes happens, it is discovered that such stipulations are not based on the idea of compensation they are not sustained. This will be particularly seen in the instances of contracts which provide the same sum to be paid in the case of a partial or of a total breach.

The damages which may result from delay in fulfilling contracts for particular works, or for performance of any specified act stipulated to be done and completed within a given time, are not always of the most uncertain nature. Damages for failure to complete a house, or any other structure, may sometimes be obtained proximately by a rental standard. But when intended for a particular purpose other than to be rented, and when delay may hinder or thwart other and dependent contracts or enterprises, the damages will be more uncertain. In a building contract containing the usual clauses fixing the days for completing the various parts of the work, a stipula-

¹ *Pierce v. Fuller*, 8 Mass. 223; *senby v. Adams*, 2 Brown P. C. 431; *Dakin v. Williams*, 17 Wend. 454, per *Roy v. Duke of Beaufort*, 2 Atk. 190; *Nelson, C. J.*; *Streeter v. Rush*, 25 Allen v. Brazier, 2 Bailey, 55; *Chase Cal. 67*, per *Rhodes, J.* Compare *v. Allen*, 18 Gray, 42; *Pearson v. Hathaway v. Lynn*, 75 Wis. 186. *Williams*, 26 Wend. 630.

² *Hurst v. Hurst*, 4 Exch. 571; *Pon-*

tion to the effect that any neglect to comply with the conditions of the contract and finish the work as provided should entitle the employer to claim damages at the rate of \$10 per [509] day for every day's detention so caused was held a covenant for stipulated damages.¹ The more recent authorities, however, are to the effect that the damages ordinarily resulting from the failure to fulfill a building contract which contains only the usual conditions are not so uncertain as to be the subjects for such stipulations.² Where a party covenants that he will transport and deliver goods within a certain time, and also that he will deduct a sum named from the freight each day they are delayed beyond the time specified for the delivery, such agreed deduction is liquidated damages.³ Under peculiar circumstances an agreement to pay \$500 for failure to surrender possession of leased premises at a certain date was held liquidated damages. The lessor was but a lessee himself, under stipulations to surrender a month later. He had authority from his lessor to put additions and improvements on the premises, all of which he had a right to remove at the end of his term. It was considered a natural and reasonable provision that, should the subtenant bind himself to leave the premises a month before the landlord's term expired, he might have sufficient time to remove his improvements and thus escape a forfeiture to his lessor.⁴ An agreement provided that land should be restored to a pre-

¹ O'Donnell v. Rosenberg, 14 Abb. (N. S.) 59; Pettis v. Bloomer, 21 How. Pr. 317; Curtis v. Brewer, 17 Pick. 513; Hamilton v. Moore, 33 Up. Can. Q. B. 100 and 520; Gaskin v. Wales, 9 Up. Can. C. P. 314; McPhee v. Wilson, 25 Up. Can. Q. B. 169; Bergheim v. Blaenavon Iron & S. Co., L. R. 10 Q. B. 319.

² Clements v. Railroad Co., 132 Pa. St. 445; Brennan v. Clark, 45 N. W. Rep. 472; S. C., 29 Neb. 385; Patent Brick Co. v. Moore, 75 Cal. 205. But see Ward v. Hudson River B. Co., 125 N. Y. 230.

³ Harmony v. Bingham, 12 N. Y. 100; Sparrow v. Paris, 7 H. & N. 594.

⁴ Peine v. Weber, 47 Ill. 41.

In Klinge v. Ritter, 54 Ill. 140, a lease provided for the surrender by the lessee of portions of the property at different times, and without adverting to such provision there was a covenant that the lessee should pay \$50 per day as stipulated damages for every day he should hold over after the termination of his lease; held, that as the provision as to damages was highly penal, and the lease admitted of two constructions as to the time the damages should begin to accrue, they would not be considered as commencing until the time when the entire premises were to be surrendered.

scribed condition and in default of performance the person bound should pay £100 per acre. The condition was referred to one in clause of the contract as a "penalty." The house of lords held, reversing the Scotch court, that the case was a proper one for stipulated damages.¹ No damages could be more uncertain than those which might result from delay in furnishing for publication the biography of a man for the time being attracting public notice. Such a man undertook to furnish his biography for publication within a specified time, and for every day's delay beyond that time agreed to pay \$161. In a suit to recover for a delay of one hundred and sixty-one days, the court held the agreement could not be literally enforced, and that the plaintiff could only recover actual damages.² So a contract to put machinery [510] in a boat for \$8,000, on or before a certain day, "under a forfeiture of \$100 per day for each and every day after the above date until the same should be completed as above," was held to provide for a penalty and not liquidated damages.³

§ 292. Same subject. The damages which may result from a mechanic quitting work contrary to his contract are uncertain; but every agreement purporting to fix the amount he shall forfeit or pay in such an event will not be treated as a liquidation thereof. Where the contract of hiring required that if the employee quit without giving thirty days' notice he should forfeit all wages due to him at the time of leaving, Campbell, J., said: "We have no difficulty in holding that the injury caused by a sudden breaking off of a contract of service by either party involves such difficulties concerning the actual loss as to render a reasonable agreement for stipulated damages appropriate. If a fixed sum, or a maximum within which wages unpaid and accruing since the last pay-day might be forfeited, should be agreed upon, and should not be an unreasonable or oppressive exaction, there would seem to be no legal objection to the stipulation if both parties are equally and justly protected. But the facts set forth in this record

¹ Lord Elphinstone v. Monkland Iron & C. Co., 11 App. Cas. 882.

² Greer v. Tweed, 13 Abb. (N. S.) 427. See Laubenheimer v. Mann, 17 Wis. 542; S. C., 19 id. 519.

³ Colwell v. Lawrence, 38 Barb. 648; Colwell v. Foulks, 86 How. Pr. 316; Van Buren v. Digges, 11 How. (U. S.) 461; Kennedy v. United States, 24 Ct. of Cls. 122, 142.

do not, we think, bring the case within any such rule. . . . The forfeiture under the contract covers all wages due at the time of leaving. This is open to the objection that the employer may have been in arrears, and thus enabled to profit by his own wrong. No such forfeiture could be enforced against wages, as such, which the workman was to have paid to him before he committed any breach of his duty. Again, it does not appear how often wages were payable, and what proportion of the year's earnings could thus be withheld for a breach of contract. It would not be reasonable to make the forfeiture cover a very long period. The inference, in the absence of proof to the contrary, would be that the price of work done by the piece might not be payable at the same intervals as ordinary wages. And inasmuch as the periodical earnings of such laborers could not be uniform it would be difficult to sustain an agreement for stipulated damages, unless some limit should be fixed beyond which the forfeiture should [511] not extend. The agreement set out in the record is also defective for want of mutuality. The employer, on failure to give notice before dismissal, is subjected to a payment of thirty days' wages. This stipulation, when applied to the wages of piece work, is entirely vague and indeterminate. It furnishes no standard of calculation, and lacks the first essential of stipulated damages, which are allowed to avoid uncertainty."¹

¹Richardson v. Woehler, 26 Mich. 90; Davis v. Freeman, 10 Mich. 188. In this case Manning, J., said: "The plaintiffs in error were to have \$1.50 per M. for drawing the timber, \$1 of which was to be paid as the timber was drawn, in supplies to enable them to carry on the job; and the remaining fifty cents in cash when all the timber was drawn. In the language of the contract, 'it being understood that the balance kept back is to secure the completion of this contract; and it is hereby agreed between the parties that the fifty cents per thousand feet is settled, fixed and liquidated damages, in case this contract is not completed by the

said first party.' They having failed to draw all the timber, the question is whether the fifty cents per thousand feet on what was drawn, and which was to be paid on completion of the contract, is to be regarded as stipulated damages, or in the nature of a forfeiture or penalty for not completing the contract. The court below charged the jury that the fifty cents per thousand feet on what had been drawn was stipulated damages. In this we think the court erred. If stipulated damages for a non-performance of the entire contract, the defendant in error could not recover any other or greater damages for a non-performance, in whole or in part.

The inquiry whether a fixed sum is intended as penalty or liquidated damages is generally answered according to the equity and justice of the particular case. If the damages are uncertain in their nature, or difficult to be proved, and in applying the stipulation to the case the result is not manifestly at variance with the principle of just compensation, it is readily adopted as consistent therewith. In such cases the intention is inferred from these circumstances, and the language of the parties is very liberally construed to give effect to it. The sum may be called a penalty or forfeiture; and the form and phraseology may be vague or equivocal; but, nevertheless, the sum stated be held to be liquidated damages.¹

And it would follow that he would recover no damages whatever on the contract had the plaintiff in error refused to draw any of the timber. Such clearly could not have been the intention of the parties. They must have intended that if the plaintiff in error should draw part of the timber, and not the whole, they should not be paid the fifty cents per thousand feet on what had been drawn by them. That, in the language of the contract, should be 'fixed and liquidated damages.' If the contract had provided for the payment of fifty cents per thousand feet as liquidated damages for the timber not drawn, the case would be altogether different. For the nearer such a contract was completed the less would be the damages. The damages would be proportioned to the non-performance. But the contrary would be the case as the contract is, if the fifty cents per thousand is to be regarded as liquidated damages, and not as penalty. For the nearer the contract is completed the greater are the damages in case of failure. The damages for not drawing five thousand of five hundred thousand feet would be \$247.50, whereas the damages for failing to draw four

hundred and ninety-five of the five hundred thousand would be only \$2.50. The policy of the law will not permit parties to make that liquidated damages, by calling it such in their contract, which in its nature is clearly a penalty or forfeiture for non-performance. While it allows them, in certain cases, to fix their own damages, it will in no case permit them to evade the law by agreement. See *Jaquith v. Hudson*, 5 Mich. 123." *Stearns v. Barrett*, 1 Pick. 443.

In *Schrimpf v. Tennessee Manuf. Co.*, 86 Tenn. 219, a servant agreed to give notice of his intention to quit, and if he failed to do so whatever was due him at the time he left the service was to be an indebtedness to the employer to be considered as liquidated damages. The contract was held void because it was unreasonable and oppressive.

¹ § 288, *ante*, n.; *Mathews v. Sharp*, 99 Pa. St. 560; *Lennon v. Smith*, 14 Daly, 520; *Miller v. Rankin*, 11 Atl. Rep. 615 (Pa.); *Eakin v. Scott*, 70 Texas, 442; *Boys v. Ancell*, 5 Bing. N. C. 390; *Streeper v. Williams*, 48 Pa. St. 450; *Burr v. Todd*, 41 id. 206; *Bigony v. Tyson*, 75 id. 157; *Pearson v. Williams*, 26 Wend. 630; *Knapp v.*

§ 293. Illustrations. Some differences will be noticed, resulting from a stricter adherence to the artificial rules of construction by some courts than by others. On the other hand, where the actual damages may be ascertained by mere computation, or can be easily established by proof, and the sum stated is not a just measure of the actual loss or injury, these circumstances prevail against very clear and positive expressions of intention to liquidate damages.¹ In cases of neutral circumstances the language and form of the contract may alone be decisive. All doubts as to the justice of the stipulated sum, or as to the actual intention of the parties, will be resolved by treating it as a penalty. Many stipulations ostensibly providing a remuneration to be paid, or in some way to inure to the party entitled to the benefit of the contract in case of a breach, have been held not to have the effect to liquidate damages because so framed as to be inconsistent in their effect with the idea of compensation either for the reason that the intention to limit the compensation for breach to such [513] amount as the provision in question may specify, or the purpose to afford compensation to that extent is doubtful in view of the special facts of the case. A few cases may be profitably consulted as illustrations of the uncertain nature of such stipulations, and how much at large is the judicial discretion by which their practical effect is governed. In a case in New York two parties agreed upon an exchange of real estate; each was to deliver a deed of his property or "forfeit the sum of \$500." Upon the first trial the court held this to be a provision for liquidated damages, and the plaintiff had a verdict for that sum, which was set aside on the defendant's motion, upon the ground that the court erred in treating that sum as other than a penalty. The case was retried upon this theory, and resulted in a verdict for the plaintiff of \$1,000 against his request and exception that it should be regarded as stipulated damages. The defendant then sought to reverse the judgment on the ground that the sum stated in the contract was not a penalty, but liquidated damages. The ruling that it was

Maltby, 18 id. 587; Upham v. Smith, 7 Mass. 265; Fisk v. Fowler, 10 Cal. 512; Sparrow v. Paris, 7 H. & N. 594; Yenner v. Hammond, 86 Wis. 277; White v. Arleth,¹ Bond, 819; Haymaker v. Schroers, 49 Mo. 406. ¹ Kemble v. Farren, 6 Bing. 141; Horner v. Flintoff, 9 M. & W. 678.

a penalty was in harmony with the defendant's argument for a new trial, and he had taken no exception to a like construction of the contract on that trial. He was, therefore, not in a situation on appeal to allege that that construction was erroneous. Church, C. J., said: "It is, however, proper to say that, if the question was before us, we should hesitate in holding it a penalty; and there are many reasons for regarding it as a provision fixing the measure of damages by the parties. The word 'forfeit' is not conclusive. A fundamental rule upon this subject is that the words employed must, in general, yield to the intention of the parties as evinced by the nature of the agreement, the amount of the sum named, and all the surrounding circumstances. The sum named is reasonable in amount; it is payable for one breach, viz.: a failure to deliver a deed; and the injury is in some degree uncertain in amount and extent, and might depend upon many unforeseen contingencies. These are material circumstances favorable to an inference that the parties intended to fix the sum as the measure of damages." But that question being precluded, by the absence of any objection on the appellant's part, the judgment was affirmed.¹

In a later case in the same state an ice company agreed [514] to deliver to K. four thousand tons of ice in 1870, for retail. Afterwards the company by fraudulent representations procured from K. a written exoneration as to all the ice above five hundred and eighty-seven tons. By the original agreement K. agreed to *pay* the ice company \$1 per ton for each and every ton that he failed to take according to the terms of the agreement; and the ice company agreed to *forfeit* \$1 per ton for each and every ton that they failed to deliver according to the terms of the agreement. The contract price of the ice delivered was \$2.50 per ton, and the market price when the exonerated quantity should have been delivered was from \$14 to \$16 per ton. A suit was brought for rescission of the agreement obtained by fraud, reducing the quantity, and for damages. The rescission was granted, and the next question was between penalty and liquidated damages under the \$1 per ton clause referred to. The court of common pleas held that the stipulation was

¹ Noyes v. Phillips, 60 N. Y. 408.

a penalty.¹ The court of appeals were of a contrary opinion. Earl, J., said: "What was here intended by the parties? The \$1 was certainly intended at least to limit the extent of damages to be paid in case of breach, else there would be no purpose for inserting it; and effect should be given to this intention if it can be consistently with the rules of law. There is nothing decisive in the language used. In case of failure by the plaintiffs they agreed 'to pay' the \$1, in case of failure by the defendant it agreed 'to forfeit' the same sum. The words 'to pay' and 'to forfeit' were evidently used in the same sense, and might be used in case the sum was intended either as liquidated damages or as a penalty."² In another case, a

¹ *Kemp v. Knickerbocker Ice Co.*, 51 How. Pr. 31; *Basye v. Ambrose*, 28 Mo. 39. See *Cotheal v. Talmage*, 9 N. Y. 551.

² § 283, *ante*, n.

³ *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 45, 57; *Winch v. Mutual Benefit Ice Co.*, 9 Daly (N. Y.), 177.

In *Lowry v. Barelli*, 21 Ohio St. 324, one party offered to sell and deliver at a specified time and place two thousand five hundred cubic feet of Italian marble, at \$2.12½ per foot, and there was added the following provisions: "For non-compliance with this contract by either party the penalty shall be as follows: If the parties of the first part are not themselves, or agents, on the spot twenty days after the stipulated notice be given, then the parties of the second part shall be at liberty to sell said marble just as if consigned to them, and claim of said first parties the difference between the net amount that the marble sold at, and what they bound themselves to pay for it, say \$2.12½ per cubic foot; provided always, that said difference shall never exceed thirty-seven and one-half cents per cubic foot, which difference shall be paid down, in cash at once, without any difficulty; and should the parties of the second

part fail to deliver within the specified time the quantity of marble above mentioned, the parties of the first part shall be at liberty to buy the same quantity of marble at the market price, and charge the difference, if any, to the parties of the second part; provided always, that the difference of the marble so purchased shall not exceed thirty-seven and one-half cents per cubic foot of the price fixed by this agreement, and that the terms of payment be cash." The vendee sued the vendor and assigned as a breach the non-delivery of the marble. The jury found, among other things, that "the defendants refused to perform the agreement on their part; that the plaintiffs did not purchase, nor attempt to purchase, marble corresponding to that described in the contract before bringing suit; that such a lot of marble could not have been purchased in New Orleans where the contract was made; that the difference between the market price and the contract price on the day of breach was greater than thirty-seven and a half cents per foot; that the damages of the plaintiff amount to \$1,516.62," for which sum they returned a verdict. A motion for a new trial was made on the ground,

building contract, the builder was to receive for the com- [515]
pleted house \$4,600; the contract contained the provision that
the builder, who was plaintiff, should "forfeit ten per cent. on
the whole amount if the said house is not entirely completed

among others, that the verdict was contrary to the law and the evidence. On this motion it was contended on behalf of the defendants "that the sum of thirty-seven and a half cents per foot is in the nature of a limitation of damages, and not actual or liquidated damages, and is the utmost that the parties can recover." This point was not noticed in the opinion, which was adverse to the motion, and judgment was ordered to be rendered on the verdict. McIlvaine, J., said: "It is no doubt competent for parties to limit by express stipulation the amount of damages to be recovered in the event of a breach of their contract; or to make the right to recover at all to depend upon a particular event; or they may agree that damages shall not be recovered in any event for a violation of the contract; thus making what would otherwise be a contract binding in law a mere option on the part of the promisor to do or not to do as he may choose. In our opinion the contract between the parties in this case was of the first and not of the second or third classes named. Taking it all together, we believe the parties intended to secure the performance at what they supposed would be a reasonable compensation to the injured party in case of a default by the other in not receiving or delivering the marble.

"It cannot be doubted that the parties intended to bind each other by this contract to the purchase and sale upon the terms named therein. For the breach of every contract the law implies damages; and to escape the consequence of this rule of law

the party in default should be able to show that damages had been waived. In this contract no waiver or exemption from damages upon the state of facts found in the special verdict is expressed, nor can it be inferred except upon the principle that *expressio unius est exclusio alterius*. This maxim, however, should not be applied in a case where, by fair construction of the whole instrument, a different intention can be ascertained. . . . Whatever might have been the law of this case, had there been such marble in the market at the time of the defendant's default, we are of opinion that the plaintiffs, under the state of facts found in the special verdict, were excused not only from making a purchase of a like quantity of marble in the market, but also from any vain and fruitless effort to do so."

In *Grand Tower Co. v. Phillips*, 28 Wall. 471, a company having coal mines agreed to deliver one hundred and fifty thousand tons of coal, the product of its mines, to P. at \$3 a ton during the year 1870, in equal daily proportions, between the 15th of February and the 15th of December; that is to say, fifteen thousand tons each month. The contract contained this provision: "If through no fault of the parties of the second part (P.), the party of the first part (the company) shall fail in any one month to deliver all or any part of the quota of coal to which the parties of the second part may be entitled in such month, the party of the first part shall pay to the parties of the second part as liquidated damages twenty-five cents per ton for

and fit to occupy at the time agreed upon." Daniel, J., said: "The clause . . . cannot properly be regarded as an [516] agreement or settlement of liquidated damages. The term 'forfeiture' imports a penalty; it has no necessary connection with the measure or degree of injury which may result from a breach of contract or from an imperfect perform-

each and every ton which it may have so failed to deliver; or instead thereof, the parties of the second part may elect to receive all or any part of the coal so in default in the next succeeding month, in which case the quota which the party of the first part would otherwise have been bound to deliver under this contract shall be increased in such succeeding month to the extent of the quantity in default." Coal rose in value from about \$3 a ton to \$9; and without the fault of P. the company did fail to deliver the quota — fifteen thousand tons — due in October, and P. thereupon elected and gave notice of the election to take the said quota in November. But the company failed to deliver it then, and failed also to deliver the quota — fifteen thousand tons — due in November. P. then elected and gave notice of his election to take in December the quota due in November, as also that due in October. No coal, however, was delivered at any time, and P. brought suit for damages. It was held that the plaintiffs were entitled to their actual damages and were not limited to twenty-five cents per ton. Bradley, J., said: "The question whether this view is right or not depends upon the true construction of the agreement made by the parties. . . . It is evident from an inspection of the contract that the election given to the plaintiffs to receive in the following month the coal which they were entitled to receive and did not receive in a par-

ticular month was a substitute for the liquidated damages of twenty-five cents per ton. With regard to that particular amount of coal, the rule of liquidated damages was at an end. The agreement did not carry it forward to the following month. It imposed upon the defendant the obligation, if the plaintiffs so elected, to furnish the coal itself instead of paying the liquidated sum. If not so, what was the option worth? It amounted to nothing more than the right of giving to the defendant another month to furnish the coal. Surely they would have had that right without stipulating for it in this solemn way. Had not this option been given to the plaintiffs, the defendant would have had the option either to furnish the coal or to pay the twenty-five cents per ton for not furnishing it — a sum which they could very well afford to pay upon a slight rise in the market prices. It was evidently the very purpose of the option given to the plaintiffs to avoid this oppressive result. They could require the coal to be delivered at all events, and if they elected to do this, it was the duty of the defendant to furnish it. The contrary construction would make the stipulation worse than useless. The plaintiffs might continue to exercise their election to receive the coal month after month, without avail, and, at the end, find themselves exactly at the point they started from — forced to accept the twenty-five cents per ton."

ance. It implies an absolute infliction regardless of the nature and extent of the causes by which it is superinduced. Unless, therefore, it shall have been expressly adopted and de- [517] clared by the parties to be a measure of injury or compensation it is never taken as such by courts of justice.”¹ The lessor for years of part of a steam mill covenanted with his lessee to furnish him with a certain amount of steam-power during every working day in the year, and that if at any time he should fail to do so the rent should cease during the time of such failure. The lessee had taken a lease for five years for the purpose of carrying on business, and had placed machinery on the premises on the faith of the lessor’s covenant to furnish him steam-power to work it. Soon after his work commenced the lessor withheld all the power and thus broke up the business. On these facts the court held that the [518] suspension of rent was not full satisfaction of the damages; it was not satisfied that the lessee had agreed to accept such suspension as a full compensation for an entire breach of the covenant.²

¹ Van Buren v. Digges, 11 How. (U. S.) 461. See § 288, n.

² Fisher v. Barret, 4 Cush. 381.

In Nowlin v. Pyne, 40 Iowa, 166, there was an agreement between the parties for exchange of farms, which contained this clause: “It is also understood that, in case the said P. fails to make said conveyance, as aforesaid, then he agrees to pay said N. for all plowing done by him on said land.” The question was whether N. was entitled to any other damages. It was contended by the other party that he was not. Day, J.: “This position would be correct if the parties to a contract must stipulate for the damages to be recovered in order that they may recover any. But the law, of itself, attaches to the breach of every contract the right to recover proper damages. That the parties have expressly provided for the payment of some of the damages, which,

perhaps, the law would not have awarded without such provision, cannot be construed to be a waiver of the right to recover other damages which the law permits. In order to defeat the recovery of such damages it must clearly appear that the parties have stipulated for all the consequences which they intend shall follow a breach of their agreement. It is plain that this agreement more particularly refers to certain incidental damages which might not arise at all, whilst as to the principal damages, and which are certain to follow a breach of the contract if it was an advantageous one to the plaintiff, the contract is silent.”

In Potter v. McPherson, 61 Mo. 240, there was a contract between the parties for constructing a railroad, by the terms of which payments were to be made by the employer in monthly instalments, ten

[519] The general doctrine was well summed up in a Pennsylvania case. The owners of a hotel had agreed to sell it for \$14,000, of which \$3,000 was to be paid at a specific time, when a deed was to be made; part possession was to be deliv-

per cent. being reserved by him until the completion of the work, "as security for the faithful performance of the contract;" and in case of certain breaches on the part of the contractor the amounts reserved were to be absolutely forfeited to the other party. Held, that the amounts so to be retained were not liquidated damages for such breaches, but the contractor could recover the entire sum agreed upon, less the damages which in fact might be sustained by reason of his non-compliance with the contract. Hough, J., said: "To hold otherwise in such a case would produce the grossest inequality and injustice. The amount forfeited might bear no just relation to the damage suffered. The more nearly the contract approaches completion, the greater would be the reserve, and the less would be the damage. As the damage diminished the sum forfeited would increase." *Savannah, etc. R. Co. v. Callahan*, 56 Ga. 331. See *Phelan v. Albany, etc. R. Co.*, 1 Lans. 258; *Jemmison v. Gray*, 29 Iowa, 587; *Faunce v. Burke*, 16 Pa. St. 469; *Hennessey v. Farrell*, 4 Cush. 267; *Jackson v. Cleveland*, 19 Wis. 400.

Easton v. Pennsylvania & O. C. Co., 13 Ohio, 79, was a similar case, the contract providing for monthly payments, and a reserve of fifteen per cent. to insure the completion of the work; and also that in case of its too slow progress, and in certain other contingencies, the president of the company or the engineer should have power to determine that the contract had been abandoned, and such determination should put an end to it,

and exonerate the company from every obligation arising therefrom, and then the job might be disposed of as though the contract had never existed. It was declared abandoned because, in the opinion of the engineer, the work was not being prosecuted with sufficient force to insure its completion within the time agreed on. Suit was brought by the contractor to recover the fifteen per cent. reserved in monthly payments for work done. Woods, J., said: "The contract may be supposed to be severe upon the plaintiffs. They were, however, by no means forced to execute it. It was voluntary. By its terms, extensive control over the work is conferred upon the defendant, and great confidence reposed in the honest and faithful exercise of his discretion. If the defendant has violated neither its letter nor its spirit it is difficult to see what reasons the plaintiffs have for complaint. We sit here to enforce the contracts made by others, but we have no authority to impose upon them obligations to which they have never assented. The plaintiffs were to be paid monthly, on estimates made monthly by the engineer. It has been done. Fifteen per cent. was to be retained to insure the completion of the work. The defendant kept back this amount. If the contract was declared abandoned, the determination of the president or engineer is conclusive. The contract is at an end, and the defendant exonerated from every obligation thence arising by express agreement. It is insisted that when the whole work is completed the fifteen per cent. may be

ered at once, and in the contract the parties agreed to forfeit \$500 in case either failed to comply with its terms. It [520] was held that the forfeiture was intended by them as a compensation to either in case the other wholly abandoned the contract and was liquidated damages, not a penalty. As the general rule of damages might not embrace all the compensation the parties deemed would be due in view of the probable risk, trouble, loss and expense incident to the contemplated change on the part of either party, they were regarded as having fixed the sum stipulated as the amount of damage each would suffer from a total failure; and the word "forfeit" was outweighed by the other elements of interpretation and meant "to pay." Agnew, J., said: "It is unnecessary to examine the numerous authorities in detail, for they are neither uniform nor consistent. No definite rule to determine the question is furnished by them, each being determined more in direct reference to its own facts than to any general rule. In the earlier cases the courts gave more weight to the language of the clause designating the sum as penalty or as liquidated damages. The modern authorities attach greater importance to the meaning and intention of the parties. Yet the intention is not all-controlling, for in some cases the subject-matter and surroundings of the contract will control the intention where equity absolutely de-

recovered by the plaintiffs. Had they finished the work the position would be correct, but if the contract is abandoned, relet and others complete the work, the amount retained as security is in its nature liquidated damages. If it were not so intended, there would be no security in the retention of this amount. . . . The president or engineer is the umpire between the parties. His determination ends the contract and exempts the company from its obligations. The agreements of the parties are the law by which their rights are to be determined, and I am extremely doubtful, at least, whether any court can legitimately interfere and upset their arrangements when an honest

discretion has been exercised, where neither fraud nor circumvention has intervened. I am instructed by my brethren, however, to say, as the opinion of the court, that in this class of cases the subject is open to inquiry whether the contractors had done any act, or omitted the performance of any duty, which, within the terms of the contract between the parties, would justify the president or engineer in declaring it abandoned; and if no such act had, in fact, been done, nor duty omitted, the honest exercise of the discretion conferred to abandon the contract ought not to shield the defendant from the payment of the per centum so retained."

mands it. A sum expressly stipulated as liquidated damages will be relieved from if it is obviously to secure payment of another sum capable of being compensated by interest. On the other hand, a sum denominated a penalty or forfeiture will be considered liquidated damages where it is fixed upon by the parties as the measure of the damages, because the nature of the case, the uncertainty of the proof or the difficulties of reaching the damages by proof have induced them to make the damages a subject of previous adjustment. In some cases the magnitude of the sum and its proportion to the probable consequence of a breach will cause it to be looked upon as minatory only. Upon the whole, the only general observation we can make is that in each case we [521] must look at the language of the contract, the intention of the parties as gathered from all its provisions, the subject of the contract and the surroundings, the ease or difficulty of measuring the breach in damages and the sum stipulated, and from the whole gather the view which good conscience and equity ought to take of the case.”¹

§ 294. Stipulation for payment of a fixed sum for partial or total breach. Contracts often contain a variety of stipulations of unequal importance and, therefore, admitting of many breaches for which the damages would be different in amount. In such a case a total breach would involve an injury greater than that which would result from the infraction of a particular stipulation. Hence, it is self-evident that a sum stipulated to be paid, either for breach of one of the minor provisions or of the whole contract, could not be a liquidation of damages on the principle of compensation for actual injury. The sum would either be too great for a partial breach or wholly inadequate to one which involved the loss of the whole contract. Where an agreement contains several stipulations differing in importance, and a sum is mentioned as liquidated damages to be paid in case of a breach and of such amount as is apparently appropriate to a total breach, it will be regarded as intended to fix the damages only for such a breach; and an intention will not be imputed to make it payable for breach of minor and unimportant parts

¹Streeper v. Williams, 48 Pa. St. 450; Shreve v. Brereton, 51 id. 175; Robeson v. Whitesides, 16 S. & R. 320.

in the absence of language very clearly expressing it.¹ If, however, it cannot be appropriated thus to a total breach, but applies by necessary construction to such as would cause trifling loss or inconvenience, as well as to those of great importance, such sum is a penalty. Parke, B., said: "The rule laid down in *Kemble v. Farren*² was that when an agreement contained several stipulations of various degrees of importance and value, the sum agreed to be paid by way of damages for breach of any of them shall be construed as a penalty, and not as liquidated damages, even though the parties have in express terms stated the contrary. . . .

¹ *Hoagland v. Segur*, 88 N. J. L. 280.

In *Pennypacker v. Jones*, 106 Pa. St. 287, the stipulation was that machines put into a mill should have a designated capacity to make high grades of flour, and if the results were not as promised the machines were to be retained without payment being made for them. The court observe that nothing was "said to the effect, either that for any breach the entire machinery may be retained without payment for it, or that for a gross breach it shall be retained as stipulated damages. No sum is fixed either as a penalty or as liquidated damages. It is manifest that if the defendants produced all the results agreed upon except a deficiency of one or two barrels in the daily product, the forfeiture of the entire contract price of the machinery would be entirely out of proportion to the damage sustained. Again the letter of this provision of the contract is that the machines may be retained if the results are not as promised. This relates only to the non-production of the results contracted to be produced, that is, that the mill should have a capacity of two hundred barrels daily, with full modern percentage of high grades flour equal in quality to best in market.

It makes no provision for damages for other breaches of contract, which may occur consistently with the production of the results stated. One of the items of damage sustained by the plaintiffs was that it took a greater quantity of grain to produce a barrel with the defendants' machines than with the ordinary process, and the referee has found especially that from this source alone there was a positive loss of \$1,096.75. This is a species of direct loss for which we think there can be a recovery. The cost to which the plaintiffs were subjected in repairing the mill after the defendants ceased work is also a direct loss arising from the defective machinery furnished, and it is not provided for in the contract. We think it clear that none of these items come within the terms of the stipulation for the retention of the machines, and that it was not within the contemplation of the parties that they should. We therefore consider that the provision for the retention of the machines was only in the nature of a penalty, and that the true measure of damages is the loss actually sustained, flowing directly from the defects in the defendants' machines."

² 6 Bing. 141.

[522] When the parties say that the same ascertained sum shall be paid for the breach of any article of the agreement, however minute or unimportant, they must be considered as not meaning exactly what they say; and a contrary intention may be collected from the other parts of the agreement.”¹ But in a later case² he is reported to have said of the same case: “That decision has since been acted upon in several cases, and I do not mean to dispute its authority. Therefore, if a party agree to pay 1,000*l.* on several events, all of which are capable of accurate valuation, the sum must be construed as a penalty and not as liquidated damages. But if there be a contract consisting of one or more stipulations, the breach of which cannot be measured, then the parties must be taken to have meant that the sum agreed on was liquidated damages and not a penalty.” And the same antithesis is stated by him in another case: “Where a deed contains several stipulations of various degrees of importance, as to some of which the damages might be considered liquidated, whilst for others they might be deemed unliquidated, and a sum of money is made payable on a breach of any of them, the courts have held it to be a penalty only, and not liquidated damages. But when the damages are altogether uncertain, and yet a definite sum of money is expressly made payable in respect to it by way of liquidated damages, those words must be read in the ordinary sense, and cannot be construed to import a penalty.”³ This latter distinction has been recognized and followed in other cases in England and in America.⁴ In the

¹ Horner v. Flintoff, 9 M. & W. 678.

² Atkins v. Kinnier, 4 Exch. 776.

³ Green v. Price, 13 M. & W. 695 ; affirmed, 16 id. 346.

⁴ Carpenter v. Lockhart, 1 Ind. 434. Cotheal v. Talmage, 9 N. Y. 551, was decided on this distinction. Ruggles, J., said: “It is contended that because the contract referred to in the bond bound the defendant to do several things of different degrees of importance, and the sum of \$500 was made payable for the non-performance of any or either, it must be a penalty, and not liquidated damages.

This doctrine, in the cases in which it is asserted, is traced to the cases of Astley v. Weldon, 2 Bos. & Pul. 346, and Kemble v. Farren, 6 Bing. 141. But I do not understand either of these cases as establishing any such rule. The principle to be deduced from them is, that where a party agrees to do several things, *one of which is to pay a sum of money*, and in case of a failure to perform any or either of the stipulations agrees to pay a larger sum as liquidated damages, the larger sum is to be regarded in the nature of a penalty ;

most recent English case on this subject there is a very full discussion of the earlier cases, and the conclusion reached is that a contract to pay a sum of money if there shall be a breach of the stipulations contained in it, they being of varied importance and none of them trivial nor conditioned for the payment of specified amounts of money, provides for liquidated damages.¹ In the case referred to the plaintiff agreed to sell an estate for 70,000*l.* to the defendant; the latter was to build upon it and complete the buildings within ten years. A deposit of 5,000*l.* was to be paid by the defendant. The agreement provided that "if the defendant should commit a substantial breach of the contract, either in not proceeding with due diligence to carry out and complete the works, or in

and being a penalty in regard to one of the stipulations to be performed is a penalty as to all. In *Kemble v. Farren Tindall*, C. J., says that if the clause fixing the sum for liquidated damages had been limited to breaches which were of uncertain nature and amount, we should have thought it would have the effect of ascertaining the damages upon any such breach; 'thus rejecting the doctrine contended for by the defendant's counsel in the present case. It is true that the doctrine thus contended for has been adopted in some English and in several American cases; hastily, I should think, and without careful examination of the cases from which it is supposed to be derived. But if it should be considered as having any solid foundation in principle, it should be applied only in subordination to the general rule, which requires the courts in these, as in all other cases, to carry into effect the true intent of the parties. It should never be applied to cases like the present, where the amount of damages is uncertain from the nature of the subject itself; and incapable of proof, not only from that uncer-

tainty, but from the circumstances already stated; and where, for these reasons, there was a necessity for ascertaining them by estimate by the parties in their contract. The only plausible ground for withholding the doctrine in any case is, that the party might be made responsible for the whole amount of damages for the breach of an unimportant part of his contract, and so be made to pay a sum by way of damages grossly disproportionate to the injury sustained by the other party. Without undertaking to deny that this rule may properly be applied to some cases, I cannot think it ought to be applied to the present. The injustice it professes to avoid is no greater than that which is tolerated in many other cases for the purpose of enforcing a faithful performance of contracts." *Bagley v. Peddie*, 16 N. Y. 469.

¹ *Wallis v. Smith*, 21 Ch. Div. 243, followed in *Schrader v. Lillis*, 10 Ontario, 358, notwithstanding the court of appeal for Ontario had, previous to the decision of *Wallis v. Smith*, announced the contrary doctrine in *Craig v. Dillon*, 6 Ont. App. 116.

failing to perform any of the provisions therein contained, then and in either of the said events the deposit money of 5,000*l.* was to be forfeited; and if the balance of such deposit had not then been paid then the defendant should forfeit and pay a sum of money equal to such balance, the intention being that if default was made by the defendant as aforesaid he should forfeit and pay to the plaintiff by way of liquidated damages the sum of 5,000*l.*, and the agreement to be void and of no effect." The defendant paid no part of the deposit, expended nothing on the estate and performed none of the acts stipulated for. A suit was brought to recover 5,000*l.* as liquidated damages, and the court of appeal held, affirming the judgment of Fry, J., that it was recoverable. It was pointed out by Jessel, M. R., that, although the *dicta* in the earlier cases¹ seemed to lay down a positive rule, the actual decisions were in cases where one or more of the stipulations was or were for the payment of a sum of money less than that named as liquidated damages. He said: "Although I wish to leave the question open .. here there are several stipulations, and one or more is or are of such a character that the damages must be small, I do not wish for a moment to abstain from stating my opinion that there is no such doctrine where there are several stipulations irrespective of importance, which is the doctrine laid down by Mr. Justice Heath,² and apparently approved of by Lord Justice James.³ There is neither authority nor principle for such doctrine, and I cannot see that it is established by any case which is binding on this court." Lord Justice Cotton said: "It is not sufficient, in my opinion, to say that the covenants to the breach of which this applies are of varying importance. That may be so, but yet the parties may very reasonably come to the conclusion that they will agree between themselves that the sum mentioned shall be assessed between them as the damages in consequence of the breaches of these various covenants. Probably there may be an exception, that where some of the

¹ *Astley v. Weldon*, 2 B. & P. 346, *v. Local Board of Redditch* [1892], 353; *In re Newman*, 4 Ch. Div. 731; 1 Q. B. 127.

Reynolds v. Bridge, 6 E. & B. 540;

Atkins v. Kinnier, 4 Exch. 783; *Gals-*

worthy v. Strutt, 1 id. 659. See Law

² *Astley v. Weldon*, *supra*.

³ *In re Newman*, *supra*.

covenants are of such a character that obviously the damages which can possibly arise from a breach in any way of that covenant would be very insignificant compared with the sum which has been fixed by the parties, there the court will give the non-natural construction to the terms used by the parties. In my opinion that comes within the same principle as where the courts have interfered, where one of the covenants has been for payment of a sum of money where the damage is capable of being assessed accurately, and is very much below the sum named." This decision is correctly interpreted to mean "that an agreement with various covenants of different importance is not to be governed by any inflexible rule peculiar to itself, but is to be dealt with as coming under the general rule that the intention of the parties themselves is to be considered. If they have said that in the case of any breach a fixed sum is to be paid, then they will be kept to their agreement unless it would lead to such an absurdity or injustice that it must be assumed that they did not mean what they said."¹

§ 295. Same subject. Whether the damages are [523] certain or not, a fixed sum made payable on the happening of one or of several events, each of which will be the occasion of some loss, cannot be deemed a sum intended for compensation unless the stipulations are all of primary importance and the damages resulting from their breach are equally uncertain, or the provisions are parts of one whole, steps in the accomplishment of one end, and to be regarded as a single contract. Otherwise no stipulation can operate on that principle. In many courts the law is held to be that a sum is stipulated damages when it conclusively appears that the parties have intentionally adopted it for that purpose. But where the courts proceed on the theory that there can be no such intention when the stipulation is so framed that it cannot by any possibility operate to adjust the recompense to actual injury, a sum made payable indifferently for one breach or for many, for a breach attended with a small loss or a large one, can have no effect to liquidate damages. In case the damages are easily computed, the extent of the inequality of the provision is seen at once; but even if they are uncertain, the inequality

¹ Mayne on Dam., 4th London ed., 145.

[524] is logically certain. Ryan, C. J., stated the point with great clearness: "Where the sum is agreed to be paid for any of several breaches of the contract, and the damages resulting from the breach of all of them are uncertain, and there is no fixed rule for measuring them, but the breaches are apparently of various degrees of importance and injury, the cases are conflicting on the rule whether the sum should be held as a penalty or as liquidated damages. On principle we are very clear that in such a case the sum should be held as a penalty. For it appears to us that it would be as unjust to sanction a recovery of the sum agreed to be paid alike for one trivial breach, or for one important breach, or for breach of the whole contract, as it would be to sanction such a recovery equally for damages certain and uncertain in their nature. The rule holding the sum to be a penalty in the latter case goes upon the injustice of allowing such a recovery equally in case of damages, uncertain indeed, but manifestly and materially different in amount; equally for breach of part of the contract, and for breach of the entire contract. Such a rule would not only put the same value on a small part as on a large part, but would put the same value on any part as on the whole."¹ This is [525] believed now to be the doctrine generally held; if a gross sum is stipulated to be paid for any failure to fulfill an

¹ *Lyman v. Babcock*, 40 Wis. 508. In 8 *Parsons on Cont.* 161, the author says: "Let us suppose a contract between parties, one of whom, for good consideration, promises to the other to do several things, and then it is agreed that the promisor shall pay, by way of liquidated damages, a large sum, if the promisee recover against him in an action for a breach of this contract. It must be supposed that this sum is intended and regarded as adequate compensation for the breach of the whole contract; for it is all that the promisor is to pay if he breaks the whole. It would, of course, be most unjust and oppressive to require him to pay this whole sum for violating any one of the least important items of the contract. But

such would be the effect, if the words of the parties prevailed over the justice of the case. The sum to be paid would, therefore, be treated as penalty, and reduced accordingly, unless the agreement provided that it should be paid only when the whole contract was broken, or so much of it as to leave the remainder of no value; or unless the sum agreed upon was broken up into parts, and to each breach of the contract its appropriate part assigned; and the sum or sums payable came in other respects within the principles of liquidated damages." *Astley v. Weldon*, 2 B. & P. 346, per Heath, J.; *Boys v. Ancell*, 5 Bing. N. C. 390; *Reilly v. Jones*, 1 Bing. 802.

agreement consisting of several parts and requiring several things to be done or omitted, it is a penalty.¹ A distinction is taken in England where a deposit is made and it is to be forfeited for the breach of a number of stipulations of varying importance. Though some of them may be trifling or require the payment of a designated sum of money on a given day, if the contract provides for stipulated damages it will be carried

¹ *Watts v. Camors*, 115 U. S. 358; *Bignall v. Gould*, 119 id. 495; *St. Louis, etc. Ry. Co. v. Shoemaker*, 27 Kan. 677; *Higbie v. Farr*, 28 Minn. 439; *Carter v. Strom*, 41 id. 522; *Dickson v. Lough*, 18 L. R. Ir. 518; *Charles Fruit Co. v. Bond*, 26 Fed. Rep. 18; *McPherson v. Robertson*, 82 Ala. 459; *Moore v. Colt*, 127 Pa. St. 289; *Farrar v. Beeman*, 63 Tex. 175; *Lansing v. Dodd*, 45 N. J. L. 525; *Whitfield v. Levy*, 35 id. 149; *Tayloe v. Sandiford*, 7 Wheat. 13; *Van Buren v. Digges*, 11 How. (U. S.) 461; *Carpenter v. Lockhart*, 1 Ind. 434; *Cook v. Finch*, 19 Minn. 407; *Lee v. Overstreet*, 44 Ga. 507; *Owens v. Hodges*, 1 McMull. (S. C.) 106; *Hammer v. Breidenbach*, 81 Mo. 49; *Goldsborough v. Baker*, 8 Cranch C. C. 48; *Nash v. Hermosilla*, 9 Cal. 581; *Foley v. McKeegan*, 4 Iowa, 1; *Martin v. Taylor*, 1 Wash. C. C. 1; *Henderson v. Cansler*, 65 N. C. 542; *Lord v. Gaddis*, 9 Iowa, 265; *Hallock v. Slater*, id. 599; *Brown v. Bellows*, 4 Pick. 179; *Moore v. Platte Co.*, 3 Mo. 467; *Jackson v. Baker*, 2 Edw. Ch. 471; *Thoroughgood v. Walker*, 2 Jones' L. 15; *Curry v. Larer*, 7 Pa. St. 470; *Fitzpatrick v. Cottingham*, 14 Wis. 219; *Trower v. Elder*, 77 Ill. 452; *Hoagland v. Segur*, 38 N. J. L. 230; *Long v. Towl*, 42 Mo. 545; *Gower v. Saltmarsh*, 11 Mo. 271; *Watts v. Sheppard*, 2 Ala. 425; *Cheddick v. Marsh*, 21 N. J. L. 463; *Niver v. Rossman*, 18 Barb. 50; *Berry v. Wisdom*, 8 Ohio St. 241; *Clement v. Cash*, 21 N. Y. 253; *Chase v. Allen*, 13 Gray, 42; *Trustees v. Walrath*, 27 Mich. 232; *Elizabethtown, etc. R. Co. v. Geoghegan*, 9 Bush, 56; *Daily v. Litchfield*, 10 Mich. 29; *Staples v. Parker*, 41 Barb. 648; *Magee v. Lavell*, L. R. 9 C. P. 107; *Shute v. Taylor*, 5 Met. 61; *Beckham v. Drake*, 9 M. & W. 79; *Hoag v. McGinnis*, 22 Wend. 168; *Higginson v. Weld*, 14 Gray, 165; *Lea v. Whitaker*, L. R. 8 C. P. 70; *In re Newman*, 4 Ch. Div. 724; *Hooper v. Savannah & M. R. Co.*, 69 Ala. 529; *Heatwole v. Gorrell*, 35 Kan. 692; *Bryton v. Marston*, 33 Ill. App. 211.

In some of the foregoing cases the rule is quoted as applicable to agreements for performance or omission of various acts, in respect to one or more of which the damages on a breach would be readily ascertainable, because the particular case embraced such stipulations; but without any expression to indicate that the determination would have been different if all the damages had been of an uncertain nature.

In *Hathaway v. Lynn*, 75 Wis. 186, there was a single stipulation for a series of acts of the same nature from each of which the promisee might expect a benefit, but it was contingent, and \$200 was stipulated as damages for violation or disregard of the terms of the agreement; it was held that for partial breach only nominal damages could be recovered in the absence of proof of substantial damages. See *McCullough v. Manning*, 132 Pa. St. 43.

out. Commenting on this rule Fry, J., said: "In that there seems to me to be great good sense, and for this reason, that if a fund is set apart to meet a particular contingency which is described, and that contingency arises, it is difficult to say that the stakeholder, or other person having the fund, is not to hand it over at once to the person who claims it under the contingency which has happened."¹

There is one class of contracts in which the general construction of stipulations liquidating damages may at first sight seem to be in conflict with the doctrine stated: contracts of a negative character, requiring a party to abstain continuously from doing certain acts, as to discontinue a nuisance² or to secure enjoyment of the good will in a certain trade or business. A contract of the latter description contains a guaranty against competition from the promisor for a certain time and at a specified place, or in some limited district. He agrees not to engage in that business for such time within that place, and if he does, or violates the contract, or fails to fulfill it, he will pay a certain sum. In general, a single violation, though [526] it be accomplished in one day, and is confined to a small part of the district, subjects him to liability for the stated sum, and a repetition of such acts, or a failure to abstain at all, may subject him to no greater liability.³ These agreements are in general such as to require one continuous act of abstention, and the consideration and the amount required to be paid evince the intention that such stipulated sum be paid for a minimum of violation. The agreement may be so framed that there may be repeated recoveries for successive infractions, or so that only one infraction is possible.⁴

¹ Wallis v. Smith, 21 Ch. Div. 243, 11 Ind. 70; Spicer v. Hoop, 51 Ind. 250, 258; Hinton v. Sparkes, L. R. 3 365; Jaquith v. Hudson, 5 Mich. 123; C. P. 161; Lea v. Whitaker, 8 id. 70; Mercer v. Irving, E. B. & E. 563; Magee v. Lavell, 9 id. 107; Reynolds v. Bridge, 6 El. & B. 528;

² Grasselli v. Lowden, 11 Ohio St. 349; not to poach, Roy v. Duke of Beaufort, 2 Atk. 190; Sainter v. Ferguson, 7 C. B. 716; Muse v. Swayne, 2 Lea (Tenn.), 251; Galsworthy v. Strutt, 1 Exch. 659; Rawlinson v. Clarke, 14 M. & W. 187.

³ See Hathaway v. Lynn, 75 Wis. 186. It is held in Kansas that contracts not to engage in business must be sued upon as breaches thereof occur.

⁴ Dakin v. Williams, 17 Wend. 447; Dunlop v. Gregory, 10 N. Y. 241; Mott v. Mott, 11 Barb. 127; Streeter v. Rush, 25 Cal. 67; Duffy v. Shockey, Heatwole v. Gorrell, 85 Kan. 692. But this is not in accord with the

Where the stated sum obviously and grossly exceeds [527] any just measure of compensation there is the same recog-

weight of authority. *Streeter v. Rush*, 25 Cal. 67; *Cushing v. Drew*, 97 Mass. 445; *Grasselli v. Lowden*, 11 Ohio St. 349; *Moore v. Colt*, 127 Pa. St. 289. See *Leary v. Laffin*, 101 Mass. 384.

Under a statute of New York a contract was authorized to be made with certain officers for the publication of the reports of the decisions of the court of appeals. The officers were given power to impose terms beneficial to the public on the contracting publisher, and to make provision in the contract that a party injured by the refusal of the contractor to sell and deliver as prescribed in the contract should be entitled to recover damages, and might fix a sum as liquidated damages. A contract so entered into required the contractor to furnish, at the contract price, any volume published under it to any other law-bookseller in the city of New York or Albany applying therefor, "in quantities not exceeding one hundred copies to each applicant;" unless the contractor choose to deliver more. The contract also provided that for any failure on the part of the contractor "to keep on sale, furnish and deliver the volumes, or any of them, as agreed, he shall forfeit and pay . . . the sum of \$100, hereby fixed and agreed upon, not as penalty, but as liquidated damages," to be sued for and recovered by the persons aggrieved. The plaintiff, a bookseller, applied on six different occasions for a number of copies required by him in his business, of certain volumes published under the contract, tendering the contract price, which defendant refused to deliver. In an action on the contract it was held a valid stipula-

tion of damages, not a penalty, and that the plaintiff was entitled to recover the damages for each refusal. *Miller, J.*, delivering the opinion of the court, treats the question as one depending on the intention of the parties, ascertained from the language of the contract and from the nature of the surrounding circumstances of the case. Referring to the case he says: "The breach provided for was a single one—a failure to keep on sale, furnish and deliver the volumes named at a price fixed. The agreement expressly provides that the sum named is fixed and agreed upon 'not as a penalty.' The failure to sell and deliver embraced not only a single volume, but might be one hundred volumes at one time. The damages for a failure to deliver a single volume might be very small, while for a larger number it would be far greater; and, in case of a bookseller, disposing of them in the course of his trade, might be beyond the amount actually fixed. The damages for a single breach were also uncertain, and could not be determined without extrinsic evidence, and without some embarrassment. The mere loss of profits on a volume to a bookseller might also be of but trifling amount when compared with the injury to his trade by being unable to furnish to his customers volumes of the reports as required. Under the circumstances it is easy to see that there would be considerable difficulty in making proof of the actual damages incurred. In view of the facts, although the question is by no means free from embarrassment, it is, perhaps, a fair inference that the parties actually intended to guard against

nized discretion in such cases as in others to declare it a penalty.¹

§ 296. Effect of part performance accepted where damages liquidated. For the same reason that one sum

these difficulties by fixing the amount named in the contract as liquidated damages. As the damages which might possibly be incurred by a failure to supply a larger number of copies provided for by the contract might be greater, we think the amount was not unreasonable, or grossly disproportionate to the probable estimate of actual damages." *Little v. Banks*, 85 N. Y. 258.

¹ *Wheatland v. Taylor*, 29 Hun, 70; *Burrill v. Daggett*, 77 Me. 545; *Smith v. Wedgwood*, 74 id. 457; *Stearns v. Barrett*, 1 Pick. 443.

In *Perkins v. Lyman*, 9 Mass. 522, S. C., 11 id. 76, the defendant covenanted for a valuable consideration that he would not be directly or indirectly interested in any voyage to the northwest coast of America or in any traffic with the natives of that coast for seven years, in the penal sum of \$8,000. It was held a violation of such covenant to own and fit a vessel for such voyage, although before her departure the covenantor divested himself of all interest in the vessel and cargo; but also held that the \$8,000 was penalty. "The question whether a sum of money mentioned in an agreement shall be considered as a penalty and so subject to the chancery powers of this court or as damages liquidated by the parties is always a question of construction, on which, as in other cases where a question of the meaning of the parties in a contract, provable in a written instrument, arises, the court may take some aid to themselves from circumstances extraneous to the writing. In order to determine upon the words used

there may be an inquiry into the subject-matter of the contract, the situation of the parties, the usages to which they may be understood to refer, as well as to other facts and circumstances of their conduct; although their words are to be taken as proved by the writing exclusively." The court considered there was nothing in the transaction and subject-matter to indicate whether the sum stated was penalty or liquidated damages. It might be either consistently with the object of the contract. But the court say: "If the sum of \$8,000, mentioned in the agreement, is to be treated as liquidated damages, then for one instance, in which the contract should be broken, and for a thousand in which the defendant should interfere in the trade contemplated by the parties to be secured to the plaintiffs for seven years, exclusively of him and of all acting under him, the same damages, the amount of demand, would be recovered, and having been once paid, if demanded as a penalty, there would be an end of the contract; but if demanded as damages, then, it seems, the demand might be repeated. Examined in this view we see nothing which gives this contract any other determinate meaning than that of penalty. If there is nothing to prevent the plaintiffs, in case the defendant should have injured them in the breach of his contract to a greater amount than \$8,000 from recovering upon his covenant, and in that form of action, the extent of the damage actually sustained, although greatly exceeding the sum mentioned, it would be

cannot consistently be compensation alike for a total and partial breach, a stated sum made payable for the former cannot by construction be applied to any infraction after acceptance of part performance.¹ In case of such a stipulation the stated sum is only recoverable upon the happening of the very event mentioned in the contract. If a partial breach occurs it has sometimes been said the stated sum is as to that breach only penalty, and damages are given on proof without regard to it.² In other instances it has been held that the damages for a partial breach are a constituent of the sum stipulated for an entire failure to perform. Thus, where there were liquidated damages for a failure to convey land, and a part only of it was conveyed, and a failure as to the residue, the damage allowed was a sum which bore the same ratio to the stipulated sum that the value of the land not conveyed bore to that of the whole.³

a severe construction, indeed, which should consider him liable to that amount upon one breach, however slight the injury and loss may have been. . . . He binds himself in the sum of \$8,000 for his faithfully and strictly adhering to this contract. It is not said, if he does so, contrary to his agreement, then he will pay that sum as a satisfaction. Nor is there anything expressed which would conclude the plaintiffs, unless it be their form of action (debt), when the amount of damages should exceed \$8,000, from demanding to the extent of their loss."

¹ Hoagland v. Segur, 38 N. J. L. 230; Shute v. Taylor, 5 Met. 61; Taylor v. The Marcella, 1 Woods, 302; Watts v. Sheppard, 2 Ala. 425; Berry v. Wisdom, 8 Ohio St. 241; Lampman v. Cochran, 16 N. Y. 275, per Shankland, J.; Sheill v. McNitt, 9 Paige, 101; Mundy v. Culver, 18 Barb. 336. The text is approved in Wibaux v. Grinnell Live Stock Co., 9 Mont. 154, 165. In this case the contract was for the sale and purchase of cattle, and stipulated that

a sum should be paid if the vendor failed to deliver the entire number called for; no provision was made for the delivery of a less number. Less than the whole were delivered and accepted. As a result the agreement for stipulated damages was converted into one in the nature of a penalty.

² Wheatland v. Taylor 29 Hun, 70; Shute v. Taylor, 5 Met. 61.

³ Watts v. Sheppard, 2 Ala. 425. See Chase v. Allen, 18 Gray, 42.

The sum named must be regarded as liquidated as to all the provisions to which it shall extend, or it will not be so regarded as to any. It cannot be liquidated damages in one case and not in the other. If the contract applies to the covenant of one party to convey, and to that of the other party to pay the consideration money on the delivery of the deed, the measure of damages in one case is the unpaid purchase-money, which can be ascertained, and as to that covenant it cannot be considered liquidated damages, and if not liquidated as to that covenant it is not as to the other. Lansing v. Dodd, 45 N. J. L.

§ 297. Liquidated damages are in lieu of performance.
 [529] It has been held that in all cases where a party relies on the payment of liquidated damages it must clearly appear from the contract that they are to be paid and received in lieu of performance.¹ Where the stipulated sum covers the loss of the whole contract, and does not apply where there is merely a violation of some detail of it, they are in lieu of the performance of the entire contract; they satisfy the whole and every particular of it. Thus, if in an agreement for submission of a controversy to arbitration it is mutually agreed that either party failing to fulfill it shall pay to the other a specified sum as stated damages, not so large in itself as to imply a penalty, it would be recoverable from the party who should revoke the power of the arbitrators, for he would thereby repudiate the submission and defeat the entire object of the agreement. But if there be no revocation, and after an award is made one party refuses to perform it, the refusal is not such a breach as the stated sum applies to.² And if the

525; *Whitfield v. Levy*, 85 id. 149, 156; *Laurea v. Bernauer*, 83 Hun, 807.

¹*Gray v. Crosby*, 18 Johns. 219; *Winch v. Mutual Benefit Ice Co.*, 9 Daly, 177.

²*Id.* In *Lowe v. Nolte*, 16 Ill. 475, an action was brought on an award. The submission stated that several suits were pending between the parties, arising out of a contract in relation to the purchase of grain; and it was agreed that all matters connected with the contract and the suits were to be referred; that the decision be conclusive, and that judgment, on ten days' notice, should be entered on the award. It was also provided that the submission should not operate to dismiss any of the pending suits until final judgment on the award, or the performance of it; the parties binding themselves to abide by the award "in the penalty of \$1,000 as stipulated damages, to be paid by the party delinquent to the

party complying." The award was for \$5,876.46. *Scates, C. J.* (speaking of causes of demurrer to the declaration), said: "The most important is the want of an averment of a failure to pay the liquidated damages, stipulated to be \$1,000, for non-compliance with the award, and which it is here contended is all that can be recovered under the submission and award. If this view is sustainable no action will lie upon the award as it is here brought, but alone upon the submission. To solve this objection it is necessary to ascertain, from the nature of the matters in controversy and the terms and language of the parties in their submission, whether they intended by this part of the agreement that the \$1,000 fixed as liquidated damages should be strictly and technically so held, or only as a penalty. Courts have not been confined and controlled alone by the literal terms, stipulated damages, used by the parties, when inquiring into

stated sum is made payable as liquidated damages for a [530] breach of some particular only of the agreement, then it may still be a question whether that feature of the contract will, notwithstanding the breach, and the claim or even payment of those damages, be of continuing obligation so as to admit of other breaches and successive claims and recoveries of the same stipulated damages. This question is not to be settled by any rule peculiar to the construction of such stipulations; it depends on the intention of the parties as ascertained by a fair interpretation of the contract. Where certain work is required to be done within a specified time it may be, and often is, agreed that a stated sum shall be paid for every week, month or other period during which its completion is delayed beyond that time. In such cases there is, by necessary implication, a continuing obligation as well as right to finish the work, though the stipulated time of performance has elapsed. These sums are recoverable and may be aggregated;¹ and they are severally payable only as complete satisfaction for the delay of performance and not in lieu of it.

§ 298. Effect of stipulation upon right of action. It is not the effect of the ordinary contract which stipulates for damages to constitute the person who claims the benefit of the stipulation a tribunal to determine his rights thereunder. Hence, where a contractor has not performed according to

their true intention and meaning; but they have looked to the subject-matter of the dispute, the situation and condition of the parties, and all the circumstances, together with the effects and consequences, as aids in arriving at the true meaning. Where a covenant is made concerning an existing cause of action, that cause may or may not be merged in the covenant. If it be merged, and the covenant be broken, the party is liable alone on the covenant, and not on the original cause of action. If it is not merged, then the covenant affords a new and additional cause of action and remedy upon it. In this latter case, if the amount named in the covenant or agreement be fixed

as liquidated or stipulated damages, and is *intended* by the parties to be paid in lieu of performance, then the recovery will be confined to that amount for the breach, as well as to his action on the covenant or agreement for his remedy, and cannot preserve his original cause of action. But when such intention does not appear, the sum named as stipulated or liquidated damages will be received and treated as a penalty; and the party may recover upon the original cause."

¹Fletcher v. Dyche, 2 T. R. 32; Pettis v. Bloomer, 21 How. Pr. 317; Hall v. Crowley, 5 Allen, 304. See *ante*, § 291; Weeks v. Little, 47 N. Y. Super. Ct. 1.

his agreement the contractee may sue for the sum which the other has agreed shall be the damages;¹ and where the amount is to be deducted from the payment last due, if such deduction has been made, the fact may be shown in bar of the action.²

§ 299. **Waiver of right to stipulated damages.** If part performance of an entire contract is accepted a stipulation concerning the damages is waived.³ The waiver of the right to annul a building contract waives a claim to stipulated damages for either non-performance or delay by the contractors, in the absence of an express agreement to the contrary.⁴ There is no waiver of the right to such damages on the ground of part performance where the obligee performs for and at the request of the obligor; no consent that an existing breach shall be disregarded can be implied from the obligee's act.⁵ Where it is provided that a sum shall be deducted from the contract price for the performance of work for each week's delay beyond the time fixed, the right thereto is not waived because the amount is not deducted from the monthly estimates or claimed from month to month, if the contract is silent as to the time when the claim shall be asserted.⁶ If the defendant's right to retain the money which has been agreed upon as stipulated damages depends upon the failure of the plaintiff to perform and the termination of the contract for that reason, the fact that the contract is ended by consent does not waive the right to the damages.⁷

¹ Mitchell v. McKinnon, 65 Mich. 683; Lea v. Whitaker, L. R. 8 C. P. 70.

² Mitchell v. McKinnon, *supra*; Stillwell v. Temple, 28 Mo. 156.

³ Wibaux v. Grinnell Live Stock Co., 9 Mont. 154.

⁴ Henderson Bridge Co. v. O'Connor, 88 Ky. 303, 331; S. C., 11 S. W. Rep. 18; 11 Ky. L. Rep. 146.

⁵ Parr v. Greenbush, 42 Hun, 232.

⁶ Texas, etc. Ry. Co. v. Rust, 19 Fed. Rep. 239, 245.

⁷ Wolf v. Des Moines Ry. Co., 64 Iowa, 380.

CHAPTER VIII.

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Interest as an element of damage has already been several times mentioned. But as such and otherwise it is an elementary topic deserving more particular treatment, and this seems the most appropriate place to introduce it.

§ 300. Definitions and general view. Interest is the compensation fixed by agreement or allowed by law for the use or detention of moneys, or for the loss thereof to the party entitled to such use. It is computed at a certain rate per centum by the year, unless stipulated for upon some other period of time. In a strict sense it is the compensation agreed to be paid for the use of money while the debtor has a right to retain the principal, and during a stipulated period of credit; in other words, before the principal is due and payable. A creditor is not entitled to be paid for the use of money owing to him before it is due unless by agreement, express or implied.¹ And this should be for the prospective use of money; otherwise it has been held not to be strictly interest.² But

¹ Minard v. Beans, 64 Pa. St. 411; Marsh. 264; Brainerd v. Champlain Thorndike v. United States, 2 Mason, T. Co., 29 Vt. 154; Evans v. Beckwith, 1; Beardslee v. Horton, 8 Mich. 560; 37 Vt. 285; Tanner v. Dundee Land Robinson v. Bland, 2 Burr. 1077; Investment Co., 8 Sawyer, 187.

Rensselaer Glass F. v. Reid, 5 Cow. ² Daniels v. Wilson, 21 Minn. 580. 587; Robinson's Adm'r v. Brock, 1 The action was on a note given for a Hen. & M. 211; White v. Walker, 81 sum agreed upon for interest after Ill. 422; Pollard v. Yoder, 2 A. K. the time for which it was computed

past use may be a valid consideration for a promise to pay money by way of compensation.¹ When expressly stipulated [532] for to accrue during the period of forbearance it becomes as it accrues a positive addition to the principal, and is thence a distinct and integral part of the debt,² payable, unless otherwise agreed, when the principal is due,³ and in the same funds.⁴ As such it has a substantive character. The creditor is not obliged to forego what is unearned of the interest for an agreed period on a tender of the principal. The borrower or debtor cannot, by tendering the money to pay the debt before it is due, stop the interest; for the time of payment is part of the contract, and is fixed for the mutual benefit and convenience of the parties.⁵ After it accrues and is due it

had elapsed, and at a rate in excess of that antecedently specified in the contract for the principal. The court say: "A contract to pay interest is a contract to pay a consideration for the future use of money. The contract in this case was a contract to pay a consideration for the past use of money, and, therefore, not a contract to pay interest in any proper or legal sense." *Adams v. Hastings*, 6 Cal. 126.

¹ *Wilcox v. Howland*, 23 Pick. 167.

² *Southern C. R. Co. v. Moravia*, 61 Barb. 181; *West Branch Bank v. Chester*, 11 Pa. St. 282; *Foster v. Harris*, 10 id. 457.

³ *Saunders v. McCarthy*, 8 Allen, 42; *Cooper's Adm'r v. Wright*, 23 N. J. L. 200.

⁴ *McCalla v. Ely*, 64 Pa. St. 254.

⁵ *Davis v. Yuba Co.*, 75 Cal. 452; *Ellis v. Craig*, 7 Johns. Ch. 7. In this case interest was payable at stated periods before the principal was due. This circumstance appears, in some measure, to have influenced the decision, but the general course of reasoning, as well as the force of the authorities cited, are in favor of the broader doctrine stated in the text. The chancellor said: "There can be no doubt that the parties

may, by express stipulation, agree that a debt shall not be paid before a given time, and until that time arrives the debtor cannot tender the debt and stop interest. The question then occurs, what was the intention of the parties in this case, upon a fair and sound interpretation of the terms of the condition of this bond? The time of payment was made an essential part of the contract for the loan of the money. The terms of this bond were equally the agreement of both parties, and in which their mutual interest and convenience are presumed to have been consulted. A prolonged time of payment, when money is loaned upon interest payable periodically, is not always given for the accommodation of the debtor: the time is intended to meet the will and wishes of both parties; under the case of persons who are unable to earn money by their own exertions, or to employ themselves profitably in business, such as aged and infirm persons, women and infants, and also in the case of literary and charitable institutions, a safe investment of money with a prolonged time of payment of the principal and short times of payment of the interest is most likely to meet

may be recovered by action whether the principal be [534] then due or not,¹ or whether the principal has been paid or not.² In pleading to show a case for such interest, the agreement must be specially counted on and a breach of it

their wants and promote their welfare. The interest of money is liable to fluctuation, and money itself is a marketable commodity, and subject to greater or less demand according to the vicissitudes of trade and credit. These considerations may be supposed to have had a material influence upon the terms of the loan. We can hardly believe that both parties in this case had not equally in view their own convenience in fixing upon a distant day of payment of the principal, or that it was the meaning of the contract that the obligor, should he be able on the next day, or the next month after the loan, to force back the money upon the plaintiff, and break up an advantageous investment. Why were the usual words *or before* omitted in the condition of the bond but to show the intentions of the parties that the principal was not to be paid before the day specified in the condition?

"The cases in the common-law courts do not appear to have settled the question by any direct or definitive decision. I think, however, the language of the books is against the defendant; and it would seem to be everywhere conceded that in no case was a tender before the day good. If the condition of a bond be payable *on or before* such a day, a plea of payment before the day, to wit, on such a day, is good. Anony-

mous, 2 Wils. 178. But if the condition of the bond be payable on *such a day*, a plea of payment before the day is bad; and the defendant must either plead it by way of accord and satisfaction, or plead *solvit ad diem*, and prove payment before the day (Jernegan v. Harrison, 1 Str. 817; Anonymous, 2 Wils. 150; Winch v. Pardon, Buller's N. P. 174). These cases turned upon the technical terms of pleading; and whatever subtleties exist on that subject, there can be no doubt that if money be tendered and accepted before the day appointed it would, when skilfully pleaded, amount to a discharge of the bond; for if, as Lord Coke says (Coke, Litt. 212b), 'If the obligor pay a lesser sum before the day and the obligee receive it, it is a satisfaction.' The bearing of these cases upon the point now under discussion consists, however, in the distinction which they assume between a bond payable *on* such a day, and *on or before* such a day, and in the doctrine which they necessarily convey that it requires the assent and concurrence of the creditor to discharge, before the day, a bond payable on a given day.

"The language of Lord Hardwicke, as chief justice of the king's bench, in Tryon v. Carter (2 Str. 994), is still more explicit on the subject. The bond in that case was payable on or before the 5th of December, and

¹ Walker v. Kimball, 22 Ill. 537; Dulaney v. Payne, 101 id. 325; Sparhawk v. Willis, 6 Gray, 163; Andover Savings Bank v. Adams, 1 Allen, 28; French v. Bates, 149 Mass. 73; Smart v. McKay, 16 Ind. 45.

² King v. Phillips, 95 N. C. 245; Kurz v. Suppiger, 18 Ill. App. 630. See Eames v. Cushman, 135 Mass. 573.

alleged. Interest is also recoverable for the detention of money after it is due. It is in many such cases recoverable of right and as a matter of law, independently of the discretion of a jury.¹ It may also be claimed of right under various circumstances of contract and tort, on the value of property or things in action, and on the value of services, though such value has to be proved; on money lent, paid, had and received, as well as on divers other forms of loss to the plaintiff, or gain to the defendant, capable of pecuniary estimate; and in such cases it is immaterial that there is no agreement for interest

payment was made on that day. The case itself is not applicable, but the observations of the chief justice are much in point. 'In the case,' he observes, 'of a bond conditioned for payment at a certain day, or upon such a day, there can properly be no *legal payment* or *legal performance* of the condition till that day. Payment before the day may, indeed, be given in evidence on *solvit ad diem*, but that goes upon the reason that the money is looked upon as a deposit in the hands of the obligee until the day comes, and then it is actual payment.' The argument in favor of the right of the obligor to pay before the day stipulated is founded on the assumption of the fact that the delay of the time of payment is introduced into the contract solely for the benefit of the debtor, and that he may waive a benefit or renounce a time given on his account according to the maxim that *quisquis potest renuntiare jure pro se introducto*. But this is asking the concession of the very point in dispute. When a specific sum without interest is made payable at a distant day, or perhaps, where the sum may be on interest, but the interest is not payable periodically in the intermediate time, there is color for the construction that the time is given solely for

the accommodation of the debtor; and if I am not mistaken, the doctrine contended for on the part of the defendant is founded entirely on that ground. But when money is loaned upon interest, payable quarterly yearly, and a distant day is mentioned for the payment of the principal, the delay is evidently as much for the benefit of the creditor as of the debtor, and the law itself most clearly implies it. The one party wants the principal to employ as capital in his business, and the other party relies upon the enjoyment of a portion of the profits of that capital, in the shape of interest periodically paid for his support and comfort. These cases of loan upon interest are, therefore, cases of mutual accommodation, and each party has an equal interest in the preservation of the definite period of payment; and neither can violate it without a violation of the terms and intention of the contract."

¹ "Both reason and authority say that if by the terms of the contract, whether oral or written, a debt be due at a certain time, then it by law carries interest from that time in the absence of any agreement otherwise by the parties." *Henderson Cotton Manufacturing Co. v. Lowell Machine Shops*, 86 Ky. 668, 673.

or forbearance. When the principal is due upon contract, of course the obligation or duty to pay interest for its detention results from the same contract, and is recoverable thereon as damages for failure to perform; and when recoverable in tort is chargeable on general principles as an additional element of damage for the purpose of full indemnity to the injured party.

As damages, interest is an inseparable incident to the principal demand; follows it as the shadow follows the substance. Whenever the demand is satisfied and discharged the accrued interest which was accessory, whether paid or not, is extinguished.¹ In pleading, it is sufficient to declare on a default in not paying the principal demand; the interest as damages, when not made special by contract, but left to be [535] measured by law, may be recovered under a general allegation of damages, without being specially claimed.² In another class of cases, similar to those last mentioned, but where the right to interest is less obvious, and in some others where the injury cannot be measured by any precise pecuniary standard, interest is allowable under the advice of the court in the discretion of the jury. These distinctions will be made more manifest, and the authorities which recognize and support them cited, when we come to discuss particular interest topics, and the law of damages in connection with particular subjects.

§ 301. Interest by the early common law. By the ancient common law it was not only unlawful but criminal to take any kind of interest. As late as the reigns of Henry VII., of Edward VI., and of Mary, every rate of interest was forbidden by express statute.³

¹ Hayes v. Chicago, etc. Ry. Co., 64 Iowa, 753; Devlin v. Mayor, 60 Hun, 68; Cutter v. Mayor, 92 N. Y. 166; Hamilton v. Van Rensselaer, 43 id. 244. See Southern C. R. Co. v. Moravia, 61 Barb. 181; Consequa v. Fanning, 8 Johns. Ch. 587; Gillespie v. Mayor, 8 Edw. 512; Jacot v. Emmett, 11 Paige, 142.

² Heiman v. Schroeder, 74 Ill. 158; McConnel v. Thomas, 3 id. 818.

³ Earl of Chesterfield v. Jansen, 1 Wils. 290.

In Houghton v. Page, 2 N. H. 42, Judge Woodbury says: "To take it (interest) was also *in foro conscientiae* punished as a crime, and not only subjected the offender to the forfeiture of all his estate, but in the 'Mirror of Justice,' 191 and 248, one of the first English law-books extant, it is lamented, as 'an abusion

§ 302. Interest in England legalized by statutes. In 1545 the statute of 37 Henry VIII. was passed. The preamble shows that interest was still illegal and criminal, but the act gave a negative sanction to it by providing that "none shall take for the loan of any money or commodity above the rate of ten pounds for one hundred pounds for one whole year." It is said that the first legal interest was taken in England under this statute. The rate was subsequently, in Queen Anne's time, reduced to five per cent.¹ And in the reign of William IV., and by various statutes of Victoria, interest has been directly and affirmatively provided for. The existing statutes repealed the law against usury; and parties are at liberty to contract for any rate of interest.²

§ 303. Interest at common law in America. There are some cases in which judges have declared interest to be of statutory creation.³ But the general course of judicial decision and legislation in this country assumes the validity of

of the common law,' that the offender was not likewise deprived of christian burial." After referring to the prohibitory statutes in England, he remarks: "It therefore follows that if the common law of England concerning interest should be adopted, we must hold void all contracts for any quantity of interest, however small and reasonable. But in this enlightened age such a rule could no more be tolerated than the absurd principles of the common law concerning witchcraft and heresy."

¹ 12 Anne, St. 2, ch. 16.

² 17-18 Victoria, ch. 90 (August 10, 1854): "Whereas, it is expedient to repeal the laws at present in force relating to usury: Be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, as follows: 1. The several acts and parts of acts made in the parliaments of England and

Scotland, and Great Britain and Ireland, mentioned in the schedule hereto, and all existing laws against usury, shall be repealed. 2. Provided always, that nothing herein contained shall prejudice or affect the rights or remedies of any person, or diminish or alter the liabilities of any person in respect to any act done previously to the passing of this act, 3. Where interest is now payable on any contract, express or implied, for payment of the legal or current rate of interest, or where upon any debt or sum of money interest is now payable by any rule of law, the same rate of interest shall be recoverable as if this act had not been passed. 4. Provided always, that nothing herein contained shall extend or be construed to extend to repeal or affect any statute relating to pawnbrokers; but that all laws touching and concerning pawnbrokers shall remain in full force and effect to all intents and purposes whatsoever as if this act had not been passed."

³ Close v. Fields, 2 Texas, 232; Isaacs

contracts for interest without statutory sanction and the legal obligation to pay it in many cases not provided for either by contract or statute.¹ That the law recognizes the use of money as valuable is placed beyond question by the allowance [537] of interest as damages for its detention when the debtor is in default or guilty of fraud. Interest is now universally treated as a legitimate consideration for the use of money. To take it is deemed morally as well as legally just in the general commerce of the world; and not only where private interests may be subserved by credit, but also in those public exigencies which induce states and nations to become borrowers. Statutes generally exist providing what shall be the rate when it is not fixed by agreement, and in many states a maximum rate is established beyond which interest is expressly or impliedly prohibited. In some states the consequences of transcending this limit are prescribed; these are various.

§ 304. **Agreements for interest.** There is no difference in principle between agreements to pay for the use of money and those to make compensation for anything else that is valuable. And, as a general rule, contracts are valid and will be enforced although there is a great disproportion between the burden of the undertaking on one side and the value of the consideration for it furnished on the other. The theory of the law is, and its practical operation is consistent therewith, that a small consideration will support an onerous agreement. The comparative benefit to be derived from the mutual considerations, executed or executory, which are technically valuable in character are not weighed. It is enough that a valuable consideration exists; its adequacy is not an element in determining whether or not an agreement founded upon it

v. McAndrew, 1 Mont. 437; Eastin v. Vandorn, Walk. (Miss.) 214; Hamer v. Kirkwood, 25 Miss. 95.

¹ Young v. Godbe, 15 Wall. 562; Parmelee v. Lawrence, 48 Ill. 331; Davis v. Greely, 1 Cal. 422.

In Young v. Polack, 3 Cal. 208, the plaintiff and defendant had a joint lease for improving certain property; plaintiff, with consent of defendant, made a contract in his own name for making the improvement

and performed it. He paid all the expenses out of his own funds. That contract was drawn by defendant, of whom the plaintiff claimed damages for not paying his share of the expense as the building advanced. The court decreed that he should pay his contribution of one-half, with three per cent. interest per month, the current rate, and the decree was affirmed.

is valid. A few examples of unconscionable bargains are to be found in the books,—examples of contracts so immensely unequal, and, if held valid, so certain to be disastrous to one party, that on the ground of being unconscionable they were held not obligatory. Still, it is an axiom of the law of contracts that mere inadequacy of consideration is no defense.

The compensation, however, for the use of money or for its detention, there being always a customary or legal rate, is susceptible of precise measurement. Therefore, contracts for a higher rate, though intended to have effect only after the principal sum is due and to measure the damages for delaying [538] its payment, are liable to be treated in respect to the interest they provide for as contracts for penalties.¹

But when parties are authorized by statute to contract for more than the ordinary legal rate of interest, either with or without restriction, such contracts are permitted to have a more liberal effect. A contract to pay interest at a given rate while the debtor has a right for a definite period to the use of the principal is different in its nature and incidents from a contract to pay interest after that right has expired; in the one case it is the price of a rightful use and possession of the money; in the other it is a liquidation of the damages for detaining it without right; in the former case the contract creates the law; in the latter interest as damages is imposed by law, though the rate may be regulated by agreement. In the computation of interest, however, beginning before and continuing after maturity of the debt, no rest is to be made at maturity or at the commencement of the suit, but the interest is to be computed continuously from the time when it commences to the settlement, judgment or decree.²

Where there is an agreement for the payment of money at a future day, and it contains or is accompanied with an express promise to pay interest from date to the time specified for payment, the law is settled that interest is chargeable afterwards if the principal remains unpaid, although the contract is silent in regard to interest after maturity. This results from

¹ Mosby v. Taylor, Gilmer (Va.), 172; Taul v. Everet, 4 J. J. Marsh. 10; Gould v. Bishop Hill Colony, 35 Ill. 324.

² Lamprey v. Mason, 148 Mass. 231; Barker v. International Bank, 80 Ill. 96; Brewster v. Wakefield, 1 Minn. 352; Folsom v. Plumer, 43 N. H. 469.

the general principle that all contracts to pay money give a right to interest from the time the principal ought to be paid.¹ It can make no difference with the application of this principle that the contract contains an express stipulation for interest until the day fixed for payment, for that is not in- [539] consistent with the implication that if not paid on that day interest is to be paid afterwards; since without such express stipulation no interest could accrue until a default of payment. The maxim *expressum facit cessare tacitum* does not apply,² for the contract does not speak to the particular case.³

Contracts relating to interest have not been enforced with uniform construction and effect. The English and American courts have not entirely harmonized; and there is a diversity in the decisions of the latter. For the purpose of showing more clearly and in detail the distinctions which have been made and the conflict of judicial decisions, the classification of subjects in the following sections has been adopted as convenient and sufficiently comprehensive.

SECTION 1.

GENERAL PROMISE TO PAY MONEY “WITH INTEREST.”

§ 305. It is liberally construed. Under the first point it is to be observed that such contracts, in common with all others, are to have a reasonable construction with a view to carrying out the actual lawful intention of the parties. The construction as to sureties will be strict.⁴ It is liberal in re-

¹ Boddam v. Riley, 2 Bro. Ch. 2; Cotton Manuf. Co. v. Lowell Machine Williams v. Sherman, 7 Wend. 109; Shops, 86 Ky. 668.

Ten Eyck v. Houghtaling, 12 How.

Pr. 523; Cartmill v. Brown, 1 A. K.

Marsh. 576; Van Rensselaer v. Jewett,

2 N. Y. 135; Hunt v. Jucks, 1 Hayw.

199; McKinley v. Blackledge, 2 Hayw.

28; Knickerbocker Ins. Co. v. Gould,

80 Ill. 388; Purdy v. Phillips, 11 N. Y.

406; Farquhar v. Morris, 7 T. R. 124;

Wenman v. Mohawk Ins. Co., 13

Wend. 267; Robinson v. Bland, 2

Burr. 1077; Chapin v. Murphy, 5

Mim. 274; West Republic Mining Co.

v. Jones, 108 Pa. St. 55; Henderson

² See Spaulding v. Lord, 19 Wis. 538.

³ Thorndike v. United States, 2 Mason, 1.

⁴ Bowery Savings Bank v. Clinton, 2 Sandf. 118. The bond of J. to the plaintiffs bore interest at six per cent. C. indorsed a covenant binding himself to them for “an additional one per cent. per annum interest, making in all seven per cent. per annum on the principal secured by the bond, until the principal should be paid;

[540] spect to these ordinary short hand expressions by which interest is commonly stipulated for orally, and which frequently find their way into written promises. Contracts for interest at a given rate per cent. will be treated as contracts for that rate per annum,¹ and even an abbreviation like "in-

the interest to be paid at the time and in the manner mentioned in the bond; it was held that C. was not bound to pay *seven per cent.* interest but only *one per cent.* on the amount of the bond; that he was bound to pay one per cent. until the bond was paid off."

In *Hamilton v. Van Rensselaer*, 43 Barb. 117; S. C., 28 How. Pr. 192, it was held that a surety who guarantees the payment of the interest on a money bond not bearing interest by its terms is liable for interest accruing after the bond becomes due.

In *Hamilton v. Van Rensselaer*, 48 N. Y. 244, the defendant guaranteed "the punctual payment of the interest" upon a bond payable in six years and six months from date, with interest semi-annually. It was held that the guaranty only extended to the interest falling due before the time of the payment of the principal; and that after the principal sum has fallen due, interest is payable not by the original terms of the agreement, but as damages for its breach. Church, C. J., said: "He (the guarantor) neither agreed to pay the principal nor to be liable for the consequences of its non-payment. The intent of the defendant, ascertained by legal rules, was to agree to pay the interest expressly provided for in the bond only; but when the plaintiff urges that the defendant has employed general words guarantying the payment of interest upon the bond without limitation, and that these words include words after as well as before default, and claims to

enforce the rigid rule of liability therefor, it is pertinent to answer that by strict legal rules interest as such cannot be recovered after default in the payment of the principal; and that such interest is not therefore within the language of the contract. We do not place the decision upon this narrow ground, but prefer to rest it upon the proposition that by the plain, ordinary meaning of the language used in the contract, when applied to the facts existing at the time it was made, the interest recoverable after the principal became due, whether it is regarded as interest upon a continuing contract, or as damages for its non-performance, was not in the contemplation of the parties at the time, and was not the interest specified and provided for in the defendant's contract. The construction contended for by the plaintiff might render the contract as burdensome as if it had been a guaranty of the payment of the principal itself. The defendant might never be able to discharge the obligation except by the payment of the principal, and in that case the result would be to compel him substantially to perform a contract which it is conceded he never entered into."

¹ *Thompson v. Hoagland*, 65 Ill. 310.

"Annual interest" means interest payable annually. *Kurz v. Suppiger*, 18 Ill. App. 630. If a note is silent as to interest and is described in a mortgage contemporaneously executed as collateral security as bearing interest the description will be imported into the note. *Prichard v. Miller*, 86

terest at ten per cen” has received the same construction.¹ So an agreement to pay a given per cent. has been construed as though it were an agreement in terms to pay interest at that per cent.²

§ 306. Law or custom fixes the rate. If the prom- [541] ise is to pay interest simply the law supplies the rate if one is fixed by statute, for parties are supposed to contract in that general way with reference to the law.³ Where no rate is established by statute it is assumed that in making and accepting a promise for interest generally the parties have in view the rate which is customary where the contract is made and to be executed. That rate will govern in respect to liquidated debts on which the law permits interest to be recovered by damages for delay of payment after they are due.⁴

§ 307. Legal or stipulated rate applies from date. A promise to pay interest on money payable at a future day will be construed as an agreement to pay it before, rather than

Ala. 500. A testator two years after he had compromised with his creditors and nine years after he had failed in business made his will expressing “that the balance due my old creditors whose claims were compromised be paid in full.” This was construed to provide for interest on the unpaid principal. *Sinclair’s Appeal*, 116 Pa. St. 316.

¹ *Gramer v. Joder*, 65 Ill. 314. See *Strickland v. Holbrook*, 75 Cal. 268.

² *Davis v. Rider*, 53 Ill. 416; *Higley v. Newell*, 28 Iowa, 516. But see *Griffith v. Furry*, 30 Ill. 251. The suit was on a note in these words: “One day after date, we promise to pay Daniel Furry, or order, four hundred and fifty-six and $\frac{1}{10}$ dollars, value received, ten per cent.” It was held that the words “ten per cent.” in their connection were without meaning. The note being described in the declaration as a note bearing ten per cent. interest, it was rejected when offered in evidence on the ground of variance.

In *Patterson v. McNeely*, 16 Ohio St. 348, the action was upon a promissory note made payable one year after date, and which contained this clause: “the above to be at ten per cent. annually.” It was held that the word “annually” should be understood as relating to and defining the rate of interest, and as equivalent to the words per annum; it did not bind the debtor for the annual payment of interest. *English v. Smock*, 34 Ind. 115. But see *Kurz v. Suppiger*, 18 Ill. App. 630.

The omission of the words “with interest” from a note which expressed that “five years from date at the rate of six one-half per cent. per annum, payable semi-annually,” was taken to be a clerical error. *Marston v. Bigelow*, 150 Mass. 45.

³ *Prevo v. Lathrop*, 2 Ill. 305; *Clay v. Drake*, Minor (Ala.), 164; *Everett v. Dilley*, 39 Kan., 73; *O’Brien v. Young*, 95 N. Y. 428; *Genet v. Kissam*, 53 N. Y. Super. Ct. 43.

⁴ *Young v. Godbe*, 15 Wall. 562.

exclusively after, maturity.¹ Statutes exist in England and in many states of the Union authorizing parties to contract for a greater than the legal rate which is applied in the absence of any agreement on money due. When agreements of this kind, or for less than the legal rate, are made in general terms, not specifying when the stipulated rate shall commence, or how long it shall continue, and the principal is payable at a future day, the promise is uniformly held to apply from date to maturity;² but whether it shall continue afterwards to operate, if the principal remain unpaid, the adjudications are not harmonious. Some cases hold that the contract operates *ex vigore* only until the debt by the agreement becomes due, and [542] that if it be not then paid the contract has no longer any effect whatever to govern the rate; and the damages for detention afterwards are limited to the ordinary legal rate of interest; other cases hold the contract rate to be *prima facie* the rate after maturity, but subject to be put aside by consideration of whether it be a reasonable rate, or there is a mutual intention to continue it; and a third class that the contract operates by its own vigor after the rate commences until the debt is paid or merged in a judgment or decree.

§ 308. **Whether same rate will apply after debt due.** If the stipulated rate is less than the legal, and the principal is made payable at a distant day, so that it is obvious from this circumstance, or from this and others, that the time of credit expressly given is the whole time of forbearance mutually intended, the creditor would seem, in reason, entitled on the expiration of that period to receive the principal, or have that rate of interest afterwards which the law gives generally upon default in the payment of money. This would appear more especially his right if he with reasonable promptness asserts his claim to the money by actual demand or resorts to legal measures for its collection. But silence and inaction after the maturity of the debt might imply acquiescence in the debtor's retention of the money and justify the inference that the

¹ *Connors v. Holland*, 113 Mass. 50; *1 J. J. Marsh.* 51; *Ely v. Wither-*
Dewey v. Bowman, 8 Cal. 145; *Hack-* spoon, 2 Ala. 181; *Campbell P. P. &*
enberry v. Shaw, 11 Ind. 392; *Pitt-* M. Co. v. Jones, 79 Ala. 475; *Ken-*
man v. Barret, 84 Mo. 84; *Ayres v.* nedy v. Nash, 1 Starkie, 152.
Hayes, 13 Mo. 252; *Winn v. Young*, ² See authorities last cited.

creditor is satisfied to prolong the credit on the original terms. A prompt demand, however, or notice that such is not his intention, or any conduct which negatives acquiescence in the delay of payment on the terms which governed before the debt was due, will prevent the old rate being extended by implication from extraneous facts, or otherwise than by necessary legal construction. Where a mortgagee contracted to receive a rate of interest less than the legal rate during the time of credit agreed upon it was held that if he suffers the mortgagor to remain in possession after the mortgage money becomes due, an understanding of the parties will be presumed that the interest shall continue at the same rate until the mortgagee thinks proper to demand payment; but that no such presumption can be raised where the mortgagee attempts to foreclose his mortgage or takes possession of the mortgaged premises on the supposition that he has actually acquired the [543] equity of redemption as a substitute for his debt.¹ Two other equity cases in New York seem to hold the rate to be the same absolutely after maturity as before by virtue of the contract fixing it.² In both of these the rate was less than the legal rate. In the latter the vice-chancellor decided that the creditor was not entitled to the legal rate after maturity though the debtor had regularly paid interest at that rate for over six years after the debt became due. Such payments were held not to be evidence of a continuing agreement to pay more than the rate specified in the bond as the rate before maturity. Later cases have been decided at law in the same manner;³ though the latest expression of the court of appeals assumes the rule to be settled to the contrary.⁴ In a late case it was held that the right to the same rate after maturity

¹ *Bell v. Mayor*, 10 Paige, 49. See *Lawrence v. Trustees*, 2 Denio, 577.

² *Miller v. Burroughs*, 4 Johns. Ch. 436; *New York L. Ins. & T. Co. v. Manning*, 8 Sandf. Ch. 58.

³ *Andrews v. Keeler*, 19 Hun, 87; *Association v. Eagleson*, 60 How. Pr. 9.

⁴ It is assumed in *O'Brien v. Young*, 95 N. Y. 428, that, in the absence of a stipulation to pay the con-

tract rate until the discharge of the obligation, the legal rate will govern, and that this is according to the weight of authority in that state. Earl, J., refers to *Macomber v. Dunham*, 8 Wend. 550; *United States Bank v. Chapin*, 9 id. 471; *Hamilton v. Van Rensselaer*, 43 N. Y. 244; *Ritter v. Phillips*, 53 id. 586; *Southern C. R. Co. v. Moravia*, 61 Barb. 180.

which was fixed by contract before is a contract right which cannot be impaired by subsequent legislation.¹ In a case in Illinois² there was a stipulation for "five per cent. per month as damages from maturity." The payee, from time to time after maturity, accepted interest at ten per cent. per annum until the death of the maker. It was held that such acceptance of interest evidenced an agreement to 'substitute ten per cent. per year in place of five per cent. per month, and was a waiver of the higher rate. In a Pennsylvania case³ it was held that a note payable at a future day with three per cent. interest from date carried that rate till the day of payment fixed in the contract, and after that legal interest. A similar rule was laid down in South Carolina.⁴

[544] § 309. **Same subject.** A contract for the payment of money at a definite future time, with a stipulation for interest at a specified rate, stands, if not performed after the date fixed for the payment of the principal, simply as a chose in action. It has then no future; the time has elapsed for performance; there remains but a right of action for damages. There is no continuing contract to pay interest in any other sense than there is to pay the principal. The promise was, as to both, to pay at a day which is past. If the principal had been loaned for a term of years with an agreement to pay interest semi-annually, this agreement, while it runs, would impose the duty to pay interest only at those half-yearly periods. But no periodicity would be recognized in the obligation to pay interest after the maturity of the debt.⁵ In a suit brought three months after that date there can be no doubt that the creditor would be entitled to a computation of interest for that time, or for any time, to the day of obtain-

¹ *Association v. Eagleson*, 60 How. Pr. 9. See *Morrisania Savings Bank v. Bauer*, 3 N. Y. L. Bull. 102; *Taylor v. Wing*, 84 N. Y. 471.

² *Bradford v. Hoiles*, 66 Ill. 517.

³ *Ludwick v. Huntzinger*, 5 W. & S. 51.

⁴ *Langston v. South Carolina R. Co.*, 2 S. C. 248.

A clause in a bank charter giving the corporation power to make dis-

count at a prescribed rate on instruments having less than twelve months to run does not establish a rule as to the rate of interest. *Chambliss v. Robertson*, 23 Miss. 302; *United States Bank v. Chapin*, 9 Wend. 471. See *Tuffli v. Ohio Life Ins. & T. Co.*, 2 Disney, 121.

⁵ But see *O'Neill v. Bookman*, 9 Rich. L. 80.

ing judgment or decree.¹ The creditor's claim for such interest could not be defeated by the argument that the interest contract continues by implication until payment of the debt, and by such contract the debtor is bound to pay only once in six months. Such an argument would be entitled to prevail if the interest contract were a continuing one — if by [545] its own prolonged operation and effect it absolutely regulated the interest *after* as it did *before* the debt was due.

Parties may by agreement liquidate damages to be paid in case of a future breach of contract; and may in like manner and upon the same principle fix the rate of interest within reasonable limits to be paid after the debt is due.² But an agreement in general terms to pay interest on a time debt is primarily for the same time as the agreement for the payment of the principal. The intention of the parties is to be ascertained from its language, and thus ascertained, the debtor intends to pay, and the creditor to receive the debt, consisting of principal and agreed interest, on the day fixed for such payment. To put any other construction on the agreement is to infer bad faith, or that the parties do not intend what they clearly say. Strictly, therefore, such an agreement does not operate beyond the pay day. Whatever influence it has in determining the interest afterwards is secondary and probative.

If the debtor does not pay when the debt is due, and this omission occurs by his default, the expectation that he will pay interest at the same rate at least as during the period of stipulated credit is natural and reasonable; and the existence of a legal obligation to do so is agreeable to the analogy of other contracts, and by such analogy is liable to be modified by circumstances. The question of interest after maturity is much governed by the equity of the case; circumstances may take away the right altogether. Those which will have this effect will readily occur to the professional mind. Among them is a tender of the debt which puts an end to the default and stops interest;³ the continued absence of the creditor;⁴ a

¹ *Wheaton v. Pike*, 9 R. I. 132.

³ *Ante*, § 276; *post*, § 383.

² See *Palmer v. Leffler*, 18 Iowa, 125; *Taylor v. Meek*, 4 Blackf. 388.

⁴ *Du Belloix v. Waterpark*, 1 D. & R. 848, n.

state of war which places the debtor and creditor in the relation of alien enemies to each other's government.¹

So the rate of interest which was obligatory by agreement during the life of the contract may be so low or so high as to negative the intention, when the contract was made, or during [546] the default, that it should continue after the contract has expired; and that circumstance may influence the court to reject the rate so agreed on as a rule in determining [547] the interest to be allowed as damages.² To the rate

¹ Mease v. Stevens, Coxe (N. J. L.), 433; Bean v. Chapman, 62 Ala. 58.

The rate of interest stipulated for is not affected by the payee's refusal to furnish the payor with a statement of the amount due, no tender being made. Lamprey v. Mason, 148 Mass. 281.

² Henry v. Thompson, Minor (Ala.), 209. This case is thus succinctly stated by Loomis, J., in Hubbard v. Callahan, 42 Conn. 524: "The suit was for the recovery of a large number of notes, differing in their terms, and no particular description of them reported; but they were reduced to four general classes in the briefs of counsel: '1st. To pay the principal at a future day, and if not punctually paid, to pay the premium or interest at the rate expressed from the date. 2d. To pay the principal at a future day, with interest at the rate expressed from the date till paid. 3d. To pay the principal at a future day, with a distinct agreement to pay the interest, not stating the time from which or till which it was to run. 4th. To pay the principal at a future day, with interest from the maturity of the note.' The rates of interest stipulated for were in some cases one hundred and twenty per cent. per annum; in others sixty per cent.; and the very lowest was thirty per cent. The statute of Alabama then

in force provided 'that any rate of interest or premium for the loan or use of money, wares, merchandise, or other commodity, fairly and *bona fide* stipulated and agreed upon by the parties to such contract, expressed in writing and signed by the party to be charged therewith, shall be legal.' A majority of the judges concurred in refusing to allow the stipulated rates of interest, but they did not agree as to the grounds of the decision. Judges Crenshaw and Minor delivered very able dissenting opinions sustaining the stipulations for interest as valid contracts. The majority opinions were given by the chief justice and by Judge Safford. Judges Ellis and Gayle concurred with the chief justice in the opinion that the contract on its face fails to show that the consideration was a loan. One reason for giving such a literal application of the statute is stated to be the unparalleled rate of interest. But in the course of the opinion the chief justice says: 'As to the second, third and fourth classes of cases as arranged in the brief and arguments of counsel, I am of opinion that if the consideration had been a fair and *bona fide* loan, the parties had a right to stipulate any rate of interest without limiting it to a future day, or to the maturity of the note, provided the contract for interest be absolute and

specified in the contract the parties have thereby given a sanction by adopting it before maturity; they have admitted it to be a fair compensation for the use of the money. The debtor's omission to pay the debt when due should have the

unconditional.' Judge Safford held (in which Gayle also concurred) that where the rates of interest were exorbitant, and there was no time of forbearance fixed by the contract, they were not within the statute." *Bell v. Mayor*, 10 Paige, 49.

Cook v. Fowler, L. R. 7 H. L. Cas. 27, was an action upon a warrant of attorney given to secure the payment of £1,830 "on the 2d of June next," with interest at five per cent. per month, "judgment to be entered up forthwith." The lord chancellor remarked upon the stipulation for interest up to a certain day, without any mention of subsequent interest upon the face of the instrument. He says: "No doubt, *prima facie*, the rate of interest stipulated up to the time certain might be taken, and generally would be taken, as the measure of interest; but this would not be conclusive. It would be for the tribunal to look at all the circumstances of the case, and to decide what was the proper sum to be awarded by way of damages." The house of lords declined to award damages at the rate of sixty per cent. because it was highly inequitable. The holder not having entered up judgment, nor made any definite claim against the debtor's estate (such debtor having died), for the space of four years and upward, it was held that the tribunal before which the claim at last came was justified in awarding by way of damages such a rate of interest as the holder of the warrant of attorney would have been entitled to, according to the ordinary rule of the court of chancery, had he entered up judg-

ment on the day named in the defeasance to the warrant of attorney, namely, at the rate of four per cent. It was held, also, that there is no rule of law that upon a contract for the payment of money on a certain day, with interest at a fixed rate down to that day, a further contract for the continuance of the same rate of interest is to be implied.

In *Brewster v. Wakefield*, 22 How. 118, the supreme court of the United States held that such a contract is spent when the day of payment arrives; that there is no stipulation in relation to interest after the debt becomes due; and that if the right to interest depended altogether on contract, and was not given by law in such a case, the creditor would be entitled to no interest whatever after the day of payment. The contract being entirely silent as to interest, if the notes be not punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provision of the contract. Therefore the interest after maturity should be after the rate established by law, where there is no contract to regulate it. There were two notes sued on, one stipulating interest at the rate of twenty and the other twenty-four per cent. per annum. Taney, C. J., said: "Nor is there anything in the character of this contract that should induce the court by *supposed intendment of the parties*, or doubtful inferences, to extend the stipulation for interest beyond the time specified in the written contract. The law of Minnesota has fixed seven per cent. per annum as a reasonable and fair compensation for

same effect to continue that rate after maturity, on the ground both of intention and admission of its fairness, where it exceeds the legal rate, as the silence and inaction of the [548] creditor where the rate is less.¹ The statutory provis-

the use of money; and where a party desires to exact from the necessities of a borrower more than three times as much as the legislature deems reasonable and just, he must take care that the contract is so written in plain and unambiguous terms; for with such a claim he must stand upon his bond."

¹ *Beckwith v. Trustees of Hartford, etc. R. Co.*, 29 Conn. 268. A railroad company issued bonds, by virtue of a statute, bearing interest payable semi-annually at the rate of seven per cent. per annum; the interest coupons were paid up to the time when the principal of the bonds fell due. And the question was submitted to the court whether the bondholders were legally entitled to seven per cent. interest or only to six, the legal rate. Hinman, J., says: "We are of opinion that the plaintiff in this case is entitled to seven per cent. per annum for the detention of his money after the principal became due. Technically speaking, it is no doubt true that the sum recoverable for such detention is treated as damages for the breach of the contract rather than interest for the money loaned, because, strictly speaking, interest can only be claimed under a contract to pay it, either express or implied, and the express contract, of course, ceased on the day when the principal was to be paid, and no implied contract can be raised from a total refusal to pay anything. But damages are recoverable for the breach of the contract; and courts, in order to give to him to whom the money is due what he fairly may be supposed to have

suffered by withholding it from him, and at the same time to prevent the borrower from making a profit by the breach of his contract, have regulated the damages for such breach by the usual rate of interest at the place where the money is detained. This though an arbitrary rule will generally operate justly and is much more convenient than any other which could be adopted. But the usual rate of interest at any place is itself as arbitrary a provision of law as the damages dependent upon it, and is by no means uniform. It is not only known to differ in different states and countries, generally depending upon positive statutes, but may vary from the ordinary or more general rate by the parties agreeing upon a lesser rate, or if authorized so to do, as in the case under consideration, by their agreement upon a higher rate; or there may be a general statute authorizing a higher rate for money borrowed for some particular purpose, or by a particular class of persons or corporations; . . . and the different rates thus agreed upon become the legal rates of interest in respect to the particular contracts during their existence. And the rates of interest thus established by agreement must be presumed to be just and equitable under the circumstances; that is, a fair compensation in such case for the use of the money between the parties during the time the contract had to run. Then, why should we not presume, as between the same parties, that such continues a fair compensation for its use until the contract is performed; as well

ions enacted in many states that judgments shall bear the same rate of interest as that expressed on the face of the contract, or the contract rate, is a legislative sanction [549] of the same rate after as before maturity.¹

In some states the rate stipulated to be paid during the period of credit has no influence in determining the rate afterwards, but the legal rate is uniformly applied. This is so in Minnesota,² Kansas,³ Kentucky,⁴ Maine,⁵ Alabama,⁶ Maryland,⁷ Arkansas,⁸ Rhode Island,⁹ South Carolina,¹⁰ Georgia (according to the understanding of the judge of the federal circuit court),¹¹ California by virtue of the code,¹² and formerly in Indiana.¹³ The same principle is held by the supreme court of the United States,¹⁴ where the question does not come before it from a

after as before the day when the principal was to be paid; and thus permit the rate of interest agreed upon to control the damages to be paid for the detention of the money, as well as the interest for its use. There is no equity in favor of one rate of interest rather than another, where they are both legal and within reasonable limits, and the defendants ought not to complain as long as it is in their power, by paying the principal, to protect themselves from paying what they thought a reasonable rate when they borrowed the money.”

¹ Hand v. Armstrong, 18 Iowa, 824.

² Talcott v. Marston, 3 Minn. 339; Mason v. Callender, 2 id. 350; Kent v. Bown, 3 id. 847; Chapin v. Murphy, 5 id. 474; Lash v. Lambert, 15 id. 416; Moreland v. Lawrence, 23 id. 84.

³ Robinson v. Kinney, 2 Kan. 184; Searle v. Adams, 8 id. 515.

⁴ Gray v. Briscoe, 6 Bush, 687; Rilling v. Thompson, 12 id. 810; White's Adm'r v. Curd, 86 Ky. 191.

⁵ Duran v. Ayer, 67 Me. 145; Eaton v. Boissonnault, id. 540.

⁶ Kitchen v. Branch Bank, 14 Ala. 283.

⁷ Brown v. Hardcastle, 63 Md. 484.

⁸ Newton v. Kennerly, 31 Ark. 626; Woodruff v. Webb, 32 id. 612; Pettigrew v. Summers, id. 571; Gardner v. Barnett, 36 id. 476.

⁹ Pearce v. Hennessy, 10 R. I. 223.

¹⁰ Langston v. South Carolina R. Co., 2 S. C. 248; Maner v. Wilson, 16 id. 469; Thatcher v. Massey, 20 id. 542; Bell v. Bell, 25 id. 149.

¹¹ Sherwood v. Moore, 35 Fed. Rep. 109. But see Daniel v. Gibson, 73 Ga. 367; Cauthen v. Central Georgia Bank, 79 id. 783; Trippe v. Wynne, 76 id. 200.

¹² Sec. 1917, Civil Code; Nash v. El Dorado Co., 24 Fed. Rep. 252. See Falkner v. Hendy, 80 Cal. 636.

¹³ Burns v. Anderson, 68 Ind. 202, overruling Kilgore v. Powers, 5 Blackf. 22; Richards v. McPherson, 74 Ind. 158. Burns v. Anderson is overruled by Shaw v. Rigby, 84 Ind. 375.

¹⁴ Brewster v. Wakefield, 23 How. 118; Burnishel v. Firman, 22 Wall. 170; Holden v. Trust Co., 100 U. S. 72.

If the obligation does not specify the rate after maturity and provides that the interest due before it is payable shall be added to the principal,

state in which the law is settled to the contrary.¹ In several of the enumerated states the question is solved according to the intention of the parties. Thus, where the stipulation is for an unusually low rate of interest, there is no presumption that it was contemplated to be continued after maturity, and the legal rate will govern.² A note payable one day after date with interest in excess of the minimum legal rate bears the stipulated rate after maturity.³ The expressions of the parties also control, though they fall short of being distinct.⁴ In England the stipulated rate before maturity would seem to be *prima facie* the rate afterwards,⁵ but subject to easier relaxa-

the legal rate will govern thereafter. *Ewell v. Dagga*, 108 U. S. 148.

¹ *Cromwell v. County of Sac*, 96 U. S. 57, an Iowa case; the conventional rate was continued: *Ohio v. Frank*, 108 id. 697; *Massachusetts Benefit Ass'n v. Miles*, 187 id. 689. See *Perry v. Taylor*, 1 Utah, 68.

² *Brown v. Hardcastle*, 68 Md. 484.

³ *Capen v. Crowell*, 66 Me. 282; *Paine v. Caswell*, 38 Me. 80; *Casted v. Walker*, 40 Ark. 117; *Gray v. Briscoe*, 6 Bush, 687; *White's Adm'r v. Curd*, 86 Ky. 191; *Piester v. Piester*, 22 S. C. 189.

But a note dated in February, payable one day after date, with interest at one per cent. per month from the first of the preceding January, bears only the legal rate after maturity. "The time named from which the interest was to run—something more than a month before the execution of the note—made it possible to count the interest for a 'month' without going beyond its maturity, and excluded the conclusion, otherwise necessary, that the phrase 'per month' could not have its full effect without touching time beyond the maturity of the note." The court remark that "this may look like a small difference to produce such consequences, but we think it is founded on principle and the de-

cided cases." *Smith v. Smith*, 33 S. C. 210.

⁴ A note payable with "ten per cent. per annum from date," and stipulating that if the interest is not paid annually it shall become principal and bear the same rate of interest, continues to carry the contract rate after maturity. *Vaughan v. Kennan*, 38 Ark. 114; *Miller v. Hall*, 18 S. C. 141. And so with a note payable one day after date "with interest from date at the rate of twelve per cent. per annum, interest to be paid annually." *Sharpe v. Lee*, 14 S. C. 841. A note payable twelve months after date "with interest from date, interest payable annually," was described in a mortgage contemporaneously executed by the same person as a note "with interest thereon at the rate of twelve and a half per cent. per annum until paid." The language of both instruments indicated an indefinite extension of credit and interest at the specified rate. *Mobley v. Davega*, 16 S. C. 78.

⁵ *Cook v. Fowler*, L. R. 7 H. of L. Cas. 27; *Keene v. Keene*, 3 C. B. (N. S.) 144; *Morgan v. Jones*, 8 Exch. 620.

A note conditioned for the payment of the principal sum with interest "until the repayment thereof"

tion and broader discretion conceded to the jury¹ than is consistent with the rule established by a preponderance of American authority, which is believed to be that the [550] rate stipulated for in general terms before maturity will be continued until verdict.² A mere change in the form of a

means until the day fixed for payment, and is not a contract to pay the agreed rate beyond that time. *In re European Central Ry. Co.*, 4 Ch. Div. 38. See *Ex parte Fewings*, 25 id. 399.

Where the promise was to pay seven per cent. so long as the principal or any part thereof should remain due, a judgment did not merge the contract in it so as to prevent the creditor from recovering the difference between the judgment and the contract rate. *Popple v. Sylvester*, 22 Ch. Div. 98.

¹ *Du Belloix v. Waterpark*, 1 D. & R. 348, n.; *Cameron v. Smith*, 2 B. & Ald. 305; *Bann v. Dalzel*, Moo. & M. 228; *Page v. Newman*, 9 B. & C. 378; *Arnott v. Redfern*, 3 Bing. 353; *Higgins v. Sargent*, 2 B. & C. 348; *Calton v. Bragg*, 15 East, 223; *Keene v. Keene*, 3 C. B. (N. S.) 144; *Gibbs v. Fremont*, 9 Exch. 25.

² *Meaders v. Gray*, 60 Miss. 400; *Tishmingo Savings Inst. v. Buchanan*, id. 496; *Hydraulic Co. v. Chatfield*, 38 Ohio St. 575; *Shaw v. Rigby*, 84 Ind. 375, overruling cases to the contrary; *Kimball v. Burns*, id. 370; *Hume v. Mazelin*, id. 574; *Shipman v. Bailey*, 20 W. Va. 140; *Brown v. Steck*, 2 Colo. 70; *Buckingham v. Orr*, 6 id. 587; *Broadway Savings Bank v. Forbes*, 79 Mo. 226, affirming S. C., 9 Mo. App. 575; *Kerr v. Haverstick*, 94 Ind. 178; *Kellogg v. Laverder*, 15 Neb. 256; *Hager v. Blake*, 19 id. 12; *Jefferson County v. Lewis*, 20 Fla. 980, 1009; *Borders v. Barber*, 81 Mo. 636; *Bowers v. Hammond*, 139 Mass. 360; *Parks v. O'Connor*, 70

Texas, 377; *Bressler v. Harris*, 19 Ill. App. 480; *Joiner v. Enos*, 23 id. 224; *Thorn v. Smith*, 71 Wis. 18; *Barbour v. Tompkins*, 81 W. Va. 410; *Kohler v. Smith*, 2 Cal. 597; *Beckwith v. Trustees of Hartford, etc. R. Co.*, 29 Conn. 268; *Adams v. Way*, 33 id. 419; *Hubbard v. Callahan*, 42 id. 524; *Kilgore v. Powers*, 5 Blackf. 22; *Gordon v. Phelps*, 7 J. J. Marsh. 619; *Pate v. Gray*, Hemp. 155; *Henderson v. Desha*, id. 231; *Spencer v. Maxfield*, 16 Wis. 179; *Pruyn v. Milwaukee*, 18 id. 367; *Marietta Iron Works v. Lottimer*, 25 Ohio St. 621; *Monnett v. Sturges*, id. 384; *Besser v. Hawthorn*, 8 Ore. 129; *Etnyre v. McDaniel*, 28 Ill. 201; *Williams v. Baker*, 67 Ill. 238; *Brewster v. Wakefield*, 1 Minn. 352; *Van Beuren v. Van Gaasbeck*, 4 Cow. 496; *Montgomery v. Boucher*, 14 Up. Can. C. P. 45; *Pridgen v. Andrews*, 7 Texas, 461; *Hopkins v. Crittenden*, 10 id. 189; *Harden v. Wolf*, 2 Ind. 31; *Engler v. Ellis*, 16 id. 475; *Hand v. Armstrong*, 18 Iowa, 324; *Thompson v. Pickel*, 20 id. 490; *Wilson v. King*, *Morris (Iowa)*, 106; *Burkhart v. Sappington*, 1 G. Greene (Iowa), 66; *Guy v. Franklin*, 5 Cal. 416; *Corcoran v. Doll*, 32 Cal. 82; *McLane v. Abram*, 2 Nev. 199; *Overton v. Bolton*, 9 Heisk. 762; *Warner v. Juif*, 38 Mich. 662; *Cecil v. Hicks*, 29 Gratt. 1; *Burgess v. Southbridge Savings Bank*, 2 Fed. Rep. 500; *Brannon v. Hursell*, 112 Mass. 68; *Union Institution v. Boston*, 129 id. 82; *Cromwell v. County of Sac*, 96 U. S. 51; *Fauntleroy v. Hannibal*, 5 Dill. 219; *Hovey v. Edmison*, 8 Dak. 449 (it is so provided in the

security does not work a reduction of the interest from the agreed to the legal rate.¹ If an instrument which is barred

code); *United States Mortgage Co. v. Sperry*, 26 Fed. Rep. 727.

If the stipulation is for the payment of a rate in excess of the minimum legal rate "until maturity," the latter will be the limit thereafter. *Hamer v. Rigby*, 65 Miss. 41.

In *Spencer v. Maxfield*, 16 Wis. 173, the action was upon a note payable at a future day with interest at the rate of twelve per cent. It was silent as to interest after maturity. The statute in force permitted parties to contract for any rate not exceeding twelve per cent, and seven was the ordinary legal rate. The stipulated rate was held to govern after maturity as a rate legally fixed. Cole, J.: "We have no doubt but the general understanding among business men has been that notes in the form of the one under consideration draw interest at the rate of twelve per cent. after as well as before maturity. Such we believe to be the construction placed upon these contracts by the community, and we think it is the correct one. . . . It seems to be strictly analogous to the case where a tenant holds over, where the law implies an agreement to pay rent according to the terms of the express lease." The contract, on this theory, imports an agreement to pay the same rate of interest after as before maturity. There is supposed to be a *tacit* agreement as distinguished from a *duty or obligation* which is to be enforced on the fiction of a promise; or as distinguished from a measurement of compensation for detaining money, by the standard of the rate of interest stipulated for its use immediately before such detention.

In *Spaulding v. Lord*, 19 Wis. 533, where the agreement was to pay interest "until the time when the principal sum will be payable," the inference of a contract to pay the specified rate after maturity was repelled by the particular language.

In *Etnyre v. McDaniel*, 28 Ill. 201, suit was brought on a promise to pay money and ten per cent. interest. Breese, J., said: "Here are two rates of interest provided for; one conventional, the other statutory. The ten per cent. rate is expressly stipulated by the parties and must prevail over the statute rate. This contract must be construed like all other contracts, and the intention of the parties must prevail. Now what did the parties intend when making a contract to pay ten per cent.? Can any one doubt it was the intention as well of the maker as of the payer of this note, that ten per cent. should be paid until the note was fully discharged. Such is the common-sense understanding of the contract, and the statutory interest does not control at all. Such contracts are made every day. It is the rate of interest fixed by the parties themselves, and to attach to the debt until it should be fully paid, and so long as it remains a note, conventional, not legal, interest was the contract, and such contracts are sanctioned by law."

The conclusion that the contract rate shall govern after maturity is reached by substantially the same reasoning in Wisconsin, Illinois and Iowa. The construction of the contract is different from that put upon the notes in *Brewster v. Wakefield*, and on the bonds in *Beckwith v.*

¹ *Union Mut. L. Ins. Co. v. Slee*, 110 Ill. 35.

by the statute of limitations is revived by a new promise the conventional rate of interest therein specified may be collected,

Trustees. These cases agree that such contracts for interest do not extend beyond the day fixed for the payment of the principal. In the former (*Brewster v. Wakefield*), for that reason it was held that the conventional interest ceased at maturity; but the Connecticut case, while it concludes that the contract operates only to the time when the principal is due, holds nevertheless that the conventional rate of interest should be adopted as the just measure of damages after maturity, having been the conventional rate immediately before, and because if the debtor is unwilling to pay damages at that rate he can avoid them by paying the debt.

In *Montgomery v. Boucher*, 14 Up. Can. C. P. 45, the defendant having made his promissory note payable two months after date, with interest at the rate of twenty per cent. per annum, and having made default in payment thereof at maturity, in an action by the holder thereon the question was submitted to the jury as to the amount they would allow after the note became due, not exceeding twenty per cent. The jury allowed only six per cent. after the note matured. Upon motion to increase the verdict by the difference between six and twenty per cent., it was held that the rate of interest agreed upon by the terms of the note is the amount which should be allowed by the jury, when allowing interest in the nature of damages, from the maturity of the note to the entry of the judgment.

In *Howland v. Jennings*, 11 Up. Can. C. P. 272, on the authority of *Keene v. Keene*, 3 C. B. (N. S.) 144, the court refused to reduce the ver-

dict of a jury which had allowed interest for the whole period from the date at the rate of twenty per cent. per annum, on a promissory note payable one month after date, with interest at that rate. The defendant contended that from the time the note became due only six per cent. should have been allowed; and the judge, at *nisi prius*, gave him leave to move the full court to reduce the verdict, which they refused to do. “On the whole,” say the court, “we think the weight of authority is in favor of the interest agreed upon by the parties being the proper amount to be allowed by the jury as interest, when allowing interest in the nature of damages, from the time the note matures to the time the judgment is to be entered. It may also be argued this is the proper mode of estimating the interest or damages to be allowed, as being that which was in the contemplation of the parties when they entered into the contract, according to the doctrine laid down in *Hadley v. Baxendale*, 9 Exch. 841.”

It may be doubted whether these cases are to be relied upon as the law of Canada at present. It is held in *St. John v. Rykert*, 10 Can. Sup. Ct. 278, following some English cases stated *ante*, n. § 809, that a promise to pay interest until the principal is paid means until the time fixed for the payment of the principal.

In *Keene v. Keene*, 3 C. B. (N. S.) 144, the suit was against the drawer on a bill of exchange payable with interest at ten per cent. per annum. The master computed interest at that rate after maturity to judgment. A motion was made on behalf of the defendant to refer to the master

notwithstanding it is higher than that allowed by law when such promise is made.¹

for reconsideration; and it was stated in support of the motion that the acceptor, whose liability measures that of the drawer, is liable only to interest at five per cent. after due. Counsel was interrupted by Willes, J., who said: "That clearly is not so; until maturity of the bill the interest is a debt; after its maturity the interest is given as damages, at the discretion of the jury. Col. Fremont had to pay twenty-five per cent. (the California rate of interest) upon the bills which he drew there, on Mr. Buchanan, the secretary of state, at Washington, and which were protested for non-acceptance. *Gibbs v. Fremont*, 9 Exch. 25. The jury saw fit to adopt, as the measure of damages, the rate of interest which the parties themselves have fixed, and the master is substituted for the jury." On the decision of the case, Cockburn, C. J., said: "The master has, as he well might, given in the shape of damages the rate of interest the parties themselves have contracted for. I think he has done quite right." Crowder, J., said: "The master would, I think, have acted very unreasonably if he had not assessed the damages by the rate which the parties had stipulated as the value of the money." *Pujol v. McKinlay*, 42 Cal. 559.

By statute in Nevada the rate of interest or damages for detention is the same after breach as that fixed by the contract before breach. So that though the statute gives damages at the rate of ten per cent. per annum for withholding money generally, it allows a higher rate corresponding to the contract rate when

money is withheld which bore, by contract, a higher rate before maturity. *McLane v. Abrams*, 2 Nev. 199.

Nutting v. McCutcheon, 5 Minn. 382, was a suit on a note for \$1,000, and interest at two and a half per cent. per month, secured by mortgage. When the note became due the maker obtained the privilege of retaining the money longer, upon condition that he would pay interest thereon quarterly at the current rates. No contract for forbearance for any specific time was entered into, nor did the maker, at the beginning of the several extensions that were granted, specially agree to pay any particular rate of interest, and no writings were executed in relation to the same; but at the end of each quarter the parties would meet and agree upon the value of money for the past quarter, and the maker would pay and the payee would receive such amount in satisfaction of the interest accrued, and indorse the same upon the note as payment up to that date, with the consent of the maker. It was held that the absence of a definite contract for forbearance on the one side, and payment on the other, at the beginning of each quarter, did not affect the validity of the payments, as the parties obviated any such difficulty by stipulating the precise terms at the end of the time, and immediately executing them as settled. When a contract lacking the essential feature of mutuality at its inception is subsequently, by the act of the parties, corrected in this particular, and executed, the question of mutuality between the parties is put to rest, although the statute requires

¹ *Vines v. Tift*, 79 Ga. 301.

SECTION 2.

AGREEMENTS FOR INTEREST — “UNTIL PAID.”

Agreements for interest at higher than legal rates, [553] both before and after maturity, will be discussed in the next section. Two classes of contracts will receive present attention: first, those which provide expressly for interest from date at a uniform rate until the debt is paid; and second, those which provide for interest from date, in case the debt, not otherwise bearing interest, shall not be punctually paid, or for interest to commence at maturity, or thenceforth to bear an increased rate in case of default.

§ 310. **Agreements for interest from date until debt paid.** Agreements which belong to the first class have, of course, no other effect than to give interest before maturity, if the rate stipulated is the legal rate, and this will continue until the debt is paid or collected. Where the conventional rate is higher than the ordinary legal rate, but does not exceed that which the parties are authorized by law to stipulate for, the contract is binding according to its terms; that is, until the debt is paid or the contract merged in a judgment or decree,¹ except in Minnesota. In Iowa the contract rate is com- [554] puted on the judgment in furtherance of the spirit and intent of the contract;² but the interest included in the judgment bears interest only at the legal rate.³ In Minnesota the statute authorizing parties to contract for any rate of interest is con-

that the contract for the payment of such interest shall be in writing; yet where it is made without writing, and executed by the parties, money paid thereunder cannot be recovered back. The rule that where contracts are made in violation of statutory provisions, or in contravention of public policy, they are void, and money paid thereunder may be recovered back, is confined in its application to such contracts as involve, by their subject-matter, some substantial violation of the spirit of the law or policy, and

not such as stipulate some matter recognized and permitted by law or policy, but in a manner other than the one prescribed.

¹ Fisher v. Bidwell, 27 Conn. 868; Palmer v. Leffler, 18 Iowa, 125; Pujol v. McKinlay, 42 Cal. 559; Taylor v. Meek, 4 Blackf. 888; Mead v. Wheeler, 18 N. H. 851; Dudley v. Reynolds, 1 Kan. 285, affirmed in Young v. Thompson, 2 Kan. 83.

² Wilson v. King, Morris, 106.

³ Burkhardt v. Sappington, 1 G. Greene, 66.

strued strictly; the rate stipulated for does not extend beyond the date fixed for payment. It is held there that interest as damages cannot be increased by contract above the ordinary legal rate; such contracts are treated as providing penalties to secure punctuality of payment, and consequently as having no legal effect.¹

The courts which hold that a general promise of interest before maturity at a given rate will operate afterwards by supposed intention of the parties will and do enforce a continuance of the same rate when that intention appears expressly or inferentially.² And other courts which enforce the same rate after as before maturity, not on the ground mainly of intention, but because the rate adopted by the parties for one period is presumed to be fair and just for another immediately succeeding, will continue that rate when the parties have given a like assurance of its fairness for the whole period that they contemplated the possibility of the money being retained.³ Wherever the privilege given to parties to stipulate special rates of interest above the general rate is held to apply to the time the debtor retains the money after it is due, it would seem to be matter of course to enforce such agreements, if the agreed rate is the same before and after the specified day of payment.⁴

§ 311. Agreements for a different rate after debt due.
[555] The second class of cases comprises those in which interest by agreement is made retrospectively to attach for the period of credit, or prospectively at a severer rate in conse-

¹ *Kent v. Bown*, 3 Minn. 347; *Talcott v. Marston*, id. 339; *Mason v. Callender*, 2 id. 350, *Daniels v. Ward*, 4 id. 168; *Brown v. Nagel*, 21 id. 415; *Holbrook v. Sims*, 39 id. 122.

² § 309, *ante*; *Capen v. Crowell*, 66 Me. 282; *Paine v. Caswell*, 68 Me. 80; *Hubbard v. Callahan*, 42 Conn. 524, 537.

³ *Beckwith v. Trustees of Hartford, etc. R. Co.*, 29 Conn. 268.

⁴ It is obvious that the final decisions in *Brewster v. Wakefield*, 22 How. (U. S.) 118, and *Cook v. Fowler*, 7 H. of L. Cas. 27, turned on the ab-

sence of an express agreement fixing or intending to fix the rate after maturity. It was held in both that the agreed rate before is not, in every instance at least, the agreed rate after maturity, and the intimations were that an express agreement to continue the rate after maturity would be effectual. And in *Florence v. Jennings*, 2 C. B. (N. S.) 454, a promise of a guarantor to pay a specified interest after maturity was actually enforced. *Popple v. Sylvester*, 22 Ch. Div. 98.

quence of the principal not being paid when due. An agreement in advance that if the principal be paid at maturity the debt may be discharged without interest, but otherwise to bear interest from date at a legal rate, is an undertaking conditionally to do something which the parties had a right to stipulate for at first absolutely. Nor is there any intrinsic difference between such an agreement and one for payment of the principal at a certain day with interest, with a proviso that if such principal be punctually paid no interest shall be charged. There can be no other legal objection to making money as interest payable on a contingency, or on the happening of a default, than to make the principal itself depend on an uncertain event. The question in both cases is whether the payment required on one alternative — the other dispensing with it — is a penalty. The fact of there being an alternative or contingency in the contract does not decide the question. A party may have two prices for goods, one for cash, and another and higher price when time is given for payment. A purchaser who is advised of these terms, and chooses to buy on time, would not be heard to object that the time price, or its excess over the cash price, was a penalty. He is as firmly bound for the price at which he purchased as though no opportunity to purchase on other terms had been offered. Either price being legal when the purchaser made his contract, it is binding; and an alternative price, determinable by default, may become absolute and collectible. There is not the same latitude allowed to agreements for interest as for prices of property, but there is entire freedom to contract for interest not above legal rates. A party who is a debtor, or who makes a loan, and to whom forbearance for one period is offered without interest, and another and longer period on terms of paying interest, may choose either offer without advantage by way of mitigation of his agreement for hav- [556] ing rejected the other. Nor is a contract any less binding in respect to either alternative, which may become absolute, when one of the parties has a continuing option until the time of performance and may then make his election by performance.¹

It is true one of the test rules for distinguishing penalty

¹ *Ante*, § 282.

from liquidated damages is that if a larger sum is agreed to be paid for default in paying a smaller the larger is a penalty. A note made payable for a sum certain on a specified day without interest if punctually paid, otherwise, with interest from date, comes within the letter of the rule. If the letter controlled, the stipulation for interest would be held to be a penalty. The rule, however, does not apply to such a case. It is designed to prevent agreements to pay a large sum in consequence of default in paying a small one, which is the actual debt, because interest is the established measure of damages for such default. It does not apply to invalidate any legal rate promised on the event of a default.

No damages for the mere non-payment of money can ever be so liquidated between the parties as to evade the provisions of the law which fixes the rate of interest.¹ In all such cases the law, having fixed the rate by positive rules, has bounded the measure of damages.² This is the rule, the other the corollary; because interest is the measure of damages for breach of contract to pay money the law will treat as penalty any larger sum which a debtor may agree to pay for such a default. But within the bounds of the legal rate of interest parties may liquidate damages for not paying money when it is due.³

¹ 2 Sedgw. on Dam. 216.

² Orr v. Churchill, 1 H. Black. 232.

³ Hackenberry v. Shaw, 11 Ind. 392; Brown v. Maulsby, 17 Ind. 10; Gully v. Remy, 1 Blackf. 69; Wakefield v. Beckley, 8 McCord, 480; Daggett v. Pratt, 15 Mass. 177. See Richards v. Marsham, 2 G. Greene, 217.

In Alexander v. Troutman, 1 Ga. 469, judgment had been entered without including the back interest, and this judgment satisfied by execution; afterwards the judgment was amended, under the order of the court, so as to include the interest from date. Nesbitt, J.: "The several assignments of error in this cause resolve themselves into one question, and that is, is the agree-

ment upon the face of the papers to pay interest from date, if the principal sum is not punctually paid at its maturity, in the nature of a penalty? The court below decided it to be an undertaking to pay the back interest as damages for a failure to pay the principal sum at the maturity of the note. . . . If this back interest is stipulated damages, then the plaintiff below is entitled to recover it; if a penalty, he is entitled under the contract to recover whatever, in the proper form of action, he could prove to be the *quantum* of his injury. The parties do not call it either the one or the other; if they did the name they gave to it would not change its nature. That is settled by the authorities. Story's Eq.

§ 312. **Same subject.** A rate of interest fixed by [557] statute is entirely arbitrary; but if it fixes an absolute limit which cannot be transcended by any interest contract, while payment is expressly postponed, any agreement for a greater

sec. 1818. The amount in this case is liquidated, whether it be penalty or damages; for the agreement is in case of non-payment punctually, then to pay ‘interest from date;’ that is, the interest which the law allows, to be computed from the date of the note. By referring to the note, and the law of the state, the amount will be ascertained, *id certum est quod certum reddi potest*. One thing is very clear; that is, that neither the courts of Great Britain nor of our Union have established any rule by which it can always with certainty be determined what is a penalty and what liquidated damages. We shall, of course, undertake to establish none. It is settled by the later cases that in order to ascertain whether the sum specified in the agreement is to be considered a penalty or liquidated damages, the court must look at the whole of the agreement; and unless it clearly appear thereby to have been intended by the parties as liquidated damages, it will be considered as a penalty. Tidd’s Pr. 877; 6 Barn. & Cress. 216; 11 Mass. 81. In commenting on this subject Mr. Justice Story remarks: ‘But we are carefully to distinguish between cases of penalties, strictly so called, and cases of liquidated damages. The latter properly occur when the parties have agreed that in case one party shall do a stipulated act, or omit to do it, the other party shall receive a certain sum as the just, appropriate and conventional amount of the damages sustained by such act of omission. In cases of this sort, courts of equity will not interfere to grant re-

lief; but deem the parties entitled to their own measure of damages; provided always, that the damages do not assume the character of *gross extravagance*, or of wanton or unreasonable disproportion to the nature or extent of the injury.’ Story’s Eq. Jur., sec. 1818; Eden on Injunctions, 41.

“Upon a careful review of the authorities, we are prepared to say that this extract affords the best general rule upon a question of no little complexity. We do not see why its application may not, in most cases, determine what is a penalty, and what damages. Its application relieves us from doubt as to what is the law of the case before us. It is a safe general rule not to interfere with the contract which parties have thought proper to make; it is the business of courts of justice not to make, but to enforce, contracts. If the meaning of the parties is reasonably plain, the court will not be astute to find out a different meaning. The parties in this case, and in all others of like character, have the unquestionable right to fix their own measure of damages. They are presumed to know, better than a jury could determine for them, what injury would result from any given act or omission. And if the parties have made their contract, and it is not in contravention of the law, let it even be conceded to be unreasonable, it is right to compel them to abide by it. In *Lowe v. Peers* (4 Burr. 2229), Lord Mansfield sustains these general views in these words: ‘When the precise sum is fixed and agreed upon between the parties, that very sum is

rate after maturity, by reference to that standard, provides for more than compensation. This, however, is the case only in a technical point of view; for the default in paying may occur under such circumstances that the higher rate will be no more

the ascertained damages, and the jury is confined to it.' In that case Peers had in writing bound himself to marry Mrs. Lowe, and in default to pay her one thousand pounds. This was held to be a case of damages. A reason for abiding the damages which the parties have agreed upon is found in the difficulty which a jury would find, in many cases, of ascertaining the amount of the injury sustained. 6 Bing. 141. In the case we are now determining we know of but one criterion which the jury would have by which to fix the damages which the payee sustained, and that is the very one by which the parties themselves ascertained them; to wit, the legal rate of interest on the money. . . . On the other hand, it may be considered as settled, that where a larger sum is stipulated to be paid in order to secure the prompt payment of a lesser, it is a case of penalty. 2 Bos. & Pul. 816. So, too, where a specified sum is agreed upon to cover different breaches, and would be in some cases too large, and in others too small, that is a case of penalty. 6 Barn. & Cress. 216. In all cases where the damages are excessive they are held to be penalty. Story's Eq., sec. 1818. Such was the case read from Alabama determined by the supreme court of that state. There the back interest reserved ranged from two and a half to ten per cent. per month."

After showing that the facts fulfill the other conditions of Judge Story's rule in respect to liquidated damages, the opinion continues: "The benefits of these contracts upon time, con-

trary to the received opinion, according to the legal view of them are reciprocal. When A. sells property or lends his money to B. and takes his note at twelve months, the possession of the property or the money passing at the time to B., the legal inference is that the price of the property or money is enhanced by the interest on the cash price of the property, or the actual sum loaned for twelve months. This interest is added to the note. Now if there be a stipulation that in case of non-payment at maturity the note shall bear interest from date, and it is not paid and the back interest is collected, the common opinion is that A. in the above case realizes sixteen per cent. upon this contract. But is this true? It is true that he does in fact receive sixteen per cent., but eight per cent. of that interest is offsetted by the use of the property or the money in the hands of B., the use being worth eight per cent. to him. The consequence is that in cases where the damages thus stipulated do not exceed eight per cent., the payee realizes only eight per cent. upon his money or the price of his property. Then the result of such a contract as the one before us, enforced, is that the payee gets eight per cent., the lawful interest upon money. Now is such an amount otherwise than just? We think not. And if just it is not *grossly extravagant* or wanton, or unnecessarily disproportioned to the injury.

"We know that in point of fact the giving of time does often enhance the price of property or money far beyond eight per cent., as stated. But how do we judicially know that

than just compensation. Treating a sum agreed to be [558] paid at a future day as representing the actual debt due on that day, and the credit or forbearance to that time as having been in some way fully compensated in the transaction in which the debt originated, an agreement to pay an additional sum, whether under the name of interest or not, in case of default in not paying that debt when it becomes due, is essentially an agreement for a penalty; but unless the statute arbitrarily fixes a rate not to be exceeded, it cannot be said that any rate is so perfectly a compensation that any larger rate would be more than that. If a debtor owing a sum [559] certain agrees to pay it at a future day, with interest at a given rate, he should be deemed to have discharged his precise legal duty and obligation by paying when due that sum, together with interest computed at that rate. An additional provision in the agreement that if he makes default in paying such principal and interest when due he shall pay a higher rate of interest from date is an agreement that by its [560] terms, if literally enforced, would make the debtor liable on the day following the maturity of his debt for an extra sum which would be greatly disproportioned to the interest for

to be the case here? We reason from the record. The reasonableness and justness of the damages may be variously illustrated. We refer only to the instance of administrators whose notes are taken at twelve months, and very often with the condition found in this note. It is of serious importance to the estate which he represents that the debts thus contracted be promptly paid. At the expiration of twelve months he is liable not only to be called upon but to be sued, if the estate which he represents, which is very generally the case, has no resources to pay its debts but the proceeds of sales; and the debts contracted on account of such sales are not promptly met; then he is put to great inconvenience, and the estate of his intestate injured. He is compelled, perhaps, to borrow money at

exorbitant rates; to submit to be sued and pay costs, or to sue upon the notes in his hands and pay commission for collecting. In this case eight per cent. for twelve months cannot be considered unjust or excessive as damages.” This opinion seems to rest on the fallacious assumption that though agreements to pay on time the price of property or a loan where the interest is added to the principal when the promise is made, the debtor really pays no interest for that time because he obtains an equivalent or more in the possession of the property or money, and that therefore the retrospective interest made payable on the face of the note for want of punctuality in paying the debt when due, consisting by concession of principal and interest, is the only interest in the transaction.

one day;¹ still, could it be treated as penalty if it would not be such had the same rate been adopted absolutely in the contract? Where additional interest, depending on default, is stipulated, and this higher rate does not exceed the legal rate, or is a reasonable one not exceeding any limit below which parties are authorized to contract for any rate, it should probably be legally assumed that the consideration was deemed by the parties, when contracting, as equivalent to the higher rate; or that such increased rate is no more than a just indemnity for the disappointment and injury occasioned by the default; that they have made, and intended to make, an alternative contract as to interest to secure punctuality of payment; or in case of default, to give the creditor the rate he was authorized to claim and demanded for forbearance.²

Where, looking at the substance of the contract rather than the particular collocation of words by which it is expressed, the damages or pecuniary consequences stipulated to result from default do not contravene any statutory provision, nor transcend what the parties might legitimately and reasonably agree shall be paid without default, or during a prolonged period of credit, there would seem to be no legal impediment to adjudging that the very contract which the parties have made shall be enforced. Contracts for a higher rate of interest after maturity than the debt had previously borne, and higher than the ordinary rate fixed by law, have been upheld [561] and enforced according to their terms. Though there is some conflict of decision, it is believed that according to the decided preponderance of authority such contracts are valid unless the rate exceeds that which the statute authorizes to be stipulated for; and also subject, in extreme cases, to having the rate cut down because it is so disproportioned to the actual value of money that it should be regarded as in the nature of a penalty.³ Contracts for very large rates of interest have

¹ *Billingsly v. Cahoon*, 7 Ind. 184; Ill. 203; *Young v. Fluke*, 15 Up. Can. *Wernwag v. Mothershead*, 3 Blackf. C. P. 360; *Witherow v. Briggs*, 67 Ill. 96; *Davis v. Rider*, 53 Ill. 416; 401.

² See *Mead v. Wheeler*, 13 N. H. *Young v. Thompson*, 2 Kan. 83; 351; *Wilkinson v. Daniels*, 1 G. *Gould v. Bishop Hill Colony*, 35 Ill. Greene, 179. 324; *Wilkinson v. Daniels*, 1 G.

³ *Wernwag v. Mothershead*, 3 Greene, 179; *Taylor v. Meek*, 4 Blackf. 401; *Latham v. Darling*, 2 Blackf. 388; *Phinney v. Baldwin*, 16

been sustained; as three dollars per month for the detention of thirty;¹ five dollars per week for detention of four hundred and thirty-two dollars;² and other instances of rates from twenty to one hundred and twenty per cent. per annum.³

SECTION 3.

AGREEMENTS FOR MORE THAN LEGAL RATE BEFORE MATURITY.

§ 313. **Effect of usury found.** It is not proposed to discuss what constitutes usury; but the effect of usury found on the amount of recovery, or of agreeing to pay interest before maturity of the debt exceeding the limit fixed by statutes. The early statutes in this country have been generally moulded after the statute of Anne;⁴ first, forbidding the taking of interest above a certain rate; and second, declaring void agreements and securities for greater rates. The taking of usury has sometimes also been made a criminal offense. Under such legislation the important question is the existence of usury. It is not a favored plea; though a legal defense to which, when established, the courts have given effect, it has been judicially denounced as unconscionable.⁵ Courts require parties who would avail themselves of it to pursue correct practice in the first instance; if they err, their defense will not be treated with indulgence.⁶

It is deemed equitable that the creditor should receive the principal and legal interest; but it is an imperfect equity; the creditor cannot himself assert it by an action or suit based upon it; on the contrary, usury is as fatal to his suits in equity to enforce usurious demands as at law; and if the

Ill. 108; *Palmer v. Leffler*, 18 Iowa, 125; *Reeves v. Stipp*, 91 Ill. 609; *Downey v. Beach*, 78 Ill. 53; *Lawrence v. Cowles*, 13 Ill. 577; *Smith v. Whitaker*, 23 Ill. 367; *Blair v. Chamblin*, 39 Ill. 521; *Miller v. Kempner*, 32 Ark. 573; *Badgett v. Jordan*, id. 154; *Portis v. Merrill*, 33 id. 416; *Bailey v. McClure*, 73 Ind. 275; *White v. Iltis*, 24 Minn. 43. But see *Newell v. Houlton*, 22 id. 19.

¹ *Latham v. Darling*, 2 Ill. 203.

² *Wernwag v. Mothershead*, 3 Blackf. 401.

³ *Taylor v. Meek*, 4 Blackf. 388.

⁴ 12 Anne, St. 2, ch. 16.

⁵ *Merrills v. Law*, 9 Cow. 65; *Marsh v. Lasher*, 13 N. J. Eq. 253.

⁶ *Beach v. Fulton Bank*, 3 Wend. 573; *Lovett v. Cowman*, 6 Hill, 223; *Woolcott v. McFarlan*, id. 227; *National Fire Ins. Co. v. Sackett*, 11 Paige, 660; *Collard v. Smith*, 18 N. J. Eq. 43; *Remer v. Shaw*, 8 id. 355.

debtor has paid usury otherwise than voluntarily¹ he may recover it. It is a passive equity which the debtor must recognize and perform only when he asks equity. Accordingly, when he asks a favor in practice by invoking the equitable power of the court by motion,² and when he appeals to a court of equity for relief against the usurious contract, or the effect of any legal assertion of the debt, or to procure its aid to establish the fact of usury, as by discovery, he will be obliged to submit to the condition of paying the principal and lawful interest.³

[563] § 314. **Who may take advantage of usury.** As usury is a defense personal to the debtor and those standing in relations of privity to him, it is not an illegal element when the usurious debt becomes a principal in the undertaking of a third party, as between him and the creditor, upon a new consideration.⁴ This principle is of general application; it will

¹ When voluntarily paid usury cannot be recovered. *Smith v. Coopers*, 9 Iowa, 376; *Nicholls v. Skeel*, 12 id. 300; *Shelton v. Gill*, 11 Ohio, 417; *Graham v. Cooper*, 17 id. 605; *Moseley v. Smith*, 21 Tex. 441; *Manny v. Stockton*, 34 Ill. 306; *Carter v. Moses*, 39 Ill. 539; *Tompkins v. Hill*, 28 Ill. 519; *Dykes v. Wyman*, 67 Mich. 236.

Nor can the debtor charge the excess of payments above the legal rate against the principal debt. *Pettis v. Ray*, 12 R. I. 344. See *Bond v. Jones*, 8 S. & M. 368.

In New Hampshire payments of usurious interest are excepted from the general rule that payment of an illegal claim with full knowledge of its illegality is irrevocable, being regarded as made under duress. *Peterborough Savings Bank v. Hodgdon*, 62 N. H. 300; *Albany v. Abbott*, 61 id. 157; *Cross v. Bell*, 34 id. 82; *Willie v. Green*, 2 id. 333.

² *Beach v. Fulton Bank*; *Remer v. Shaw*, *supra*.

³ *Livingston v. Tompkins*, 4 Johns. Ch. 415; *Rogers v. Rathbun*, 1 id. 367; *Tupper v. Powell*, id. 439; *Fan-*

ning v. Dunham, 5 id. 122; *Fitzroy v. Gwillim*, 1 T. R. 153; *Mason v. Gardiner*, 4 Bro. Ch. 436; *Schermerhorn v. Talman*, 14 N. Y. 93; *Conner v. Myers*, 7 Blackf. 337; *Cooper v. Tappan*, 4 Wis. 362; *Platt v. Robinson*, 10 id. 128; *Miller v. Ford*, 1 N. J. Eq. 358; *Legoux v. Wante*, 3 Har. & J. 184; *Jordan v. Trumbo*, 6 Gill & J. 103; *McRaven v. Forbes*, 6 How. (Miss.) 569; *Noble v. Walker*, 32 Ala. 456; *Ruddell v. Ambler*, 18 Ark. 369; *Taylor v. Smith*, 2 Hawks, 465; *Pearson v. Bailey*, 23 Ala. 537; *McGeehe v. George*, 38 Ala. 323; *Wilson v. Hardesty*, 1 Md. Ch. 66; *Ballinger v. Edwards*, 4 Ired. Eq. 449; *Thomas v. Doub*, 8 Gill, 1; *Boyers v. Boddie*, 3 Humph. 666; *Hudnit v. Nash*, 16 N. J. Eq. 550; *Eslava v. Crampton*, 61 Ala. 507; *Cook v. Patterson*, 103 N. C. 127; *Eiseman v. Gallagher*, 24 Neb. 79; *Carver v. Brady*, 104 N. C. 219.

But it is otherwise under a statute in Minnesota. *Scott v. Austin*, 36 Minn. 460; *Exley v. Berryhill*, 37 id. 182.

⁴ *Bank of Newbury v. Sinclair*, 60

prevent deductions for usury to which, as between the creditor and the debtor, the latter is entitled to under various statutes, when such deductions are asked for or against other persons who have novated or paid the usurious debt at the debtor's request.¹

§ 315. **When contracts not void for usury.** In the statutes of several of the states, and in some charters for commercial corporations, there has been a simple prohibition of interest above a certain rate, but no provision that agreements and securities for such interest should be void. Under such legislation it has been made a question whether such agreements and securities are to be treated as wholly void,—whether the reservation of interest above the legal rate renders the whole contract, as an entire thing, illegal,—so that the principal as well as interest is to be regarded as involved in an unlawful venture; or whether such agreements are void only to the extent of the illegal interest. On this question there is some conflict of decision. In a case in the national supreme court, where usury in the transfer of a promissory note was complained of by the maker, the court said the taking of interest by the bank, beyond the sum authorized by its charter, would doubtless be a violation of the latter, for which a remedy might be applied by the government; but as the act did not declare that it shall avoid the contract, it was not perceived how the defendant could avail himself of this ground to defeat a recovery. The statute containing no ex-

N. H. 100; *Essley v. Sloan*, 116 Ill. 391; *Gathercole v. Young*, 61 N. H. 563; *Sullivan Savings Inst. v. Copeland*, 71 Iowa, 67; *Jeffries v. Allen*, 29 S. C. 501; *Cheney v. Dunlap*, 27 Neb. 401; *Log Cabin, etc. Ass'n v. Gross*, 71 Md. 456; *Griel v. Lehman*, 59 Ala. 419; *Lee v. Feamster*, 21 W. Va. 108; *Palmer v. Call*, 2 McCrary, 522; *Burlington Mutual L. Ass'n v. Heider*, 55 Iowa, 424; *Mason v. Searles*, 56 id. 532; *First Nat. Bank v. Bentley*, 27 Minn. 87; *Pence v. Christman*, 15 Ind. 287; *Stephens v. Muir*, 8 Ind. 352.

Where the debtor is insolvent and there is a fund in court to be

distributed, equity will allow one creditor to suggest usury as to a co-creditor, and if the debtor is insolvent will compel the usurious creditor to write off his usury and only give him his principal and legal interest. *Brooks v. Todd*, 79 Ga. 692. The heir of a deceased borrower who has paid a usurious debt to release his inheritance may recover the usury paid. *Pope v. Marshall*, 78 Ga. 635.

¹ *Brinkerhoff v. Foote*, 1 Hoff. Ch. 261; *Thurston v. Prentiss*, 1 Mich. 193; *Shirley v. Spencer*, 9 Ill. 583. But see *Totten v. Cooke*, 2 Met. (Ky.) 275; *Stevens v. Davis*, 3 Met. (Mass.) 211.

press provision that usurious contracts should be utterly void, the contract was to be deemed valid, at least in respect to persons who were strangers to the usury.¹ In a later case that [564] court held that a contract made in violation of the same charter fixing a limit of interest, where the usury was set up by the other party to the usurious contract, was void *in toto*. The decision was put upon the naked prohibition in the charter, expressly laying out of view the general statute on the subject of interest. It was so held void by a majority of the court on general principles. The reservation of interest in the contract at a rate the taking of which would be a violation of the charter vitiated the contract for both principal and interest, and rendered it utterly void.² This decision was

¹ Fleckner v. Bank, 8 Wheat. 838.

² Bank v. Owens, 2 Pet. 527. The language of the charter was: "The bank shall not be at liberty to purchase any public debt whatever; nor shall it take more than six per cent. per annum for or upon its loans or discounts." It was held that an agreement "corruptly and usuriously" to loan depreciated bills, taking therefor a note on time, bearing legal interest, was a violation of the charter. Johnson, J., said: "To understand the gist of the question, it is necessary to observe that, although the act of incorporation forbids the taking of a greater interest than six per cent., it does not declare void any contract reserving a greater sum than is permitted. Most, if not all, the acts passed in England, and in the states, on the same subject (1829), declare such contracts usurious and void. The question, then, is whether such contracts are void in law, upon general principles." In a previous part of the opinion he said: "Some doubts have been thrown out whether, as the charter speaks only of *taking*, it can apply to a case in which the interest has only been *reserved*, not received. But on that

point the majority are clearly of opinion that reserving must be implied in the word taking, since it cannot be permitted by law to stipulate for the reservation of that which it is not permitted to receive. . . . When the restrictive policy of a law alone is in contemplation, we hold it to be a universal rule that it is unlawful to contract to do that which it is unlawful to do." The contract being held to be within the prohibition, the opinion is that such contracts are void upon general principles. The authorities cited are wholly English, and unquestionably sound on both sides of the Atlantic. They may be distinguished, however, from the case decided in this important particular: the fundamental purpose for which the contracts in question, in the cases cited, were made, or to which they were ancillary, was illegal; *malum in se* or *malum prohibitum*. In the Owens case the principal purpose of the transaction — the loan and promise of interest — was lawful; making loans for interest was one of the main objects of the corporation; the illegality complained of was an incidental violation of the

followed at the circuit by a case decided by Taney, C. J., [565] upon a simple constitutional prohibition of interest above a specified rate which was exceeded in the contract that was the subject of the action.¹ The Maryland interest law, as modified by the act of 1845, prohibited, in the language of the statute of Anne, the taking of more than six per cent. per annum, but by that act the lender was entitled, notwithstanding the contract exceeded that limit, to recover the principal and six per cent. This law was in force when the constitution of 1850 took effect. That instrument contained a clause in these words: "The rate of interest in this state shall not exceed six per cent. per annum, and no higher rate shall be taken or demanded; and the legislature shall provide by law all necessary forfeitures and penalties against usury." Before any legislation under the constitution this case arose upon a bill of exchange to which a plea of usury was interposed. On demurrer, Taney, C. J., following the doctrine of the supreme court, held that the prohibition in the constitution was inconsistent with and abrogated the provision of the act of 1845 giving the lender the principal and six per cent. interest. And he declared that, "as the constitution has forbidden the taking or demanding of more than six per cent., no contract made in this state can be enforced where a higher rate of interest is taken or demanded by the contract." "A court of justice cannot lend its aid to him to recover it (the money loaned), because the contract for the loan is one entire thing, and consequently is altogether invalid or void, and it would be contrary to the duty of a court of justice to assist a party in consummating an act which the law forbids." The absence of any penalty was held no argument in support of the action.² But the supreme court of Maryland arrived at a dif-

ference. There is the difference between the case decided and those cited to support it, of an incident being impressed with the character of the principal, and the principal being infected by the vice of the incident.

¹ Dill v. Ellicott, Taney, 233.

² Id.

A constitutional provision declar-

ing contracts which provide for a rate of interest in excess of a named sum and which requires the legislature to provide penalties to prevent and punish usury is self-executing so far as to render a contract thereafter made for a prohibited rate invalid. Watson v. Aiken, 55 Texas, 536; Hemphill v. Watson, 60 id. 679.

ferent conclusion.¹ It, in effect, held that the absolute prohibition in the constitution was not inconsistent with the act of 1845 in respect to allowing the creditor to recover upon a usurious contract the principal and legal interest. No penalty, forfeiture or other punishment was prescribed. The question has also been decided in Indiana. Usury there was [566] made an offense punishable on indictment by fine of double the amount of the usury. The decision was based on the authority of the case cited from the supreme court of the United States.² All that is meant according to any legal usage by a statute which declares a usurious contract to "be

¹ In *Bandel v. Isaac*, 13 Md. 202.

² *Fowler v. Throckmorton*, 6 Blackf. 326.

In other states, where usury has not been made a criminal offense, and contracts tainted with it not declared by statute to be utterly void, they have been held invalid only to the extent of the usury, or at most as to the contract for interest.

Alabama: *Saltmarsh v. Planters', etc. Bank*, 17 Ala. 761. See S. C., 14 Ala. 668.

Arkansas: The statute declares securities tainted with usury to be void. *Jones v. McLean*, 18 Ark. 456. But as to the effect of usury in cases not within that statute, see *Alston v. Brashears*, 4 Ark. 422, where the principal of the usurious contract was held recoverable.

Connecticut: A corporation having power to loan money under certain restrictions, having afterwards taken a note as security on terms which were, in respect to interest, a violation of the charter, it was held in a suit *on the note, with the money counts*, that although there could be no recovery on the note, the money loaned, with the legal interest, might be recovered. *Philadelphia Loan Co. v. Towner*, 13 Conn. 249. See *Sheldon v. Steere*, 5 Conn. 181.

Georgia: Contract void only to the

extent of the usury. *Dillon v. McRae*, 40 Ga. 107.

Iowa: A contract tainted with usury is void only to the extent of the usury, and may be enforced for the residue. *Richards v. Marshman*, 2 G. Greene, 217; *Shuck v. Wight*, 1 id. 128; *Haggard v. Atlee*, id. 44; *Gower v. Carter*, 3 Iowa, 244; *Ficklin v. Zwart*, 10 id. 387; *Drake v. Lowry*, 14 id. 125; *Garth v. Cooper*, 12 id. 364; *Wight v. Shuck*, *Morris*, 425; *Wilson v. Dean*, 10 Iowa, 431.

Michigan: The effect of usury is not to avoid the contract, but to reduce the amount; the usurer is entitled to recover the amount actually loaned and legal interest (*Thurston v. Prentiss*, Walk. Ch. 529; *Craig v. Butler*, 9 Mich. 21), which is construed to be the highest rate the law permits to be stipulated for. *Smith v. Stoddard*, 10 Mich. 148.

Illinois: The statute which fixes the legal rate at six per cent. allows "any person who shall pay or deliver any greater sum or value for any loan, discount or forbearance," to "recover threefold the amount of money so paid" from the person so receiving; but does not invalidate the contract reserving an illegal rate of interest. *Hansbrough v. Peck*, 5 Wall. 497; *McGill v. Ware*, 5 Ill. 21; *Lucas v. Spencer*, 27 id. 15; *Mapps*

void and of no effect for whole premium or rate of interest only" is that a court of law will not lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties for the express

v. Sharpe, 32 id. 13; *Cushman v. Sutphen*, 42 id. 256; *Conkling v. Underhill*, 4 id. 388; *Ferguson v. Sutphen*, 8 id. 547; *Hunter v. Hatch*, 45 id. 178.

Missouri: In *Farmers' & T. Bank v. Harrison*, 57 Mo. 503, Lewis, J., said: "Hitherto . . . when the defense (of usury) was successful courts have habitually rendered judgment for the principal sum and ten per cent. interest, setting apart the interest to the county school fund;" and it was here held that the same rule would apply to a corporation restrained by its charter from taking interest above a specified rate, in actions by it upon contracts providing for a greater rate.

Ohio: In *Bank of Chillicothe v. Swayne*, 8 Ohio, 257, is a history of the legislation of the state on the subject of interest. The act of 1799 fixed the rate at six per cent., but inflicted no penalty for taking or reserving a greater rate. It did not declare any such contract void, nor create any forfeiture of the principal sum, but forfeited the entire interest. It expressly provided that the lender might recover the principal after deducting payments on account of interest. The act of 1804 fixed the rate at six per cent. and provided as to persons taking more that "such persons shall forfeit the whole amount of the debt on which the illegal interest was charged or received," one-half to the informer prosecuting, and one-half to the county treasury; said to be substantially, if not literally, the same as the Pennsylvania statute, and probably copied from it. Act of 1824: "All

creditors shall be entitled to receive interest on all money after the same shall have become due, either on bond, bill, promissory note or other instrument of writing; on contracts for money or property; on all balances due on settlement between parties thereto; on all money withheld by unreasonable and vexatious delay of payment; and on all judgments obtained from the date thereof; and on all decrees obtained in any court of chancery for the payment of money from the day specified in the said decree for the payment thereof, or if no day be specified, then from the date of entering thereof, until such debt, money or property is paid at the rate of six per cent. per annum and no more." Although this statute provided only that all creditors should be entitled to interest at six per cent. per annum *and no more*, "on all money *after the same shall become due*," it was held and finally settled, up to 1850, that the rate could not be raised by agreement before or after due by reason of the prohibition in the act. Hitchcock, J., said: "From 1804 to the present period (1838), there has been no time in which an individual might recover the principal sum of money loaned, together with lawful interest, notwithstanding by the terms of the loan he was to have received a greater rate of interest." In this case, however, a like prohibition in the charter of a bank limiting its right to charge interest to a specified rate was held to render a contract exceeding this limit wholly void on the ground of its want of power to make it. For criticism on this distinction, see *McLean v. Lafayette*

purpose of carrying into effect that which is prohibited. Such a contract is not so far void that the repeal of the statute which forbade it, no saving clause being embodied in the repealing act, will not operate to cut off the defense of usury in an action upon it.¹

[567] Subjecting the usurer to a fine, or to loss of all interest on the debt by a separate prosecution, does not of itself [568] render the contract into which the usury enters wholly void. Where it is not declared void for usury by the statute, [569] and there are no specific provisions for a different adjustment of the amount which may be recovered, the contract [570] as to interest is held void when it stipulates for a rate forbidden by law; then the principal sum may be recovered with ordinary interest.²

In many cases the construction of such statutes has been influenced by antecedent legislation indicating some legislative policy. And the history of legislation upon this subject shows

Bank, 3 McLean, 589; and Farmers' & T. Bank v. Harrison, 57 Mo. 503; Lafayette Benefit Society v. Lewis, 7 Ohio, 81.

Pennsylvania: Usurious agreements not wholly void. The creditor is entitled to recover the sum loaned and legal interest. Wycoff v. Longhead, 2 Dall. 92; Turner v. Calvert, 12 S. & R. 46; Kupfert v. Guttenberg Building Ass'n, 30 Pa. St. 465; Philadelphia, etc. R. Co. v. Lewis, 33 id. 33. See Evans v. Negley, 13 S. & R. 218.

Mississippi: Taking or reserving illegal interest is not a punishable offense, nor does it render the contract into which it enters void; by statute it causes a forfeiture of all interest. Wallace v. Fouche, 27 Miss. 266; Newman v. Williams, 29 id. 212; M'Alister v. Jerman, 32 id. 142; Brown v. Nevitt, 27 id. 801.

Kentucky: An agreement to set the hire of a negro worth £22 per year against the interest of £125 is so far void as to let in the borrower to redeem, but does not vitiate the whole contract. Reed v. Landsdale,

Hardin, 6. But see Richardson v. Brown, 3 Bibb, 207; Wells v. Porter, 5 B. Mon. 416; Denham v. Stone, 7 J. J. Marsh. 176.

¹ Ewell v. Daggs, 108 U. S. 143.

² Bunn v. Kinney, 15 Ohio St. 40. By an act passed in 1850 parties were allowed in Ohio to "stipulate for interest at any rate not exceeding ten per cent. yearly." In an action on a note at four months, which included interest at nearly twenty per cent., it was held usurious and void to the extent of interest above six per cent. from date. There was no mention of interest on the face of the note, except "after due;" the usury was included with the principal. The interest agreement implied by putting interest and principal together, in the amount for which the note was given, was enforced to the extent of six per cent. between its date and maturity; for if the interest agreement were wholly void, no interest whatever could be recovered for that time.

the progress and tendency of popular thought; the gradual subsidence and final disappearance of the old prejudice against not only interest, but usury. The common law is flexible enough to accommodate itself by degrees to deliberate popular convictions; and it has done so in respect to interest and usury. Very high rates of stipulated interest which transcend statutory limits are abated and brought to the standard which the law fixes; and when no limit is fixed by statute such stipulated rates are sometimes mitigated as the law mitigates penalties; but in both cases the excessive interest is treated as free from the taint of crime. Usury, as a crime, is rapidly disappearing from the statutes everywhere.

§ 316. **Computation under usury statutes.** Under [571] statutes where the rates allowed by law have been exceeded in the contract, and the principal sum or a part of it remains collectible, various questions have arisen affecting the amount the creditor is entitled to recover. The forfeiture of interest or principal declared by statute for usury inures to the debtor, and may operate in reduction of the debt where such forfeiture is not exclusively to be adjudged in a separate proceeding, or to be adjudged in the creditor's suit to a public fund. The interest contract which violates a statute is of course wholly void; but in many instances the statute goes further, and by way of penalty declares a forfeiture of all interest, or a forfeiture of double or treble the amount of the interest or usury, and sometimes also a portion of the principal. If the forfeiture is to be worked out by a criminal proceeding or a *qui tam* action, it is not to be deducted from the valid portion of the debt.¹ In Ohio, under the act of 1804, which provided for forfeiture of the whole debt, the creditor was entitled, nevertheless, to recover it from the debtor with legal interest; for the statute excluded him from the benefit of the forfeiture by awarding one-half to the informer and devoting the other half to the county treasury. So the Iowa act of 1839 abated the interest to the legal standard between the debtor and creditor, and made the latter subject to a forfeiture to the county of the usurious part of the interest and twenty-five per cent. interest thereon.²

¹ Richards v. Marshman, 2 G. Greene, Drake v. Lowry, 14 Iowa, 125; Sheldon v. Mickel, 40 Iowa, 19.

² Ficklin v. Zwart, 10 Iowa, 387;

Under a statute in Indiana¹ which limits the rate of interest and provides that in actions upon contracts by which, directly or indirectly, a higher rate is contracted for, taken or reserved, the plaintiff, besides losing costs, shall only recover the principal, deducting interest paid, notes containing a promise of such interest are, to the extent of it, without consideration. Whether it is openly expressed, stealthily added to the principal or taken in advance without reducing the sum stated in the note, there is to the extent of the interest a want of consideration.² Where, however, a note bearing usurious interest is given for a precedent debt, the "principal" allowed to be recovered may include not only the original principal, but such interest as has legally accrued thereon up to the time of giving the usurious note.³

The Massachusetts act of 1825, as modified by the act of 1826, and the Illinois act of 1845, are similar in respect to the consequences to the creditor of usury, in an action upon the usurious contract. The creditor must pay costs and forfeit threefold the amount of the whole interest reserved, discounted or taken; he is entitled to judgment and execution for the balance only which may remain due upon the contract or assurance after deducting the forfeiture. In the former state this statute has been regarded in her own courts in respect to these and other accompanying provisions as such a mitigation of the law previously in force that it is remedial rather than penal.⁴ So that the debtor as plaintiff, seeking equitable relief by bill in equity to redeem by payment of the amount equitably due upon the usurious debt, may claim the same benefit of the forfeiture and have the debt reduced by it, as when he is defendant at law, if the creditor asserts his rights under the contract by his answer.⁵

In Illinois, however, there is no provision for recovering usury voluntarily paid; the right to deduct it from the debt on which it was paid in actions therefor is the only remedy.⁶

¹ Gavin & Hord, 408, § 4.

⁵ Ibid.; Gerrish v. Black, 104 Mass.

² Musselman v. McElhenney, 23 Ind. 4; Cross v. Wood, 30 Ind. 378; Hays v. Miller, 12 Ind. 187.

400; Minot v. Sawyer, 8 Allen, 78; Smith v. Robinson, 10 Allen, 130.

³ Pratt v. Wallbridge, 16 Ind. 147.

⁶ Reinback v. Crabtree, 77 Ill. 182;

⁴ Hart v. Goldsmith, 1 Allen, 145; Gray v. Bennett, 3 Met. 522.

Saylor v. Daniels, 37 Ill. 331; Farwell v. Meyer, 35 Ill. 40; Lucas v. Spencer, 27 Ill. 15; Parmelee v.

The statutes, through successive changes, are and have been penal by reason of the forfeiture of interest; and the debtor who seeks equity is required to do equity by paying principal and legal interest.¹ But while the transaction remains unsettled and suit is brought for the recovery of the usurious debt, or any part of it, the debtor had a right prior to 1867 to reduce it by applying all the usury paid. Where usury had been contracted for the statute was express that the creditor was entitled to recover only the principal due, or only the balance after deducting the forfeiture.² The [573] usury received was considered as having been extorted by the creditor and should be applied in part payment of the principal of the debt.³

§ 317. **Same subject.** Under those statutes, as under all others, the parties may free the debt of the usurious taint, and rescue it from the frowns of the law. The courts do not shut the door in the face of the penitent.⁴ The debt will usually be so divested of the vice with which usury infects a contract, if the usury is deducted from the debt, and a new contract made for the payment of so much of the original principal alone as remains unpaid, with only lawful interest.⁵ But in Illinois the debt, so long as it remains against the same debtor who has paid usury, would seem to be subject to a deduction for all the usury paid; merely striking out the usury from the debt unpaid and substituting a new agreement or new securities bearing lawful interest for the same debt will not suffice.⁶

Lawrence, 44 Ill. 405; Booker v. Co. v. Burkam, id. 283; Craig v. Butler, 9 id. 21; Barnes v. Hedley, 2 Anderson, 35 Ill. 66.

¹ Mapps v. Sharpe, 32 Ill. 13; Snyder v. Griswold, 37 Ill. 216; Cushman v. Sutphen, 42 Ill. 256. But see Johnson v. Thompson, 28 Ill. 852. Taunt. 184; Kilbourn v. Bradley, 3 Day, 356; Postlethwait v. Garrett, 3 T. B. Mon. 345; Fowler v. Garret, 3 J. J. Marsh. 682.

² Driscoll v. Tannoek, 76 Ill. 154; Reinback v. Crabtree, 77 Ill. 182; Farwell v. Meyer, 85 Ill. 40. ⁶ In Mitchell v. Lyman, 77 Ill. 525, a usury debt was, by a new agreement, so freed of usury as to subsequently bear legal interest; but it was the same debt, and so divested of its original character as to cut off the right to deduct the usury paid while in a usurious state. A person borrowed \$3,000, gave his note for that amount, payable in one year, with

³ Id.

⁴ De Wolf v. Johnson, 10 Wheat. 367.

⁵ Chadbourn v. Watts, 10 Mass. 121; Clark v. Phelps, 6 Met. 296; Smith v. Stoddard, 10 Mich. 148; Collins Iron

[574] In Michigan, where only the excess above the highest rate which may be stipulated for is usury, and where only that excess can be abated, or, after having been paid, can be deducted in actions for the principal, this remedy of recoupment does not exist, if the parties have made new securities which include nothing but the actual loan, and are not meant to be mere evasions;¹ nor if they have adjusted the debt by applying credits and payments so that usury contained in the items adjusted is not contained as an integral part of the debt in its final form.²

Statutes providing for a forfeiture of threefold the amount of the whole interest reserved or taken were in force in several states for many years. Under them the interest was computed, for the purpose of determining the amount of the forfeiture, on the basis of the contract, up to the time the

interest at ten per cent.; but the lender retained out of the \$3,000 five per cent., so that the borrower actually received no more than \$2,850. At the end of the year all interest was paid, and a new note given for \$3,000 with interest at ten per cent., with personal security, and the mortgage which had been made to secure the first note discharged. In an action upon the second note, it was held that although the same debt was secured by the second as by the first note, and, therefore, was subject to be reduced by the interest paid on the first note, yet, the last note was not usurious, and the plaintiff was entitled to interest upon it. This case was governed by the law of 1857, which provides that if any person or corporation shall contract to receive a greater rate of interest than ten per cent. upon any contract, *written or verbal*, such person shall forfeit the whole of the interest, and shall be entitled only to recover the principal sum. The language of this statute is peculiar.

In *Reinback v. Crabtree*, 77 Ill.

182, a loan of \$450 was made, and a note given calling for ten per cent. interest; there was also a verbal agreement made at the same time to pay six per cent. more, and payment made pursuant to that agreement. This verbal agreement was held to make the transaction usurious, and that, although usurious interest once paid cannot be recovered back, it is settled in that state that this rule does not apply where the transaction has not been settled, and the tenderer brings his action for the balance. In such action the borrower may defend by claiming a credit for whatever usurious interest he has paid in the same transaction. *Saylor v. Daniels*, 37 Ill. 331.

And the fact that new notes have, from time to time, been given does not change the case. *Farwell v. Meyer*, 35 Ill. 40; *Parmelee v. Lawrence*, 44 Ill. 405; *Booker v. Anderson*, 35 Ill. 66.

¹ *Smith v. Stoddard*, 10 Mich. 148.

² *Collins Iron Co. v. Burkam*, 10 Mich. 283.

amount due was ascertained by the verdict.¹ And in Massachusetts threefold the amount of the whole interest, usurious as well as lawful,² and in New Hampshire threefold the sum above the lawful interest,³ was deducted. On usurious contracts in Iowa the creditor is entitled only to the principal; ten per cent. is adjudged against the debtor for certain public funds; this is computed upon the amount of the contract up to the rendition of the judgment,⁴ and in the same way against a surety.⁵ Where there have been partial payments, it is held that the computation should be made [575] as between debtor and creditor;⁶ and if the principal of a usurious debt has been paid, and the action is brought for the usurious interest, on the defense of usury, the judgment for the penalty to the school fund cannot be rendered.⁷

Where usury does not wholly invalidate the debtor's contract to pay the principal, but it is subject to be reduced by deduction of the usury, or interest paid or reserved, whether single or multiplied, the benefit of that defense is of course confined to actions upon the usurious contract, or in some form for the collection of the usurious debt. The defense is available in suits for the foreclosure of mortgages, as well as in personal actions upon the contract.⁸ The usurious debt, originally a gross sum, or made so by the consolidation of a series of transactions, is often divided to be paid by instalments secured in one instrument or in several. When so divided, and a part only is sued for, the residue being either paid, or for other reasons not in issue — perhaps belonging to another party — may the entire deduction to which the debtor is entitled for usury be made from the portion sued for? In Maine the debtor is entitled to an abatement of the usurious interest, and to have such usury as he has paid on a debt deducted from the collectible portion when it is sued for.⁹ In that state where a usurious debt is divided and separate notes

¹ Parker v. Biglow, 14 Pick. 436.

² Brigham v. Marean, 7 Pick. 40.

³ Gibson v. Stearns, 8 N. H. 185.
See Rev. St. N. H., ch. 190, § 8;
Divoll v. Atwood, 41 N. H. 449.

⁴ Ficklin v. Zwart, 10 Iowa, 887;
Drake v. Lowry, 14 Iowa, 125.

⁵ McIntosh v. Likens, 25 Iowa, 555.

⁶ Sheldon v. Mickel, 40 Iowa, 19;

Smith v. Coopers, 9 Iowa, 376.

⁷ Easley v. Brand, 18 Iowa, 132.

⁸ Minot v. Sawyer, 8 Allen, 78;

Cowles v. Woodruff, 8 Conn. 85.

⁹ Loud v. Merrill, 45 Me. 516.

given for it each note is held to contain the same proportion of the usury as of the entire debt; and subject to abatement by application of a like proportion only of any usurious interest that had been paid on the whole debt.¹

In New Hampshire usury was for a long time punished by obliging the creditor to lose three times the sum above the lawful interest taken, to be deducted from the sum found lawfully due. Where a usurious debt was secured by two notes, and one had been paid, it was held in an action against the other that the payment of one could not affect the defendant's right to the deduction allowed by the statute any more than if the whole sum had been put into one note and the amount paid had been indorsed upon it; the balance still due upon the last note is the balance of the money upon which the usurious interest was secured and paid; and to subject it only to a proportionate abatement would be an evasion of the spirit and letter of the statute.²

SECTION 4.

AGREEMENTS FOR MORE THAN LEGAL RATE AFTER MATURITY.

§ 318. Not usury, but penalty. This subject has been, to a considerable extent, touched upon in the preceding pages, but attention has not been called to the distinct question of the effect of stipulating for rates of interest exceeding those allowed by law to be paid after maturity. The question may practically arise under statutes regulating interest in two ways: first, by providing that the interest on money shall be a given rate, and no more; second, by prescribing a general rate, and that parties may agree on any other not exceeding a specified higher rate. Reserving a greater sum for interest before maturity than the rate fixed by statute, or than is authorized to be stipulated for, renders the contract usurious. But agreeing for the prohibited rates to be computed after maturity is not usury.³

¹ *Pierce v. Conant*, 25 Me. 83; *Darling v. March*, 22 Me. 184; *Ticonic Bank v. Johnson*, 31 Me. 414.

² *Farr v. Chandler*, 51 N. H. 545.

³ *Scottish-American Mortgage Co.*

v. Wilson, 24 Fed. Rep. 810; *Stansbury v. Stansbury*, 24 W. Va. 684; *Chaffe v. Landers*, 46 Ark. 364; *Weyrich v. Hobelman*, 14 Neb. 432; *Barbour v. Tompkins*, 31 W. Va. 410 (if

The reason given is that the debtor can relieve himself by at once paying the debt; he is no longer bound to keep the money that it may earn interest for the creditor. By [577] paying the debt the debtor can prevent its increase by the accumulation of interest. This reasoning overlooks the possibility that for want of money the debtor will be unable to avail himself of this relief; this is the very inability with its distressing consequences from which it is deemed humane and politic by statutes against usury to shield him. The right to stop interest by paying the principal without the ability to make such payment is just equivalent to the right a person has to borrow money when no person having it will lend to him. If the creditor's power over the necessitous to extort oppressive terms at the lending is deserving of legal check, why limit that restriction to the period of credit? High rates of interest to commence at the end of that period are as likely to be oppressive as when applied before, and more likely to be assented to. But the further reason is given that higher than legal rates agreed to for interest after maturity are in the nature of a penalty, and therefore only the actual damages are recoverable; and as these damages are for the non-payment of money they are measured by the legal rate of interest. The doctrine thus limited is correctly stated thus: An agreement to pay more than the legal rate of interest by way of penalty for not paying the debt is not usurious because the debtor may at any time relieve himself by paying it

the agreement is made after the interest has become due); *Lawrence v. Cowles*, 18 Ill. 577; *Gould v. Bishop Hill Colony*, 85 Ill. 324; *Davis v. Rider*, 53 Ill. 416; *Witherow v. Briggs*, 67 Ill. 96; *Wilday v. Morrison*, 66 Ill. 532; *Cutler v. How*, 8 Mass. 257; *Call v. Scott*, 4 Call, 402; *Wilson v. Dean*, 10 Iowa, 432; *Gower v. Carter*, 3 Iowa, 244; *Moore v. Hylton*, 1 Dev. Eq. 433; *Campbell v. Shields*, 6 Leigh, 517; *Gambril v. Doe*, 8 Blackf. 140; *Fisher v. Otis*, 3 Pin. (Wis.) 78; *Wight v. Shuck*, *Morris (Iowa)*, 425; *Shuck v. Wight*, 1 G. Greene, 128; *Fisher v. Anderson*, 25 Iowa, 28; *Jones v. Berryhill*, *id.* 289;

Rogers v. Sample, 33 Miss. 310; *Roberts v. Trenayne*, Cro. Jac. 507; *Floyer v. Edwards*, 1 Cowp. 112; *Wells v. Girling*, 1 Brod. & Bing. 447; Bac. Abr., title "Usury," letter c; *Caton v. Shaw*, 2 Har. & G. 13.

Under the Tennessee statute which provides that "interest is the compensation which may be demanded by the lender from the borrower, or creditor from the debtor, for the use of money," a rate in excess of that fixed by law is usurious, though it is not payable until after the maturity of the obligation. *Richardson v. Brown*, 9 Baxter, 242.

with lawful interest if he is able to do so; and even if he incurs the penalty, this may be reduced to the actual debt reckoned in the same manner.¹ No agreement is valid for a greater rate of interest to be paid after maturity than may be legally stipulated to be paid before. This rule is founded upon principle and authority. Parties may contract absolutely or conditionally, as we have seen, for any rate within a statute fixing interest limits. When a rate above those limits is agreed to be paid before maturity it is usurious; not collectible; if it is agreed to be paid after maturity it is in the nature of a penalty and has no effect; then the legal rate will govern as though no agreement had been made.²

¹ 3 Parsons on Cont. 116.

² Shuck v. Wight, 1 G. Greene, 128; Wight v. Shuck, Morris (Iowa), 425; Gower v. Carter, 3 Iowa, 244; Wilson v. Dean, 10 Iowa, 432; Cutler v. How, 8 Mass. 257; Conrad v. Gibbon, 29 Iowa, 120; Clark v. Kay, 26 Ga. 408; Claypool v. Sturgess, 10 Ohio St. 440; Taul v. Everet, 4 J. J. Marsh. 10; Jackson v. Shawl, 29 Cal. 267; Burnhisel v. Firman, 22 Wall. 170; Bunn v. Kinney, 15 Ohio St. 40; Caton v. Shaw, 2 Har. & G. 13; Sexton v. Murdock, 36 Iowa, 516; Pyke v. Clark, 3 B. Mon. 262; Brockway v. Clark, 6 Ohio, 45.

In Gower v. Carter, 3 Iowa, 244, the action was brought on an agreement to pay a sum of money by a certain day, and more than legal interest afterwards, by way of penalty, if the debt be not punctually paid. Stockton, J., said: "The defendants' agreement to pay two and a half per centum per month, in default of payment of the promissory notes at maturity, is not essentially different from an agreement to pay a gross sum as such penalty. Nor do we perceive that either of the notes sued on is essentially different from a penal bond by which the obligor binds himself to pay the obligee a certain sum, with the condition appended, by which the first

obligation is to be void on the payment of the lesser sum to the obligee by a day certain. The real nature and essence of the agreement is always disclosed by the condition of the bond or undertaking.

"In the present case the condition of the contract was to pay the note with interest, by a certain day. If not paid punctually when due, the defendants promise to pay as a penalty for the default two and a half per centum per month from maturity until paid. Are the plaintiffs entitled to enforce this penalty against the defendants, on their failure to pay the notes at their maturity? We must first remark, however, that on examination of the petition we find that it does not set forth any breaches on the part of the defendants, as on a penal bond. It does not aver what amount is claimed by plaintiffs as due from defendants, nor does it pray judgment for the amount of the penalty. We refer to this in connection with the question made by the defendants in their assignment of errors, viz.: whether the court should have rendered judgment for the penalty of two and a half per centum per month, and if not, for what amount should judgment have been rendered?

"The consideration of this question

§ 319. When debtor relieved in Illinois. In Illinois, [578] however, this rule does not appear to be recognized. A remedy in equity has sometimes been abstractly acknowl- [579] edged as one that might be available in case of an interest

renders it advisable to inquire to some extent into the nature and history of actions for penalties sued on penal obligations. In an action of debt on a penal bond for condition broken, the amount which the plaintiff was entitled to recover was originally the penalty. The action could not be relieved against by payment or tender. This severe rule of the common law was only mitigated by the practice of the courts of chancery, which interposed and would not allow the creditor to take more than in conscience he ought. Sedgw. on Dam. 898. From the time that it became settled in equity that the condition of the bond was the agreement of the parties, the obligor was relieved from the penalty. Very soon arose the practice, enforced by legislation, requiring the plaintiff to assign breaches in his declaration, and the jury on the trial assessed such damages for the breaches assigned as the plaintiff on the trial might prove. And it is enacted by the code of Iowa, section 1818, that in actions on penal bonds the petition must set forth the breaches, and the judgment rendered thereon must be for the actual damages only. It may therefore be laid down as a settled rule, that no other sum can now be recovered under a penalty than that which shall compensate the plaintiff for his actual loss. The penalty is in no sense the measure of compensation; and the plaintiff must show the particular injury of which he complains, and have his damages assessed by a jury. Such damages, it is further held, are not necessarily

nominal, and the jury may give substantial damages if they see fit. Sedgw. on Dam. 896, 897.

"In the case of a loan of money, although in point of fact the creditor may suffer the most serious inconvenience for the want of punctual payment of his debt, as happens every day, and a subsequent payment of principal and interest may be a very inadequate compensation for the original disappointment, it may be stated as a general rule that a promise of paying a penalty beyond the amount of legal interest cannot be enforced. Pothier on Obligations, Appendix, 87. Where the penalty has been incurred, the ends of justice may be arrived at by reducing the penalty to the actual debt. 2 Parsons on Contracts, 893. The case of *Groves v. Groves*, 1 Wash. (Va.) 1, was an agreement for the payment of a debt at a certain day, and, if not paid punctually, then for the payment of a larger sum; the court held that a contract to pay a larger sum at a future day was not usurious, and that the increased sum should be considered as a penalty against which equity ought to relieve, on compensation being made. So in *Brockway v. Clark*, 6 Ohio, 45, the supreme court of Ohio held that where a money-lender takes from a borrower an obligation for a greater amount than the money lent and stipulated interest, with an undertaking on his part to receive a less sum in discharge of the obligation, if punctually paid, equity may relieve against the excess as a penalty, on the same principle upon which

[580] contract of an oppressive character.¹ While the statute limited the rate which might be stipulated for to ten per cent. per annum a note was given to which was added this clause: "and if the same is not paid when due, to pay her twenty-four per cent. interest thereon from the time the same is due until

parties are ordinarily relieved from penalties. The same was granted at law in Massachusetts in the case of *Cutler v. How*, 8 Mass. 257. After a verdict by the jury, for the plaintiff, assessing the damages, the court directed a certain amount of the penalty, which it deemed oppressive, to be deducted from the amount of the verdict, and judgment was entered on the verdict as amended.

"In *Shuck v. Wight*, 1 G. Greene, 128, the note was for the sum of \$300, payable two years after date, and to bear interest after maturity, if not paid, at the rate of fifty per centum per annum. Suit being brought by the holder of the note to foreclose a mortgage given to secure its payment, the petition prayed judgment for the amount of the note with such interest as the court should deem just and proper. Judgment was given for the plaintiff for the amount of the note and interest at six per centum per annum. This judgment was affirmed by the supreme court (1 G. Greene, 128), and we may consider that the principle was thereby settled so far as the authority of this court could settle it, that the plaintiff was not entitled to judgment for the penalty of fifty per centum per annum, but for six per cent. only.

"In another class of cases where the parties have agreed upon a sum certain as the measure of damages, in order as far as possible to avoid all future questions as to the amount of damages which may result from the violation of the contract; and where

a definite sum was named as settled and liquidated, if the construction of the phraseology would work oppression the use of the term 'liquidated damages' did not prevent the courts from inquiring into the actual injury sustained, and doing justice between the parties. No damages for the non-payment of money can ever be so liquidated between the parties as to evade the provisions of the law which fix the rate of interest. *Sedgw. on Dam.* 400. In *Orr v. Churchill*, 1 H. Black. 232, Lord Loughborough said: 'There can only be an agreement for liquidated damages where there is an agreement for the performance of certain acts, the not doing of which would be injurious to one of the parties; or to guard against the performance of acts which if done would also be injurious. But in cases like the present, the law having fixed by positive rules the rate of interest, has bounded the measure of damages.' In the case of *Gray v. Crosby*, 18 Johns. 219, where a party covenanted on a certain contingency to pay to another a sum of money, with a proviso that if he failed or refused then he would pay a larger sum as liquidated damages, the supreme court of New York say: Such facts constitute no right to recover beyond the money actually due. Liquidated damages are not applicable to such a case. If they were they might afford a secure protection for usury, and countenance oppression under the forms of law."

¹ *Gould v. Bishop Hill Colony*, 35 Ill. 324.

paid.” The supreme court held, as it had done before and as it did repeatedly afterwards, that such agreements for interest are not usurious unless given on such short time as to induce the belief that they were designed to evade the statute against usury.¹ Such contracts do not come within the rule that a greater sum is a penalty when it is made payable on failure to pay a smaller sum. Where that rule applies, the greater sum becomes due at once in case of non-payment at the [581] day and is strictly a penalty from which a court of chancery will relieve on slight grounds. The courts of that state, in common with other courts, pronounce such excessive interest a penalty to ensure punctuality, but it is not there strictly a penalty against which courts of chancery will relieve except for cogent reasons. On the contrary, these penalties are enforced for the full amount agreed to be paid.²

SECTION 5.

INTEREST AS COMPENSATION.

§ 320. **Scope of section.** Under previous heads we have discussed interest resulting from or connected with agreements therefor. It is now proposed to consider the subject in a broader sense:—the liability for interest where there is no actual agreement to pay it, not only in connection with obligations *ex contractu* to pay the principal, but also where the liability is founded in tort. A liability for interest may result from a tacit agreement to pay it; and the law in many instances implies a duty to pay it on the principle of *quantum*

¹ Ibid.; Lawrence v. Cowles, 13 Ill. 577; Smith v. Whitaker, 23 Ill. 367; Bishop Hill Colony v. Edgerton, 26 Ill. 54; Davis v. Rider, 53 Ill. 416; Wilday v. Morrison, 66 Ill. 532; Witherow v. Briggs, 67 Ill. 96; Bane v. Gridley, id. 388.

In a recent case in which thirty per cent. per annum was stipulated to be paid after maturity, the court, referring to its previous decisions, said it could hardly have decided all these cases without passing upon both

of these questions, namely, whether such interest was of the nature of a penalty, or usurious, and evidently did not regard a merely increased rate of interest in consequence of non-payment at maturity as a penalty in the sense in which a gross sum is a penalty when it is to be paid at a particular day. Bane v. Gridley, 67 Ill. 388.

² Downey v. Beach, 78 Ill. 58; Reeves v. Stipp, 91 Ill. 609.

meruit. It is also almost¹ invariably chargeable as damages in cases of default in the payment of a liquidated debt; and upon damages for violation of contracts where such damages are determinable by some certain standard. In cases of tort [582] interest is allowed not only upon money, but the value of property wrongfully taken, converted, or lost by culpable neglect. It is recoverable, also, upon pecuniary elements of damage although the principal injury may involve a claim for unliquidated damages.

§ 321. **Right not absolute.** It will appear more fully hereafter that the right to interest as compensation is not absolute, as it is where there are agreements made to pay it. In some jurisdictions the allowance of it is discretionary with the jury, and in others it cannot be allowed in a numerous class of cases as interest, though the lapse of time between the origin of the cause of action and the time of trial may be considered by the jury in estimating the damages. In cases where the right to recover interest is not absolute the plaintiff may properly be deprived of it if he has been guilty of laches in making his demand or in prosecuting his action, either for the time anterior to judgment or for such other period as the jury may find that his laches continued.² The rate of interest allowed as compensation is that provided by law when the liability is established.³

§ 322. **Tacit agreement to pay interest on accounts.** As will be presently seen more at large interest is not allowed

¹ In Maryland a subscription for stock in a corporation, the amount subscribed being payable in fixed instalments, is not such a contract as interest is recoverable on as matter of right. *Frank v. Morrison*, 55 Md. 399. The jury may allow it. *Musgrove v. Morrison*, 54 id. 161.

Interest on a note given as a subscription to a railroad company and payable one year after the completion of the road, in the absence of an agreement, is due only from the time payment is demanded. *Stevens v. Corbitt*, 33 Mich. 458.

² *Redfield v. Ystalyfera Iron Co.*, 110 U. S. 174; *Bann v. Dalzell*, 3 C. &

P. 376; *Newell v. Keith*, 11 Vt. 214; *Adams Exp. Co. v. Milton*, 11 Bush. 49; *Bartells v. Redfield*, 27 Fed. Rep. 286; S. C., 23 Blatch. 486; *Stewart v. Schell*, 31 Fed. Rep. 65; *United States v. Sanborn*, 135 U. S. 271; *Brinkly v. Willis*, 22 Ark. 9; *Clark v. Hershy*, 52 id. 478.

A party who claims damages for a tort, liability for which has been denied, may defer bringing an action until a pending case involving the same question is settled. *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126.

³ *First Nat. Bank v. Fourth Nat. Bank*, 89 N. Y. 412; *Sanders v. Lake Shore & M. S. Ry. Co.*, 94 id. 641.

upon open running accounts. Where there is no definite credit, the parties deal upon the assumption,—by the debtor, that although he has no claim to forbearance, yet payment will be requested; and, on the part of the creditor, that the account has no time to run and will be paid on demand. Hence interest is not payable before demand for the same reason that it is never payable, except by agreement, while the debtor has a right to retain the money; in such cases it is not payable on the ground of default until the creditor has put the debtor under a present duty to pay by rendering the account or requesting payment. Where, by the custom of a place, of a trade or of a particular dealer, moneys owing on account are to carry interest after a certain period, whether demanded or not, persons who contract debts at that place, in that trade or to that dealer, with notice of that custom at the time of contracting, tacitly acquiesce in it, and by a natural implication tacitly agree to the liability which it imposes.¹

¹ *Auzerais v. Naglee*, 74 Cal. 60; *Hummel v. Brown*, 24 Pa. St. 810; *Watt v. Hoch*, 25 id. 411; *Newell v. Griswold*, 6 Johns. 45; *Barclay v. Kennedy*, 3 Wash. C. C. 350; *Loring v. Gurney*, 5 Pick. 15; *Raymond v. Isham*, 8 Vt. 258; *Consequa v. Fanning*, 3 Johns. Ch. 587; *Wood v. Smith*, 23 Vt. 706; *Esterly v. Cole*, 1 Barb. 235; S. C., 3 N. Y. 502; *Knight v. Mitchell*, 3 Brev. 506; *Wills v. Brown*, 3 N. J. L. *548; *Dickson v. Surginer*, 3 Brev. 417; *Black v. Reybold*, 3 Harr. (Del.) 528; *Higgins v. Sargent*, 2 B. & C. 349; *McAlister v. Reab*, 4 Wend. 483; *Reab v. McAlister*, 8 id. 109; *Veiths v. Hagge*, 8 Iowa, 163; *Knox v. Jones*, 2 Dall. 193; *Farmers', etc. Co. v. Mann*, 4 Robt. 356; *McKnight v. Dunlop*, 4 Barb. 36.

In *Meech v. Smith*, 7 Wend. 315, an action upon the account of a forwarding merchant, on the trial the plaintiff proved an account of about \$34 for the transportation of a quantity of flour by him for the defendant from R. to N. Y. in 1827. The

plaintiff claimed interest on his account and offered to prove the universal custom of forwarding merchants to charge interest upon such accounts; that such custom was well known to the defendant when he contracted with the plaintiff, and that he had settled several accounts of a similar description with the plaintiff in which interest was charged without objection. Exception was taken upon the rejection of this testimony. *Savage, C. J.*, said: "On the question of interest, I think the court erred. Interest is always properly chargeable where there is either an express or implied agreement to pay it. The facts offered to be proved are sufficient, in my judgment, to authorize a jury to infer that there was an agreement to pay interest; it was the uniform custom of all those engaged in the same business to charge interest; it was the custom of the plaintiff to charge it; he had charged it in former accounts against the defendant, and it had been paid without objection, be-

[583] This interest is part of the debt, a compensation for forbearance, not damages for withholding money due. A tacit agreement is of the same nature and force as an actual one, but not being expressed, it is, of course, to be established

fore the contract was made on which this suit is brought. In the case of *Trotter v. Grant*, 2 Wend. 415, there was no evidence that the defendant *knew* the plaintiff's custom to charge interest, nor had he ever settled an account in which interest was charged; there were in that case no sufficient facts from which an agreement to pay interest could be implied, and, the account being unliquidated, interest could not be recovered." See *Liotard v. Graves*, 8 Cal. 226; *Williams v. Craig*, 1 Dall. 813; *Dodge v. Perkins*, 9 Pick. 368; *Rayburn v. Day*, 27 Ill. 46; *Harrison v. Handley*, 1 Bibb, 443; *Von Hemert v. Porter*, 11 Met. 210; *Warren v. Tyler*, 81 Ill. 15.

In *Koons v. Miller*, 3 W. & S. 271, the court say: "The practice of the merchants of Philadelphia to charge interest on their accounts after six months has endured more than half a century; and it is so universal that their customers deal with them avowedly on the basis of it. It is so notorious as to be recognized abroad; as may be seen in *Bispham v. Pollock*, 1 McLean, 411, in which the circuit court of the United States for the district of Indiana left its existence, as the existence of any foreign law must be left, to the jury. Its existence is so notorious at home, however, that we are bound to take notice of it as part of the law. That it has not been sooner recognized by judicial decision has arisen from the fact that it has not before been thought a subject of dispute; but the principle is as well known and observed in the collection of merchants' debts as any other custom

peculiar to the state." To the same effect are *Watt v. Hoch*, 25 Pa. St. 411; *Adams v. Palmer*, 30 id. 346.

In *Fisher v. Sargent*, 10 Cush. 250, *assumpsit* was brought for goods sold and delivered. The plaintiffs were traders in Boston, and at the trial offered testimony tending to prove a custom among merchants and traders there to charge interest on their accounts after a credit of four or six months; but offered no evidence as to the credit given in this particular transaction, or that payment had been demanded. The jury were instructed that they might, upon this evidence, allow interest after six months—to which exceptions were taken. These were overruled. Bigelow, J., said: "Ordinarily, in the absence of any evidence of usage, or of a special agreement between the parties, interest cannot be recovered upon an open running account for goods sold and delivered, when there was no specific term of credit agreed on between the parties. This is the general rule; but it may be varied by proof of the usage of a particular trade or business to charge interest after the expiration of a certain period. In such cases, parties having knowledge of the usage are presumed to contract with reference to it, and will be as much bound by it as if it entered specially into the agreement of bargain and sale. Such usage may be shown by proof of the practice among merchants and traders generally in a town or city, or by evidence of the mode of dealing in a particular branch or class of trade. It is undoubtedly true that in order

by circumstances. Contracting a debt with a custom in [584] view which contemplates the payment of interest before steps have been taken to liquidate an account or to obtain payment, affords one example of such intent. Dealing with knowl-

to render the usage of a particular trade or place binding upon a party, so as to make it part of a contract, it must be made to appear that it was known to the party who is to be affected by it. But this knowledge may be established by presumptive as well as by direct evidence.

"It may be inferred from the uniformity and long continuance of the usage; from the fact that a party has for some time been in the particular trade to which it relates; from the previous dealings between the parties, or from any other facts tending to show its general notoriety. Whether such facts exist in any particular case is a proper question for a jury. In the case at bar there was evidence tending to prove the usage, and its knowledge by the defendant, from which it was competent for the jury to infer a contract to pay interest on the articles as charged by the plaintiff."

In *Adriance v. Brooks*, 13 Tex. 279, Hemphill, C. J., said the act of 1840 undertook to regulate the subject of interest; and unlike the English statute of 37 Henry 8, it gave an affirmative and not an indirect and negative sanction to its allowance. It differed also from the English statute by dividing interest into two classes, viz.: that which is allowed by law, and that which may be agreed upon by the parties; and there was the further distinction, not known to the earlier English statutes, that the contracts on which the law provided that interest should be recovered, or in which the parties might stipulate for interest, should be written contracts. But

though provision is made for recovery of interest on written contracts, yet there is no prohibition of a stipulation for the payment of interest on a verbal agreement, or on a contract not in writing. And if such an agreement be not criminal, or contrary to good morals or public policy, it would seem that it should be binding. And accordingly, in *Pridgen v. Hill*, 12 Tex. 374, a suit on an account upon which the party had agreed to pay interest, it was held that such agreement was valid and might be enforced in law. In the previous cases of *Cloud v. Smith*, 1 Tex. 102; *Close v. Fields*, 2 id. 232; *Crook v. McGreal*, 3 id. 487; *Davis v. Thorn*, 6 id. 486; *Wetmore v. Woodhouse*, 10 id. 33, the question of a verbal, distinct, positive agreement to pay interest on a debt acknowledged to be due was not presented; and although there are expressions in the opinions in those cases which would seem to restrict the recovery of interest to debts on written contracts, and such is the general rule under the statute, yet we deem it no departure from the principle of those decisions, with reference to the facts then before the court, to hold, when a new fact is presented, viz.: an agreement to pay interest, that it shall be enforced, though it be not in writing; nor the debt on which it was stipulated, in writing; such agreement not being prohibited by law, nor subversive of sound policy or good morals. . . . But the subject is one which may be, and, as we have seen, has been, regulated by statute. This has provided for the stipulation and recovery of in-

edge of such a custom, making no objection to it, or proceeding [585] after objection without any waiver of the custom by the creditor, is a consent to pay interest as the custom requires.¹ And a continuance of the dealing after paying one account containing such interest is to furnish by this circumstance additional evidence of such consent in the subsequent transaction.² Whether there is in a given case such an agreement is for the jury.³

The custom in such cases is an evidentiary fact to show the intention of the parties. It has no other effect. It does not alter the law. It derives all its force from being sanctioned and adopted by the parties. It can have no validity to bind the debtor to pay interest or fix a rate or mode of computation; nor will his acquiescence or tacit consent bind him to a liability which he could not by express agreement legally assume. It is a legal usage of merchants to cast interest on the items of their mutual accounts and strike a balance at the end of the year, and make that balance the first item of principal for the ensuing year; but the law does not make it binding on the debtor except under a specific agreement after [586] the mutual dealings are passed.⁴ A learned English

terest on written contracts. And, on the grounds stated, we have also supported verbal agreements to pay interest. But this case is neither upon a written contract, nor was there any agreement to pay interest. The ground upon which it is claimed is the fact that the defendant had previously paid interest on similar accounts. This we deem insufficient. Had the contract been in writing, the statute would have allowed interest; or had he verbally agreed to pay, we would not have permitted him to violate his engagement. Thus far we will go beyond the cases expressly provided for by the statute. But we will not go further, and scrutinize the acts of the parties to judge whether an implied obligation to pay interest, as an

incident of the debt, has been created."

¹ Where a statute does no more than prohibit a recovery of interest beyond the legal rate on a contract not in writing, interest in excess of that rate may be included in an account stated and recovered. The rate, being known and assented to by the debtor, and not being in violation of positive law, affords a sufficient consideration for the promise involved in such an account. *Auzerais v. Naglee*, 74 Cal. 60; *Marye v. Strouse*, 6 Sawyer, 205.

² *Warren v. Tyler*, 81 Ill. 15.

³ See *Ayers v. Metcalf*, 39 Ill. 307; *Fisher v. Sargent*, 10 Cush. 250, *Cole v. Trull*, 9 Pick. 325.

⁴ *Von Hemert v. Porter*, 11 Met. 210; *Marrs v. Southwick*, 3 Port. 351; *Jones v. Ennis*, 18 Hun, 452.

text writer¹ says: "Where parties have acquiesced in a course of dealing in which interest was exacted, they will be assumed to have contracted to pay it.² And in this way even compound interest may be charged as long as the accounts remain open.³ But although compound interest may be charged, by means of half-yearly rests, where such practice is assented to, it is not sufficient to show that such has been the usage of the plaintiff without proving that the defendant was acquainted with it.⁴ And even in the case of merchants' accounts where this system prevails, the plaintiff can recover no more than the principal upon the *last* balance, in which there is no new account, and no new transaction, however long it may be before the action is brought to recover the balance, and the jury cannot give interest, still less compound interest, upon the balance;⁵ and the same rule applies between banker and customer. Accounts which are made up with yearly or half-yearly rests while the relationship continues only bear simple interest from the time it is terminated by death or otherwise."⁶

Where accounts are settled without charging interest the settlement will not be opened for the purpose of allowing it; the settlement is conclusive in the absence of fraud or mistake.⁷ Transactions anterior to it and included therein are not interest-bearing.⁸

§ 323. Interest where payment unreasonably and vexatiously delayed. Under a statute of Illinois interest is due on any instrument in writing, on the settlement of accounts, from the day of liquidating them between the parties and as-

¹ Wood's Mayne on Dam. 221.

² Ex parte Williams, 1 Rose, 399.

³ Bruce v. Hunter, 3 Camp. 467; Newell v. Jones, 4 C. & P. 124; Eaton v. Bell, 5 B. & Ald. 84; Ferguson v. Fyffe, 8 Cl. & F. 121; Mosse v. Salt, 82 Beav. 269.

⁴ Dawes v. Pinner, 2 Camp. 486, n.; Moore v. Voughton, 1 Stark. 487. And see Williamson v. Williamson, L. R. 7 Eq. 542, where acquiescence in a banker's charge of 500*l.* for a half-year's commission on an overdrawn account was held not to entitle the

banker to make the same charge as of right in the subsequent half years; also Crosskill v. Bower, 82 Beav. 86.

⁵ Attwood v. Taylor, 1 M. & G. 301; Waring v. Cunliffe, 1 Ves. 99; Ex parte Bevan, 9 Ves. 228; Ferguson v. Fyffe, 8 Cl. & F. 121.

⁶ Per Lord Selborne, C., Barfield v. Loughborough, L. R. 8 Ch. 7.

⁷ Martin v. Beckwith, 4 Wis. 219; Hodges v. Hosford, 17 Vt. 614; Chandler v. People's Savings Bank, 61 Cal. 410.

⁸ Chandler v. Bank, *supra*.

certaining the balance, and on money withheld by an unreasonable and vexatious delay of payment. Interest is not allowable under the last clause by reason of the debtor's mere delay or his defense of a suit to collect the debt. To make the delay unreasonable and vexatious he must throw obstacles in the way of the creditor or by some means induce him to postpone the commencement of proceedings for the collection of his demand.¹ Where one party constantly claimed a sum largely in excess of what was equitably due and was refused payment of any amount approaching that to which he was entitled, there was such delay as justified the allowance of interest on the aggregate sum due from the time the master's report was filed.² If there has been unreasonable and vexatious delay in paying a just claim the debtor cannot be relieved by paying anything less than interest on it from the time it became due.³

§ 324. Quantum meruit claim to interest. Where one person requests another to perform service, supply goods or pay money, and the request is complied with, nothing further being said or done to indicate his intentions, it is a very simple transaction; the law interprets it according to the ethics of fair dealing; the request, acceded to, imports an agreement so definite and so certain to be understood by both [587] parties in the same sense that they deem it quite superfluous to state it. And when a remedy is sought on such transactions the common law requires in pleading no greater certainty or particularity. The party making the request, by necessary intendment, promises the party complying with it to pay him so much as he reasonably deserves. For benefits conferred upon request, or, enjoyed under various circumstances which are tantamount to a request, there is a legal duty to make compensation; this is measured by the standard of reciprocal justice. The party in whose favor such duty is implied is legally entitled to recover so much as he reasonably

¹ *West Chicago Alcohol Works v. Daniels v. Osborn*, 75 id. 615; *Jasoy Sheer*, 104 Ill. 586. See further, *Be- v. Horn*, 64 id. 879; *Chapman v. dell v. Janney*, 9 id. 193; *Hitt v. Burt*, 77 id. 615; *Devine v. Edwards*, Allen, 13 id. 596; *Kennedy v. Gibbs*, 10 id. 138.

15 id. 406; *Newlan v. Shafer*, 38 id. 379; *McCormick v. Elston*, 16 id. 204; *Aldrich v. Dunham*, id. 403; ²*Thomas v. Peoria, etc. Ry.*, 86 Fed. Rep. 808, per Harlan, J.

³ *Chicago v. Tebbetts*, 104 U. S. 120.

deserves. Interest is in many cases allowed upon this principle. It is almost an axiom in American jurisprudence that he who has the use of another's money, or money he ought to pay, should pay interest on it.¹

§ 325. **Allowed on money lent.** Interest in this class of cases is recovered not on the ground that the money is due the lender, and the borrower is in default for not repaying from the moment of receiving it, but on the principle that the use of money is worth the legal rate of interest; and therefore the money borrowed should bear interest from the date of the loan.² In Massachusetts, however, if there is no contract to pay interest, and in the absence of usage, fraud, or an earlier demand, interest will be allowed from the date of the writ only.³

¹ *Port Royal v. Graham*, 84 Pa. St. 426; *Jones v. Williams*, 2 Call, 102; *Fasholt v. Reed*, 16 S. & R. 266; *Miller v. Bank of Orleans*, 5 Whart. 503; *Rapelie v. Emory*, 1 Dall. 349; *Lewis v. Bradford*, 8 Ala. 632; *Perrin v. Parker*, 126 Ill. 201; *Goodnow v. Litchfield*, 63 Iowa, 275; *Goodnow v. Plumbe*, 64 id. 672.

² 1 Am. Lead. Cas. 518; *Butler v. Butler*, 10 R. L. 501; *Hodges v. Hodges*, 9 id. 82; *Reid v. Rensselaer Glass Factory*, 3 Cow. 393; *Rensselaer Glass Factory v. Reid*, 5 id. 589.

In England the rule is not to give interest on money lent. Lord Ellenborough said no case had occurred in fifty-two years in which, upon a simple contract of lending, without any agreement for the payment of the principal at a certain time, or for interest to run immediately, or special circumstances from which a contract for interest was to be inferred, had interest ever been given.

In *Harris v. Benson*, 2 Str. 910, it is said that interest had never been allowed for money lent without a note. In *Robinson v. Bland*, 2 Burr. 1077, it was held that interest was recoverable on money lent from the

time when it was agreed to be paid. Some American cases recognize the same doctrine. *Murray v. Ware*, 1 Bibb, 325; *Bell v. Logan*, 7 J. J. Marsh. 593. *Butsee Chaney v. Cooke*, 5 T. B. Mon. 248.

³ *Gay v. Rooke*, 151 Mass. 115.

In *Hubbard v. Charlestown Branch R. Co.*, 11 Met. 124, Shaw, C. J., said: "The only question now raised on this bill of exceptions is whether the defendants were chargeable with interest upon the amount overdrawn by them from the time of such overdraft. The court are of the opinion that the direction of the judge was not correct in point of law, when he instructed the jury that if the amount was actually paid to the defendants then the jury should add interest from the time of the overdraft, without instructing them to take into consideration the other circumstances of the case. If money were fraudulently or wrongfully obtained from a bank, it might be recovered back with interest. *Wood v. Robbins*, 11 Mass. 504. Perhaps the evidence might have been properly left to the jury to find whether the money was wrongfully drawn or not. But we

[588] § 326. **Allowed on money paid.** From the date of the payment such a debt is of the same nature as a loan, and the right to interest is based upon the same reason. The cases on this point are numerous. Where three persons were interested in a cargo sent abroad, money paid for general average was held to bear interest from the time it was advanced. Interest was deemed demandable in every case where one man had used or been benefited by the application of the money of another, paid under such circumstances as to imply a request. It would be inequitable to allow interest only from the time when the principal was demanded, in such a transaction happening in a foreign country, where it is long before the plaintiff can be advised of his having a claim, and longer still before he can know exactly what he is entitled to demand.¹ It is, therefore, a general rule that interest is recoverable on money paid by one person for the benefit of another at his request express or implied.² It may be re-
[589] covered by a surety who pays his principal's debt.³

think an overdraft on a bank is not necessarily wrongful; it may be made in conformity with some mutual agreement or understanding. A draft on a bank, by one who has no funds, or beyond his funds, and a payment made in pursuance of it, constitute a loan of money; and supposing it to be made without any stipulation for interest at the outset, it does not necessarily draw interest until neglect or refusal of payment, after demand made, or some other default. . . . In general, when there is a loan without any stipulation to pay interest, and when one has the money of another, having been guilty of no wrong in obtaining it, and no default in returning it, interest is not chargeable." See *Etheridge v. Binney*, 9 Pick. 272; *Dodge v. Perkins*, id. 368; *Hunt v. Nevers*, 15 id. 500.

¹*Sims v. Willing*, 8 S. & R. 103; *Gibbs v. Bryant*, 1 Pick. 118; *Isley v. Jewett*, 2 Met. 168; *Weeks v. Hasty*, 13 Mass. 218.

²*Gibbs v. Bryant*, *Weeks v. Hasty*, *supra*; *Liotard v. Graves*, 3 Cal. 226; *Milne v. Rempubliam*, 3 Yeates, 103; *Hastie v. De Peyster*, 3 Cal. 190; *Thompson v. Stevens*, 2 N. & McC. 494; *Buckmaster v. Grundy*, 8 Ill. 626; *Aikin v. Peay*, 5 Strobb. 15; *Blaney v. Hendricks*, 2 W. Black. 761; *Trelawney v. Thomas*, 1 H. Black. 304; *Craven v. Tickell*, 1 Ves. 60; *Chamberlain v. Smith*, 1 Mo. 718; *Gillet v. Van Rensselaer*, 15 N. Y. 897; *Morris v. Allen*, 14 N. J. Eq. 44; *Cobbey v. Knapp*, 28 Neb. 158.

³*Newman v. Newman*, 29 Mo. App. 649; *Sims v. Goudelock*, 7 Rich. L. 23; *Sollee v. Meugy*, 1 Bailey, 620; *Miles v. Bacon*, 4 J. J. Marsh. 458; *Breckinridge v. Taylor*, 5 Dana, 114; *Knight v. Mantz*, Ga. Dec. 22; *Winder v. Diffenderffer*, 2 Bland, 166.

A statute providing that when a bond, bill or note shall not be paid by the principal according to its terms and shall be paid by the "surety," that the principal shall re-

Though a surety discharge a debt bearing a high rate of conventional interest, he is not entitled to charge his principal thereafter the same, but only the legal, rate.¹ So a surety obtaining contribution from a co-surety is entitled to interest.² But if the plaintiff has securities from the principal in his hands for the payment of the debt which were expected to yield the means therefor, the co-surety is entitled to notice of any deficiency. His liability extends only to a moiety of the deficiency; as that is contingent both as to time and amount, he should not be charged with interest until he is at least informed that he is a debtor.³ Such information would be manifestly essential to make out an equitable title to charge interest; such a notice would place the co-surety at once in default if he did not then pay his contribution; such notice is necessary to establish his consent to accept forbearance. A party paying money for another cannot recover for interest paid which accrued in consequence of his own negligent delay in making the payment.⁴ An agent or factor is also entitled to interest on advances for his principal.⁵

§ 327. Same subject. Where one of two parties hav- [590]
ing contiguous tenements refused to unite with the other in erecting a new party-wall, or to contribute anything to the expense, he denying the right of the plaintiff to prostrate the old wall or to charge him with any portion of the cost of the new, the court held him liable; the expense was an equitable charge on the wall and on the owner for the time being. The question being raised whether the plaintiff was entitled to interest and from what time, the chancellor said it was a case of money expended for the use of the defendant, and upon every sound principle the plaintiff ought to receive interest after a moiety of the joint expense had been demanded and refused; adding that it is the settled law of the state that

fund the amount or value with interest thereon, does not include joint debtors. *McGee v. Russell*, 49 Ark. 104.

¹ *McGee v. Russell*, *supra*; *Memphis, etc. R. Co. v. Dow*, 120 U. S. 287; *Bushong v. Taylor*, 84 Mo. 660; *Newman v. Newman*, *supra*; *Smith v. Johnson*, 23 Cal. 63. See *Fisk v. Brunette*, 80 Wis. 102.

² *Isley v. Jewett*, 2 Met. 168; *Aikin v. Peay*, 5 Strobb. 15.

³ *Goodloe v. Clay*, 6 B. Mon. 236.

⁴ *Somers v. Wright*, 115 Mass. 292.

⁵ *Taylor v. Knox*, 1 Dana, 391; *Cheeseborough v. Hunter*, 1 Hill (S. C.), 400; *Smetz v. Kennedy*, Riley, 218; *Walters v. McGirt*, 8 Rich. 287; *Howard v. Behn*, 27 Ga. 174.

money received or advanced for the use of another carries interest after a default in payment, and it is a very reasonable and just rule. Interest was claimed from the time of the advance of the money to build the wall; it was allowed from the date of the demand and refusal on the general principle that a party is liable for interest after a default; and by implication it was considered that the plaintiff was not entitled, on any other principle, to interest from the date when it had been advanced.¹ The defendant could not be considered as in default until demand; he was under no duty to repay moneys expended by the plaintiff against his will for the common benefit until informed of the amount, and an opportunity thus given to discharge the indebtedness. The principal claim was not one which the debtor acknowledged; it was, however, maintained against him;² but subsequently the doctrine on which it was founded was doubted and overruled.³ Senator Colden,⁴ referring to this case, said: "The circumstances of that case were very peculiar. The defendant was liable to contribute to the rebuilding of a party-wall. He not only refused to contribute, but forbid the prostration of the old wall. The complainant erected a new one at a much greater expense than the re-establishment of the old one required. It could not be ascertained till the new wall was appraised and it was [591] estimated what it would have cost to restore the old wall how much the defendant ought to have paid. When the appraisement and estimate were made and the extent of the defendant's liability was thereby settled the complainant demanded the amount. The chancellor decided that the defendant should pay interest from that time. Here was a case very different from an advance of specific sums of money. It is true the demand is considered in the court of chancery as a demand for money advanced; but it was more like a demand for unliquidated damages, which never carries interest. The defendant could not have discharged the principal till after the appraisement and estimate had settled how much he was liable to contribute to the party-wall."⁵

¹ *Campbell v. Mesier*, 6 Johns. Ch. 21.

⁴ *In Rensselaer Glass Factory v. Reid*, 5 Cow. 598.

² *Campbell v. Mesier*, 4 id. 334.

⁵ The case of *Rensselaer Glass Fac-*

³ *Partridge v. Gilbert*, 15 N. Y. 601;
Sherred v. Cisco, 4 Sandf. 480.

Interest may likewise be allowed on money advanced by trustees for the benefit of the trust. The law requires of trustees diligence and good faith; and they will not be [592] entitled to interest on advances made necessary by their defaults. As a general rule an administrator is not entitled to interest on money advanced by him beyond the funds of the estate in his hands, because it is in his power to put himself in cash from the estate, and it is not his duty to advance his own funds for its benefit.¹ If, however, such special circumstances exist as to justify advances by him, and he makes them judiciously, he will be entitled to interest.² Where the advance by an administrator or other like trustee is meritorious, or where an executor for the benefit of the estate has paid his own money for taxes, necessary expenses, repairs, and

tory v. Reid raised the question whether cash advances made by an agent, charged in an account not reported to his principal, but where the circumstances indicated that the latter must have known that the advances were made, should bear interest. The case was very thoroughly considered. Senator Colden, in the prevailing final opinion, said generally of the subject of interest: "As often as the question of interest has been before a court, the judges seem to have considered it as depending on general equitable principles; and, in most instances, to have decided each case in reference to its particular circumstances, without attempting to give any rule which might be generally applicable." And again: "However it may be with respect to money lent, or as to money had and received, or in regard to merchandise sold and delivered; or, however it may be where advances are made in pursuance of an express agreement in which nothing is said about interest, I think the above authorities will admit of no other conclusion than that it is now a well established general rule of law, that where a person ad-

vances money for the use of another, under an implied authority, he who makes the advance is entitled to interest from the time it is made." In the exhaustive dissenting opinion of Senator Spencer he says: "Probably the rule of easiest application would be this: where money has been lent, advanced or expended by request, and under an agreement to pay at a specific time, or where it has been had and received under a like agreement, then the allowance of interest may be safely referred to the principle of an implied contract to pay interest on default; and so, also, where the money is not to be refunded at a particular time, but a default arises from a demand or notice, the same principle will apply. But where no time of payment is fixed, and where the duty to pay arises from the relative situation of the parties, it seems it should be referred to a jury to determine whether damages shall be given by the allowance of interest."

¹ *Storer v. Storer*, 9 Mass. 37; *Evarts v. Nason's Estate*, 11 Vt. 122.

² *Rix v. Smith*, 8 Vt. 365.

debts which carried interest, he is entitled to interest.¹ A trustee is not obliged, when the exigencies of his trust require advances, to raise money at a loss to himself. Where property is in his hands as security, and he is restricted by its nature and situation from selling it, and, to keep it in good order, must borrow money, he may resort to banks or other usual modes of raising it upon his credit. And in such cases he is entitled to full indemnity.²

§ 328. **Quantum meruit claim to interest between vendor and purchaser.** Where a purchaser obtains possession of the land purchased while the contract is pending, such possession may oblige him to pay interest when otherwise he would be entitled to retain the purchase-money without being so liable. Before the time fixed for payment he is not liable to pay interest unless it is required by the contract. It frequently happens, however, that when the time arrives for payment [593] the seller is not prepared to fulfill the concurrent condition of making title; on that account the purchaser would be under no obligation to part with his money; and being in no default, interest could not be exacted; but if he has taken and enjoys the possession while the vendor is precluded from demanding the money on account of the state of the title, and he finally makes title so as to have a right to performance of the contract of purchase, he will be entitled to interest on the purchase-money if the purchaser had possession of the estate.³

¹ Mann v. Lawrence, 3 Bradf. Sur. 424; Liddell v. McVickar, 11 N. J. L. 44; Jennison v. Hapgood, 10 Pick. 79; Hayward v. Ellis, 18 Pick. 272. See Aldridge v. McClelland, 36 N. J. Eq. 288.

² In Barrell v. Joy, 16 Mass. 221, compound interest was allowed a trustee under the circumstances stated in the text, as a mode of compensation for the interest he was obliged to pay to provide himself with the necessary means to keep the trust property in good order. In a note the reporter says: "The trustee in this case could only claim an indemnity, and ought not to be allowed compound interest unless he

could show that he was in the discharge of his duty obliged to pay it." Evertson v. Tappen, 5 Johns. Ch. 517. See Lessee of Dilworth v. Sinderling, 1 Bin. 494.

³ Minard v. Beans, 64 Pa. St. 411; Lang v. Moole, 81 N. J. Eq. 413; Breckenridge v. Hoke, 4 Bibb, 272; Cleveland v. Burrill, 25 Barb. 532; Cullum v. Branch Bank, 4 Ala. 21; Selden v. James, 6 Rand. 465; Rutledge v. Smith, 1 McCord Ch. 399; Boyce v. Pritchett's Heirs, 6 Dana, 281; Hepburn v. Dunlop, 1 Wheat. 179; Brockenbrough v. Blythe's Ex'r, 8 Leigh, 619; Steenrod v. Railroad Co., 27 W. Va. 1.

McKenna v. Sterrett, 6 Watts,

This rule, however, is not absolute; it rests upon equitable grounds, and is subject to the modifying effect of other [594] equitable circumstances for the consideration of a chancellor in equity or of a jury at law.¹ A vendee may avoid liability for interest if he is unable to pay on account of the default of the vendor, by setting aside the purchase-money and notify-

162, was an action for purchase-money on tender of title; purchaser in possession. Rogers, J.: "At the time of the contract both parties were aware that Sterrett had no title; notwithstanding which McKennan was to take immediate possession, as appears from that clause which stipulates that if McKennan is deprived of the property Sterrett will pay him for all the improvements, either in buildings or otherwise. With a full knowledge of all the facts Sterrett agrees to sell McKennan ten acres of land, with the allowance, for \$45 per acre, and Sterrett agrees to give him a clear title. The payments are to be one-half in hand, as soon as he makes him a right for the ten acres of land, and the remaining half in three yearly payments. Now, nothing can be clearer than that until tender of title the vendor is not entitled to payment of the purchase-money; and it is a general principle that interest is not demandable of right until the debt is due, except in pursuance of the terms of an express contract; and no contract is here alleged. But the argument is that the vendor took possession, and as he enjoys the profits he ought to pay interest. And this is true in ordinary cases, where a time is fixed for the payment of the purchase-money; but the right to take immediate possession was part of the contract; and the vendees having taken possession cannot affect the construction of that clause in the agreement on which the debt is only recoverable after a

clear title is made. A different construction would render the vendor careless of obtaining and tendering a title, as he would be sure of legal interest from the time the vendee took possession. Why this extraordinary delay took place we have not been informed; but there is nothing which leads us to believe that it arose from the fault of the vendee. The court are therefore of opinion that interest is only demandable from the time of the tender of the title." See *Beeson v. Elliott*, 1 Del. Ch. 368.

¹ *Letcher v. Woodson*, 1 Brock. 212.

In *Dias v. Glover*, Hoff. Ch. 71, it was held that though the general rule is to allow interest from the time when the contract should have been fulfilled, and to give the purchaser the rents and profits, yet if the vendor caused the delay and interest exceeded the rent, the purchaser should be permitted to elect to pay the interest or relinquish his right to the rents.

In *Selleck v. Tallman*, 11 Daly (N. Y.), 141, judgment was given plaintiff for the specific performance of a contract to sell land he had bargained for, for the purpose of making improvements upon it. No rent or other profits were derivable from it in the condition it was in. He was kept out of possession and sustained large damages which could not be compensated. The vendor was charged with interest and taxes accruing prior to the delivery of his deed.

ing the latter that it is awaiting his acceptance.¹ A vendor who conveys wild land to which he has no title cannot claim interest on the purchase-price on the subsequent accrual of title by the act of a third party for any time anterior to that event, though the vendee was in possession, the benefits resulting to him therefrom being produced by his own improvements.²

Where there has been wilful and vexatious delay by the fault or gross laches of the vendor, in consequence of which the purchase-money has lain idle and unproductive, it may be left to the jury to say whether he shall receive interest.³ On the rescission of a contract of sale where the vendee has been in possession, in the absence of proof to the contrary, his use of the land will in equity be deemed equivalent to that of the price paid, and interest ought not to be given.⁴ So where the vendor in a verbal contract refused to perform it, the vendee is entitled, in addition to the purchase-money paid, to receive interest thereon only from the time the former asserted his rights.⁵ Whether the vendee be entitled to have the consideration refunded upon rescission of the sale, or to damages on the basis of the sum paid for a total or partial breach of the covenants for title, interest will be withheld for so much of the time as he enjoyed the possession without liability for *mesne* profits.⁶ The doctrine is that possession is equivalent to interest on the consideration; and where the

¹ *Steenrod v. Railroad Co.*, 27 W. Va. 1; *Bostwick v. Beach*, 103 N. Y. Ch. 274; S. C., 2 N. Y. 408.

414; *Cracroft v. Roebuck*, 1 Ves. 221; *Roberts v. Massay*, 13 id. 561; *Kershaw v. Kershaw*, L. R. 9 Eq. 56.

If a note for the purchase-price of land is payable at a designated bank, and the maker is ready at the agreed time and place to pay it, but is unable to do so because the note is not in the bank's possession, he is not liable for interest subsequently accruing unless he realized it from the use of the money. *Cheney v. Libby*, 134 U. S. 68.

² *Toms v. Boyes*, 59 Mich. 386.

³ *McCormick v. Crall*, 6 Watts, 207; *Kester v. Rockell*, 2 W. & S.

365; *Stevenson v. Maxwell*, 2 Sandf. Ch. 274; S. C., 2 N. Y. 408.

⁴ *Talbot v. Seabee's Heirs*, 1 Dana, 56; *Wickliffe v. Clay*, id. 585.

The vendee will be allowed interest only from the time he gave up the possession. *Ankeny v. Clark*, 20 Pac. Rep. 583; 1 Wash. St. 549.

⁵ *Fox's Heirs v. Longly*, 1 A. K. Marsh. 388.

⁶ *Staats v. Ten Eyck*, 3 Cal. 111; *Pitcher v. Livingston*, 4 Johns. 1; *Bennet v. Jenkins*, 13 id. 50; *Baldwin v. Munn*, 2 Wend. 399; *Dimmick v. Lockwood*, 10 id. 142; *Caulkins v. Harris*, 9 Johns. 324; *Kane v. Sanger*, 14 id. 89; *Baxter v. Ryerss*, 13 Barb. 267; *Flint v. Stead-*

bargain is given up, or the title fails and the purchase-money must be refunded, interest will not be added in either [595] case to a purchaser who has had possession unless there is a liability to the superior owner for rents and profits; and then only to the extent of that liability.¹ The reason assigned is if the occupant shall recover interest on the value of the land when he has obtained the equivalent of that interest in the use thereof, he will have received and his vendor will have lost more than the value of what was given for it; and as the occupant is liable to the evictor for *mesne* profits for the period of limitation preceding the eviction, for that period he should not be entitled to interest on the consideration which he paid for the land.² This doctrine is further illustrated by the case of a tenant by the curtesy conveying in fee with warranty. The grantee has been held entitled to recover from his estate on the covenant only the purchase-money, with interest from the time of his death.³ So where an eviction is only by the claim of a tenant in dower, the measure of damages is the present value of an annuity equal to interest at the legal rate on one-third of the consideration money for the

man, 36 Vt. 216; Rich v. Johnson, 2 Pin. (Wis.) 88; Noonan v. Ilsley, 21 Wis. 138; Patterson v. Stewart, 6 W. & S. 527; Fernander v. Dunn, 19 Ga. 497; Harding v. Larkin, 41 Ill. 418; Thompson v. Jones, 11 B. Mon. 365; Hale v. New Orleans, 13 La. Ann. 499; Bach v. Miller, 16 id. 44; Clark v. Parr, 14 Ohio, 118; Whitlock v. Crew, 28 Ga. 289; Collier v. Cowyer, 53 Ark. 322.

¹Point Street Iron Works v. Turner, 14 R. L. 122; Crockett v. Gray, 39 Kan. 659; Ware v. Lippincott, 45 N. J. Eq. 320; Whitlock v. Crew, 28 Ga. 289.

If a *bona fide* purchaser in possession is allowed the value of his improvements as against the owners of the land he will not be entitled to interest thereon. Boykin v. Ancrum, 28 S. C. 486.

²Cogswell's Heirs v. Lyon, 8 J. J. Marsh. 40. In this case the deed was

avoided, although the entire consideration had been paid, on the ground of fraud on creditors, and the court say: "As a general proposition, it is plainly just and reasonable that the vendee, after losing the benefit of his purchase, should be restored to the price which he gave, and its annual interest. But if he shall have already received the interest or its equivalent in the enjoyment of the profits of the land, he has no right, in conscience, to compel the vendor to pay it again. And surely, if he must have the interest, the vendor should have rents. But, in equity, the interest on the price and the use of the land are considered equivalent, and, therefore, there need be no account of the profits, as they should be set off against the interest." See Bartlett v. Blanton, 4 J. J. Marsh. 426.

³House v. House, 10 Paige, 158.

time the tenant in dower has a probable expectation of life according to approved tables of life annuities.¹ The purchaser must sometimes submit to equitable terms when in default in order to obtain relief by specific performance. In such cases, in order fully to indemnify the seller, the court, according to the circumstances, may decree a larger amount of interest than such vendor could recover as plaintiff; as by compounding the interest with rests at short intervals.² When a vendee [596] has a right to recover a deposit of a part or the whole of the purchase-money because of the vendor's inability to make title he can also recover interest from the time it was paid though there was no express agreement to pay it.³

§ 329. Interest allowed from time when money ought to be paid. Interest is imposed by law as damages for not discharging a debt when it ought to be paid. In this country the principle has long been settled that if a debt ought to be paid at a particular time, and is not then paid through the default of the debtor, compensation in damages equal to the value of money, which is the legal interest upon it, shall be paid during such time as the party is in default.⁴ The important practical inquiry, therefore, in each case in which interest is in question is, what is the date at which this legal duty to pay, as an absolute present duty, arose. This date does not always coincide with that at which the demand is

¹ *Wager v. Schuyler*, 1 Wend. 553.

² *Cleveland v. Burrill*, 25 Barb. 532; *Morris v. Hoyt*, 11 Mich. 10.

³ *Flinn v. Barber*, 64 Ala. 200.

⁴ 1 Am. Lead. Cases, 498; *Day v. Brett*, 6 Johns. 24; *Hunt v. Jucks*, 1 Hayw. 173; *Broughton v. Mitchell*, 64 Ala. 210; *Flinn v. Barber*, id. 200; *Milton v. Blackshear*, 8 Fla. 161; *Bishop Hill Colony v. Edgerton*, 26 Ill. 54; *Cheek v. Waldrum*, 25 Ala. 155; *Purdy v. Philips*, 11 N. Y. 406; *People v. New York*, 5 Cow. 331; *Dodge v. Perkins*, 9 Pick. 368; *Williams v. Sherman*, 7 Wend. 109; *Ten Eyck v. Houghtaling*, 12 How. Pr. 523; *Van Rensselaer v. Jewett*, 2 N. Y. 135; *Maltman v. Williamson*, 69 Ill. 423; *Swett v. Hooper*, 62 Me. 54;

Wenman v. Mohawk Ins. Co., 13 Wend. 267; *French v. French*, 126 Mass. 860; *McMahon v. New York, etc. R. Co.*, 20 N. Y. 463. In this case the court held that interest may be charged on the ground of the debtor's default although the amount of the demand neither has been nor can readily be ascertained.

A debtor is not excused from paying when the money is due where the contract under which it is claimed fixes the price of the work, though the amount of material furnished under it was uncertain and the claim was disputed in good faith. *Louisville v. Henderson's Trustee*, 11 S. W. Rep. 111; — Ky. —.

legally due and suable. Where a sum certain is payable at a particular time, either immediately after the debt is contracted or in the future, the debtor should pay at that time; otherwise, he is at once in default and liable for interest. In such cases it is his duty to pay at the very time when the debt is legally and technically due.¹ It is upon the ground

¹ *Elkin v. Moore*, 6 B. Mon. 462; *Rensselaer Glass Factory v. Reid*, 5 Cw. 587, 611; *Robinson v. Bland*, 2 Burr. 1086; *Farquhar v. Morris*, 7 T. R. 124; *Purdy v. Philips*, 11 N. Y. 406; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 888; *Peoria M. & F. Ins. Co. v. Lewis*, 18 Ill. 553; *Hunt v. Jucks*, 1 Hayw. 178; *Milton v. Blackshear*, 8 Fla. 161; *Wenman v. Mohawk Ins. Co.*, 18 Wend. 267; *Cheek v. Waldrum*, 25 Ala. 152; *Bishop Hill Colony v. Edgerton*, 26 Ill. 54; *Royal v. Miller*, 8 Dana, 55-58; *Newlan v. Shafer*, 88 Ill. 879; *Putnam v. Lewis*, 8 Johns. 889.

Interest is not allowed with the [597] same liberality in England as in this country. In *Mayne on Damages* (Wood's ed. 224) it is said: "Formerly it was thought, where a sum of money was agreed to be paid on a particular day, that on default, interest from that day might be recovered without any express or implied contract to that effect. *Blaney v. Hendricks*, 2 W. Bl. 761; S. C., 8 Wils. 205; *Shipley v. Hammond*, 5 Esp. 114; *Chalie v. Duke of York*, 6 Esp. 45; *De Havilland v. Bower Bank*, 1 Camp. 50; *Mountford v. Willes*, 2 B. & P. 337. But this doctrine has now been overruled. *Gordon v. Swan*, 12 East, 419; *Higgins v. Sargent*, 2 B. & C. 348; *Page v. Newman*, 9 B. & C. 378; *Foster v. Weston*, 6 Bing. 709; *Cook v. Fowler*, L. R. 7 H. L. 27; 43 L. J. (Ch.) 855. It has, however, been always held that where, by an award, money is made payable on a certain day, in-

terest ought to be allowed from that day, if payment was demanded at the place appointed. *Pinham v. Tuckington*, 8 Cowp. 468; *Churcher v. Stringer*, 2 B. & Ad. 777; *Johnson v. Durant*, 4 C. & P. 327. I cannot, on principle, explain this exception. Many apparent exceptions to the rule that interest is only recoverable in the cases just mentioned may be explained by distinguishing between interest recovered as part of the debt and interest recovered as damages for its detention. For instance, interest on a deposit may be recovered, if laid as special damage in an action for breach of an agreement to sell an estate. *De Bernales v. Wood*, 8 Camp. 258; *Farquhar v. Farley*, 7 Taunt. 592. So it may be allowed as damages in an action on a mortgage deed after the day of default (*Dickinson v. Harrison*, 4 Price, 282; *Atkinson v. Jones*, 2 A. & E. 439; *Price v. G. W. Ry. Co.*, 16 M. & W. 244); or upon a contract to pay money upon a particular day (*Watkins v. Morgan*, 6 C. & P. 661); or upon a covenant to indemnify a surety. *Petre v. Duncombe*, 20 L. J. (Q. B.) 242; S. C., 2 Lown., M. & P. 107. Where a written security is given for the payment of money on a particular day, with interest up to that day at a fixed rate, a claim for subsequent interest would be a claim for damages at the discretion of the tribunal before which the demand is made, and not for interest due as a matter of law. The former rate might but need not be adopted in assessing the damages.

stated that statutes which give a preference to one class of creditors over another in the distribution of an estate are construed to include interest on the claims of the preferred class,

Cook v. Fowler, L. R. 7 H. L. 27-32. And it is laid down as a general rule, that although it be not due *ex contractu*, a party may be entitled to damages in the form of interest where there has been long delay under vexatious and oppressive circumstances in the payment of what is due under the contract. *Hillhouse v. Davis*, 1 M. & S. 169; *Arnott v. Redfern*, 3 Bing. 353.

"Interest cannot be recovered as such in an action against the vendor of an estate, the sale of which has gone off, for the recovery of a deposit which has been lying idle (*Bradshaw v. Bennett*, 5 C. & P. 48; *Maberley v. Robins*, 5 Taunt. 625); but it may be recovered as special damages for breach of the contract if so laid. *De Bernales v. Wood*, 3 Camp. 258; *Farquhar v. Farley*, 7 Taunt. 592. But the principal and auctioneer stand on a different footing; and in an action against the latter to recover the deposit paid to him, interest cannot be recovered even as damages, unless, perhaps, after a demand and refusal on the contract being rescinded. *Lee v. Warner*, 8 Taunt. 45. Not even when the auctioneer has made interest upon the money while in his hands, and although he was requested by one of the parties, before the completion of the contract, to invest it. *Harrington v. Hoggart*, 1 B. & Ad. 577. Interest is not due as such in an action for money secured on mortgage, after day of default, without covenant to pay interest, but may be recovered as damages. Nor in an action for money lent unless there has been an usage to that effect (*Alton v. Bragg*, 15 East, 223; *Shaw v.*

Picton, 4 B. & C. 723); or for money had and received (*Walker v. Constable*, 1 B. & B. 306); even though by the course of dealing between the defendant and the person from whom the money was received to the plaintiff's use the sum would have borne interest; for no right passed to the plaintiff but a right to demand the sum actually in the defendant's hands. *Freeling v. Schroeder*, 2 Bing. N. C. 79. And it makes no difference that the money has been obtained by fraud (*Crockford v. Winter*, 1 Camp. 124); nor in actions for money paid (*Carr v. Edwards*, 3 Stark. 132; *Hicks v. Mareco*, 5 C. & P. 498); or on account stated (*Nichol v. Thompson*, 1 Camp. 52; *Chalie v. Duke of York*, 6 Esp. 45; *Blaney v. Hendricks*, 2 W. Bl. 761. *Contra*, *Abbot, C. J.*, 2 C. & B. 349); or for goods sold, even though to be paid for on a particular day. *Gordon v. Swan*, 12 East, 419. *Mountford v. Willes*, 2 B. & P. 337, merely decides that if the jury allow interest — which they clearly may do as damages — the court will not disturb their verdict, though it is otherwise where the payment was to be made by bill. Nor in an action for work and labor (*Trelawney v. Thomas*, 1 H. Bl. 303; *Milsom v. Hayward*, 9 Price, 134); nor on money lying with a banker (*Edwards v. Vere*, 5 B. & Ad. 232); nor upon a policy of insurance (*Kingston v. McIntosh*, 1 Camp. 518; *Bain v. Case*, 3 C. & P. 496); nor are annuitants entitled to interest on the arrears of their annuities." *Earl of Mansfield v. Ogle*, 4 De G. & J. 41; *Booth v. Carleton*, 30 L. J. (Ch.) 178; *Blogg v. Johnson*, L. R. 2 Ch. 225. See *Marsh v. Jones*, 40 Ch. Div. 563.

although the assets are not sufficient to pay all creditors.¹ Interest should be allowed on the claims against a national bank during the period between the time it is placed in the hands of a receiver and the closing up of its affairs, before appropriating the surplus to the stockholders.²

§ 330. No interest on penalties; statutory liability for riots. Interest is not allowed on statutory penalties.³ [598] Where a constable who failed to return an execution within the time prescribed by statute was declared liable for the amount then due and ten per cent. damages, it was held interest could not be added.⁴ Before judgment the penalty allowed for taking or receiving usurious interest by a national bank does not bear interest.⁵ A judgment imposing a fine is not interest-bearing.⁶ Interest is not recoverable under a statute which makes a county or municipality liable to the owner of property for damages resulting thereto from a riot;⁷ but it may be recovered on stipulated damages.⁸

§ 331. When allowed on penalty of bonds. There has been some question in actions upon penal bonds where the damages for breach of the condition equal or exceed [599] the penalty whether recovery beyond the penalty can be had by adding interest from the date of the breach, where such damages are of such a nature as to bear interest.⁹ But the American courts are now nearly agreed that interest on the penalty in such cases may be recovered.¹⁰ It is not, however,

¹ *Shultz v. Weaver*, 11 S. & R. 182; *French v. French*, 126 Mass. 360. *Champneys v. Lyle*, 1 Bin. 827. *Contra*, *Devereux v. Burgwin*, 11

² *Chemical Nat. Bank v. Bailey*, 12 Ired. L. 490 (not even from the date of the writ). *Blatch*, 480.

³ *Davenport v. McKee*, 98 N. C. 500; *People v. Gold & Stock Tel. Co.*, 98 N. Y. 67; *Thomas v. Weed*, 14 Johns. 255. ⁹ See *Hellen v. Ardley*, 8 C. & P. 12; *Lonsdale v. Church*, 2 T. R. 388; *Brangwin v. Perrott*, 2 W. Bl. 1190; *Clark v. Bush*, 3 Cow. 151; *McClure v. Dunkin*, 1 East, 436; *Francis v. Wilson*, Ry. & M. 105; *Harris v. Clap*, 1 Mass. 308; *United States v. Arnold*, 1 Gall. 348; *Fairlie v. Lawson*, 5 Cow. 424; *Fraser v. Little*, 13 Mich. 195.

⁴ *Trouer v. Sharp*, 4 J. J. Marsh. 79. ¹⁰ *Maddox v. Rader*, 9 Mont. 126; *Jefferson Co. v. Lineberger*, 3 id. 246; *Frink v. Southern Express Co.*, 82 Ga. 33; *Burt v. Delano*, 4 Cliff.

⁵ *Columbia Nat. Bank v. Bletz*, 2 Penny. (Penn.) 169; *Higley v. First Nat. Bank*, 26 Ohio St. 75.

⁶ *State v. Steen*, 14 Tex. 396.

⁷ *Weir v. Allegheny Co.*, 95 Pa. St. 413.

⁸ *Little v. Banks*, 85 N. Y. 267; *Winch v. Mutual B. I. Co.*, 86 id. 618;

recoverable upon a bail bond conditioned for the appearance of a person to answer a criminal offense.¹

§ 332. **Interest against government.** It has been established as a general rule in the practice of the federal government that interest is not allowed on claims against it, whether they originate in contract or in tort, or whether they arise in the ordinary business of administration or under private acts of relief passed by congress on special application. The only recognized exceptions are where the government stipulates to pay interest and where it is given expressly by an act of congress either by the name of interest or by that of damages.² The same rule is applied in England;³ and in some of the states.⁴ A state is not bound to pay interest on its bonds after their maturity unless its consent to do so is shown by an act of its legislature or by a contract which its officers were authorized to enter into.⁵ The right to interest does not attach to a judgment against the federal government unless by virtue of an act of congress.⁶ If the statute providing for interest on judgments does not except counties they are liable therefor when judgment is rendered against them on contract obligations.⁷ A claim arising against a county upon a statute and not *ex contractu* does not carry interest unless the act so provides.⁸ If a funding statute does not provide for interest on bonds issued by a county after their maturity they will not bear it.⁹ The older cases were less strict in exempting gov-

618; *Stern v. People*, 102 Ill. 540; *Leighton v. Brown*, 98 Mass. 516; *United States v. Curtis*, 100 U. S. 119; *School District v. Drentzer*, 51 Wis. 153; *State v. Sooy*, 39 N. J. L. 539, 555; *Clark v. Wilkinson*, 59 Wis. 548; *Brunswick v. Snow*, 78 Me. 177; *Burchfield v. Haffey*, 34 Kan. 42; *Harris v. Clap*, *supra*; *Brainard v. Jones*, 18 N. Y. 85; *Hughes v. Wickliffe*, 11 B. Mon. 202; *Carter v. Thorn*, 18 id. 613; *Bank of Brighton v. Smith*, 12 Allen, 243; *McGill v. Bank of United States*, 12 Wheat. 511; *Ives v. Merchants' Bank*, 12 How. (U. S.) 159; *Warner v. Thurlo*, 15 Mass. 154. Compare *Blewett v. Front Street C. Ry. Co.*, 49 Fed. Rep. 126.

¹ *United States v. Broadhead*, 127 U. S. 212.

² *Angarcia v. Bayard*, 127 U. S. 251; *Tillson v. United States*, 100 id. 43, 47; *Wrightman v. United States*, 23 Ct. of Cls. 144.

³ *In re Gosman*, 17 Ch. Div. 771.

⁴ *Ohio v. Board of Public Works*, 36 Ohio St. 409.

⁵ *United States v. North Carolina*, 136 U. S. 211.

⁶ *United States v. Sherman*, 98 U. S. 565.

⁷ *Nevada Co. v. Hicks*, 50 Ark. 416.

⁸ *Clay Co. v. Chickasaw Co.*, 64 Miss. 534; *Beals v. Supervisors*, 28 Cal. 449.

⁹ *Soher v. Supervisors*, 39 Cal. 134.

ernment from liability for interest;¹ but they generally held that in the absence of an express agreement to pay it a demand was necessary to entitle the creditor to it.² The liability of municipal and *quasi*-municipal corporations for interest, except on express contracts, depends very largely upon their charters and the general statutes of the state of which they are parts. No rule can be deduced from the adjudications which can be relied upon outside of the jurisdiction in which the particular case was decided.³

§ 333. Judgments bear interest. In nearly all the states and territories there are statutes which provide that judgments shall carry interest in a greater or smaller class of actions and suits, the tendency of legislation being to diminish the number of exceptions. These statutes do not give a judgment the nature of a contract, except when they provide that the rate of interest on a judgment shall be that which the parties have stipulated for. In such a case a change in the statute after a contract has been made for the payment of an agreed rate of interest does not affect the liability or rights

¹ *Respublica v. Mitchell*, 2 Dall. 101; *People v. Canal Com'rs*, 5 Denio, 401; *Canal Com'rs v. Kempshall*, 26 Wend. 404; *Thorndike v. United States*, 2 Mason, 1.

² *Attorney-General v. Cape Fear Nav. Co.*, 2 Ired. Eq. 444; *Milne v. Rempubliam*, 8 Yeates, 102; *Adams v. Beach*, 6 Hill, 27; *Auditor v. Dugges*, 8 Leigh, 241; *Pawlet v. Sandgate*, 19 Vt. 62; *United States v. Hoar*, 2 Mason, 314; *State v. Mayes*, 28 Miss. 709.

³ A claim which has been audited against a county does not bear interest until judgment is rendered upon it. *Wheeler v. Newberry Co.*, 18 S. C. 182. Interest is not allowable upon a claim against a county until a warrant has been presented and indorsed "not paid for want of funds." *Grant Co. v. Lake Co.*, 17 Ore. 453. See *Territory v. Board of Com'rs*, 8 Mont. 396. County warrants which are payable in the order of their registration

and are silent as to interest and time of payment do not bear interest. *Ashe v. Harris*, 55 Texas, 49. If a warrant is not paid on presentment a right of action then accrues, and interest may be recovered on the original indebtedness from the time suit was brought. *Mahanoy v. Comry*, 103 Pa. St. 362; *Snyder v. Boviard*, 122 id. 442. For a violation of its duty as a lessee a city is liable for interest on the resulting damages. *Allegheny v. Campbell*, 107 Pa. St. 530. A municipal officer has no authority to bind the municipality to pay compound interest on an account unless it is expressly given him. *St. Louis Gas L. Co. v. St. Louis*, 11 Mo. App. 55, 77. As to the liability of a town which has acquired property of another town by virtue of a statute to pay interest on the value thereof or for delay, see *Needham v. Wellesley*, 139 Mass. 372.

of the parties thereto.¹ In other cases a judgment is an obligation of record, interest on which is given as damages for delay in performing the contract or duty which it enforces. Hence, when the rate of interest thereon is reduced by law, a judgment previously rendered cannot carry a higher rate than is fixed by the amendatory act after it takes effect,² although the judgment so rendered was based upon a contract which provided for the payment of the stipulated rate until it was discharged.³ The rate of interest designated in a statute for judgments to bear cannot be varied by the parties to the contract sued upon.⁴ Except as they are subject to legislative control to the extent indicated, judgments are debts of record, having like incidents as other debts, including that of bearing interest.⁵ This quality is given them on common-law principles in actions based upon the fact of the wrongful detention of money. The interest, however, is not collectible on execution, either as such or as damages, unless authorized by statute,⁶ or it is so specified in the judgment.⁷ In the absence of

¹ *Bond v. Dolby*, 17 Neb. 491.

² *O'Brien v. Young*, 95 N. Y. 428 (two judges dissenting). *Contra*, *Cox v. Marlatt*, 86 N. J. L. 389.

³ *Taylor v. Wing*, 84 N. Y. 471.

⁴ *Haas v. Chicago Society*, 20 Ill. 248; *Moore v. Holland*, 16 S. C. 15. See *Deshler v. Holmes*, 44 N. J. Eq. 581, as to the right to have interest paid in excess of the judgment credited on the principal.

⁵ *Benkard v. Babcock*, 27 How. Pr. 391.

Under the code of California (§ 1504, Civil Code) a claim against the estate of a deceased person which has been passed upon on the final settlement of the administrator's account and ordered paid has the effect of a judgment against the estate and bears interest from the date of the settlement regardless of whether the original was interest-bearing. *Oliver's Estate*, 70 Cal. 184; *Glenn's Estate*, 74 id. 567. And so in Texas. *Finley v. Carothers*, 9 Texas, 517.

But the return of commissioners on claims against an estate is not a judgment, and a rate of interest fixed thereon does not affect the contract between the parties. *Bowers v. Hammond*, 139 Mass. 360. Neither is an award of dower. *Stunz v. Stunz*, 131 Ill. 210. An order of court affirming the assessment of damages resulting from taking property for public use is a judgment. *Beveredge v. Park Com'rs*, 100 Ill. 75; *Cook v. South Park Com'rs*, 61 id. 115.

⁶ *Perkins v. Fourniquet*, 14 How. (U. S.) 328; *Michaux v. Brown*, 10 Gratt. 612.

⁷ Interest cannot be collected on a money judgment unless it so directs. *Anderson's Succession*, 33 La. Ann. 581. But a recovery of it is not prevented because the record entry of the judgment does not show that it was allowed. *Nevada Co. v. Hicks*, 50 Ark. 416; *Annis v. Smith*, 16 Pet. 303, 311. Every judgment in a civil action bears the rate of interest which

a statute authorizing the collection of interest upon execution, that which accrues between the rendition and collection of a judgment is lost; or in other words, since such interest [600] is allowed as damages, it can only be obtained by suit. The very sum in the judgment is the amount to be collected by execution unless a statute exists authorizing the officer to compute and collect interest.¹ *Indebitatus assumpsit* will not lie for that purpose.² And the claim for it will be extinguished by collection or payment of the principal to which it is incident.³ Some cases are to be found which deny that judgments bear interest.⁴ Considering the hostility of the early common law to interest it is easy to maintain on its principles any proposition adverse to its recovery. But on the principle now universally admitted, that on all liquidated sums interest may be recovered after the date when it was the duty of the debtor to pay, judgments will carry interest. And it is generally held that

the cause of action bore, although it is silent concerning it. A judgment-creditor may have the record corrected to show the rate. *Evans v. Fisher*, 26 Mo. App. 541.

A judgment against a corporation is an unliquidated demand when the defendant's property has been placed in the hands of a receiver; it is not enforceable as a judgment against the receiver's funds, and does not bear interest against them. The fact that it was rendered by consent is immaterial, and so is the fact that an order has been made directing the receiver to pay it, but without specifying the sum due. *Ex parte Brown*, 18 S. C. 87.

¹ *Perkins v. Fourniquet*, 14 How. (U. S.) 328; *Michaux v. Brown*, 10 Gratt. (Va.) 612; *Solon v. Virginia, etc. R. Co.*, 14 Nev. 405.

² *Beedle v. Grant*, 1 Tyler (Vt.), 423.

³ See *post*, § 372.

After a judgment providing for the payment of the legal rate of interest has been satisfied the creditor cannot collect the contract rate though

it was his right to have the judgment provide for it. *Rice v. Hulbert*, 67 Iowa, 724.

⁴ *Perkins v. Fourniquet*, 14 How. (U. S.) 328; *Homer v. Kirkwood*, 25 Miss. 96; *Easton v. Vandorn*, Walk. (Miss.) 214; *Sewell's Case*, 37 Mo. 448; *Williamson v. Broughton*, 4 McCord, 123. See *Harrington v. Glenn*, 1 Hill L. (S. C.) 53; *Thomas v. Wilson*, 8 McCord, 105; *Lambkin v. Nance*, 2 Brev. 99; *Todd v. Botchford*, 86 N. Y. 517.

A judgment cannot draw interest in the absence of a statute authorizing it although it be rendered upon a contract. *Reece v. Knott*, 3 Utah, 451. Interest was refused on a judgment the amount of which was doubled by interest, a portion of it being compounded. *Downs v. Allen*, 22 Fed. Rep. 805. Under the Kentucky statute judgments for personal torts do not bear interest. *McMurty v. Kentucky C. R. Co.*, 84 Ky. 462. It is otherwise in the District of Columbia. *Hel-len v. Metropolitan R. Co.*, 4 Mackey, 519.

interest is recoverable both on judgments and decrees,¹ at least on the latter so far as they are *in personam* and binding upon the debtor's property, and rendered without reference to the sale of particular portions of it and the distribution of

¹ Beall v. Silver, 2 Rand. 401; Roan's Adm'r v. Drummond's Adm'r, 6 Rand. 182; Clarke's Adm'r v. Day, 2 Leigh, 172; Marshall v. Dudley, 4 J. J. Marsh. 244; Mercer v. Beall, 4 Leigh, 189; Laidley v. Merrifield, 7 id. 346; Klock v. Robinson, 22 Wend. 157; Nunnelle v. Morton, Cooke (Tenn.), 21; Gwinn v. Whittaker, 1 Harr. & J. 754; Sayre v. Austin, 3 Wend. 496; Smith v. Todd's Ex'r, 3 J. J. Marsh. 306; Hodgdon v. Hodgdon, 2 N. H. 169; Hudson v. Daily, 13 Ala. 742; Hopkins v. Shepard, 129 Mass. 600.

In Administrator of Pinckney v. Singleton, 2 Hill (S. C.), 52, it was said: "At common law no interest could be collected upon an execution under a judgment; but interest was recoverable in an action of debt on judgment, and by commencing such an action the plaintiff obtains an inchoate right to the interest which cannot be defeated by a subsequent payment. And, therefore, where an action of debt on judgment was commenced against an administrator suggesting a *devastavit*, although the administrator after suit brought paid the amount of the judgment and costs with interest on the original cause of action, it was held that the plaintiff might still go on to recover the interest on the entire amount of the judgment (including the principal and interest), and the court will not preclude him from this right by ordering satisfaction to be entered on the judgment."

In Crawford v. Ex'r of Simonton, 7 Port. 110, Collier, J., reviewed the authorities and stated the law: "Damages in lieu of interest are allowed at common law for a default

to pay money or deliver property, upon the principle that the creditor should be compensated for the want of punctuality in his debtor in keeping him out of the use of the money or property. McWhorter v. Standifer, 2 Port. 519. Accordingly, it has been held that interest is allowed on judgments at common law to the time of affirmance or of a new judgment rendered. Zink v. Langton, 2 Doug. 749. By the rules of the common law Lord Ellenborough considered it to be within the general province of a jury to give damages for the detention of a debt, and he, therefore, sustained a verdict which allowed interest on a statutable ascertainment of damages for an injury to individual property occasioned by a public improvement made by a corporation (1 M. & Sel. 171); and in 7 Har. & J. 755, it is said that both by the decisions of the court of Maryland and the English courts every judgment for money carries interest unless otherwise agreed by the parties or its terms forbid it. So in North Carolina it has been holden that a plaintiff is entitled to interest on his judgment if a new action is brought up to the time of the rendition of the new judgment. 2 Hayw. 26, 378; Thomas v. Edwards, 3 Ans. 804; Butler v. Stoullit, 8 Moore, 472; Prescott v. Parker, 4 Mass. 170. In Atkinson v. Braybrooke, 4 Camp. 380, Lord Ellenborough considered that interest was not in general recoverable on a foreign judgment because it was a simple contract. 8 P., 8 Price, 350. But in McClure v. Dunkin, 1 East, 486, the court of king's bench determined that in *assumpsit* on a judg-

their proceeds.¹ Some exceptions have been noticed as to government in the last section.

Under a statute providing that "interest shall be allowed on all money due upon any judgment," it may be recovered

ment rendered in Ireland it was competent to the jury to allow interest to the plaintiff, and that in that respect there was no difference between a foreign judgment and a judgment in a court of record in England. The only adjudication to the contrary is a case in 4 McCord, 212, which is deemed outweighed by the authorities. In *Moore v. Patten*, 2 Port. 451, it was determined that a jury might, in their discretion, allow interest upon unsettled accounts for goods, wares, etc., from the time they became due. And in *Tate v. Innerarity*, 1 Stew. & Port. 88, it was adjudged competent upon common-law principles for parties to stipulate for the payment of a reasonable rate of interest, and where it was not ascertained by contract the rate might be fixed by the custom of the place where the contract was made.

"From the decisions we have noticed we educe as applicable to the case at bar the rule that the allowance of interest, except upon the particular liabilities embraced by statute, must depend upon the circumstances of the case. To avoid its payment it is competent for the defendant to show that he is not in fault for the non-payment of the principal sum, or that the plaintiff had been absent from the country, without having left a known agent, etc.; but if the defendant offers no excuse for the delay the plaintiff is entitled to recover interest as damages."

In *Himely v. Rose*, 5 Cranch, 813, it was held that if property ordered to be restored be sold, interest is not to be paid unless specially ordered by the decree. *Marshall, C.*

J.: "Restitution of the cargo was awarded. The property having been sold, the money proceeding from the sale is substituted for the specific articles. If this money remains in the possession of the court, it carries no interest; if it be in the hands of an individual, it may bear interest or otherwise, as the court may direct."

In *Cox v. Marlatt*, 86 N. J. L. 889, the court say: "Our practice has been for many years, independent of any express statute, to allow interest to be levied under execution as an incident to the judgment, and as an increase of damages for the detention of the debt without bringing a distinct action for the interest as damages for such detention." See *Todd v. Botchford*, 86 N. Y. 517.

Judgments for costs carry interest (*Emmitt v. Brophy*, 42 Ohio St. 82; *Klock v. Robinson*, 22 Wend. 157), when the costs are included in a judgment which is the cause of action. *Tiernan v. Minghini*, 28 W. Va. 314. In an admiralty proceeding a federal circuit court is not bound to allow interest on costs awarded by the district court, although they are included in the former's decree. *The Scotland*, 118 U. S. 507. A judgment entered *nunc pro tunc* bears interest from the day on which it is considered to have been rendered. *Barber v. Briscoe*, 9 Mont. 341.

¹ If a decree provides for the division of the proceeds of designated property according to fixed priorities and specifies the amounts to be paid claimants, and there is not enough to pay the principal and interest due

upon a foreign judgment which is sued upon.¹ In suits upon judgments rendered in other states interest is recoverable under the laws of the forum, and not at the rate authorized by the laws of the state in which they were rendered;² and this is the rule whether the law of the original jurisdiction allows interest on judgments or not.³

[602] § 334. **Same subject.** Although the judgment separately states the amount of principal and interest the total bears interest.⁴ After judgment against a corporation interest on it is computed in an action against a stockholder.⁵ It seems to have been the practice in Kentucky prior to the statute of 1837, giving interest on judgments and decrees, and in some other states, to adjudge "accruing" interest on debts which by the terms of the agreement were to bear interest [603] "until paid." The practice was to adjudge interest from

them all, it will not be construed as allowing interest to one claimant to the exclusion of others. *National Bank v. Heard*, 65 Ga. 189.

¹ *Shickle v. Watts*, 94 Mo. 410.

² *Barringer v. King*, 5 Gray, 9; *Hopkins v. Shepard*, 129 Mass. 600; *Clark v. Child*, 136 id. 344; *Crone v. Dawson*, 19 Mo. App. 214 (in the absence of proof of the rate of interest in the state in which judgment was rendered). In *Schell v. Stetson*, 12 Phila. 187, a judgment of a New York court sued on in Pennsylvania was held to carry interest by virtue of the fact that it would do so in the former state, the law of which the court took notice of. The judgment was for costs, and interest thereon was not allowable under the laws of Pennsylvania.

³ *Nelson v. Felden*, 7 Rich. Eq. 394; *Warren v. McCarty*, 25 Ill. 95; *Prince v. Lamb*, Breese, 378; *Fonville v. Monroe*, 74 Ill. 126; *Talbot v. National Bank*, 129 Mass. 67; *Williams v. American Bank*, 4 Met. 317; *Barringer v. King*, 5 Gray, 9.

⁴ *Coles v. Kelsey*, 13 Tex. 75.

A verdict will not be vitiated by in-

cluding improper interest, separately stated from any other sum found, nor for assuming to direct that prospective interest be allowed; the excessive interest or the impertinent direction that the sum found bear interest in the future may be stricken out or disregarded as surplusage. *Brugh v. Shanks*, 5 Leigh, 598.

Where a petition sets forth the recovery of judgment for a certain sum, without stating the rate of interest it is entitled to draw, but the plaintiff in his petition demands judgment for the amount of the recovery, with interest thereon at ten per cent. from a day therein stated, the record showing a submission of the cause to the court by the parties, and the rendition of a judgment for the original judgment, with ten per cent. interest, without exception, it was considered that the demand for ten per cent. would authorize the introduction of proof of that rate, and that the production of such proof should be presumed. *Haskins v. Alcott*, 13 Ohio St. 210.

⁵ See § 343.

the date when it was provided by agreement to commence without any computation to the rendition of the judgment, and it was not included with the principal sum recovered; when the judgment was collected or paid the interest was computed according to the agreement and judgment without rest at the time of the latter. But where interest was recoverable as damages, it was embraced in the judgment. Interest on judgments in that state prior to 1837, as damages for detention of the money, was not matter of right, but discretionary.¹ Judgments upon contracts stipulating a certain rate of interest until the debt should be paid were entered for accruing interest. The court entered judgment for the debt in the declaration mentioned, and also the legal or conventional interest from the time the debt was due and payable, or the interest stipulated to be given commenced until payment should be made.² And since the statute of 1837, giving interest on all judgments, it is error to render judgment in a suit on a bill of exchange for principal and interest by way of damages, by which interest would run after judgment by force of the statute.³ In debt on a judgment bearing interest, if the plaintiff demanded only principal and interest accrued at the commencement of the action, he could not have judgment for accruing interest.⁴ But generally under statutes allowing [604] judgments to be taken upon contracts to bear interest there-

¹ *Lair v. Jelf*, 3 Dana, 181; *West v. Patrick's Adm'r*, 1 J. J. Marsh. 95; *Shockey's Adm'r v. Glasford*, 6 Dana, 16; *Marshall v. Dudley*, 4 J. J. Marsh. 245; *Caldwell v. Richards*, 2 Bibb, 331; *Guthrie v. Wickliffe*, 4 id. 542; *Smith's Adm'r v. Todd's Ex'r*, 3 J. J. Marsh. 306; *Bartlett v. Blanton*, 4 id. 410; *McMillan v. Scott*, 1 T. B. Mon. 150.

² *Harden v. Major*, 4 Bibb, 104; *Taul v. Moore*, Hardin, 90; *Cotton v. Reavill*, 2 Bibb, 99; *Russell v. Shepherd*, Hardin, 44; *Harper v. Bell*, 2 Bibb, 221; *Troxwell v. Fugate*, Hardin, 2. See *Henderson v. Desha*, Hemp. C. C. 231. But see also *Byrd v. Gasquet*, id. 261.

³ *Chamberlain v. Maitland*, 5 B. Mon. 448.

⁴ *Caldwell v. Richards*, 2 Bibb, 332.

Where a creditor obtained a judgment at law, and then came into a court of equity to foreclose a mortgage for the same debt, it was held that interest should not be decreed, the judgment not bearing it; but the judgment be taken as the amount to be paid. *Heydale v. Hazlehurst*, 4 Bibb, 19. See *Brigham v. Van Buskirk*, 6 B. Mon. 197, holding that by the statute of 1837 the intention was to establish the principle that debts established by judgment or decree should bear interest from that time unless by the terms of the judgment they bore interest from a prior day.

after at the contract rate, the correct rule is to add the interest due on the principal up to the time of the judgment to the principal, and enter the judgment for the gross amount; and this judgment, including both principal and interest, is then to bear the interest stipulated in the contract until the debt is paid.¹ Equity follows the law and allows interest in like cases.² On debts on which interest would be given as damages at law, it is decreed in chancery down to the time of the decree.³

§ 335. Not allowed on revival of judgment by *scire facias*. Accrued interest on a judgment is lost by reviving it by *scire facias*. Nearly all the authorities agree that the judgment in such proceedings does not include interest on the judgment revived; the party reviving only obtains execution of the judgment without interest.⁴ And it has been held in Vermont that the revival of the judgment by such process is a final waiver and renunciation of the interest which had accrued up [605] to the time of the new judgment on the *scire facias*.⁵

¹ Guy v. Franklin, 5 Cal. 416; Emeric v. Tams, 6 id. 155; McCann v. Lewis, 9 id. 246; Mount v. Chapman, id. 297; Corcoran v. Doll, 32 id. 82; Bibend v. Liverpool, etc. Ins. Co., 30 id. 78; Coles v. Kelsey, 13 Tex. 75; Palmer v. Murray, 8 Mont. 312, overruling earlier cases.

Under a statute which provides that "when a decree or judgment is rendered or made for the payment of money it shall be for the aggregate of principal and interest due at the time of judgment or decree, with interest thereon from that date," when a decree has been once made for the principal and interest to that date a second aggregation of the same debt in the same cause in subsequent decrees for the payment of the original decree is unauthorized. Tiernan v. Minghini, 28 W. Va. 314, 323.

² Samuel v. Minter, 3 A. K. Marsh. 480; McAlexander v. Lee, id. 483; Moore v. Pendergrast's Heirs, 6 J. J. Marsh. 534; Taylor v. Knox's Ex'rs,

5 Dana, 466; Hammond v. Hammond, 2 Bland's Ch. 306.

³ Deany v. Scriba, 2 Call, 415; Dawson v. Clay's Heirs, 1 J. J. Marsh. 165; Lair v. Jelf, 3 Dana, 181; Hughes v. Standeford, id. 285.

⁴ Anonymous, Mart. & Hayw. 182; Mann v. Taylor, 1 McCord L. 113. See Barron v. Morrison, 44 N. H. 226.

⁵ Hall v. Hall, 8 Vt. 156. In this case Redfield, chancellor, said: "It is well settled that on *scire facias* to revive a judgment no damages can be awarded. The writ claims none. The object of the suit is merely to revive the judgment, and no interest can be added to it; execution upon the judgment in *scire facias* must issue for the same sum of the original judgment. At common law, not only could no damages be recovered, but no costs, until the statute of 8 & 9 Wm. 3, ch. 11, which provides for costs. 14 Petersdorf, 386. As the debtor had been discharged on *habeas corpus*, no good

But it is held in Pennsylvania that bringing *scire facias* does not extinguish the right to interest. Where a judgment had been several times so revived, the plaintiff, in an action on it, had a right to charge interest on the aggregate amount of principal and interest due at the time of rendering judgment on each *scire facias*.¹

§ 336. Interest in condemnation proceedings. Interest is allowed on the damages assessed in proceedings to condemn property in the exercise of the power of eminent domain, if the property has been taken,² and from the time of the taking though proceedings are not instituted until subsequently,³ and it will run during the pendency of an appeal if the assessment appealed from is confirmed or increased;⁴ but not other-

reason is now perceived why the oratrix might not have brought debt upon the judgment. *Scire facias* is the most common, although not the exclusive, remedy. But the judgment having been revived by *scire facias*, the plaintiff failed, of course, of obtaining execution of the interest which had accrued; and we think thus lost the claim of interest. It will not be allowed to separate the interest from the debt of which it is a mere incident. The judgment upon the *scire facias* so far merged the judgment for the alimony that the portion not recovered by the levy was gone. It became a new debt, and could never be declared upon as a judgment of any other term than that of the judgment on the *scire facias*."

¹ *Fries v. Watson*, 5 S. & R. 220. See *Meason's Estate*, 4 Watts, 341.

Phillips v. South Park Com'rs, 119 Ill. 627; *Alloway v. Nashville*, 88 Tenn. 510; *Stewart v. County*, 2 Pa. St. 340; *Clough v. Unity*, 18 N. H. 75; *Cook v. South Park Com'rs*, 61 Ill. 115; *Commonwealth v. Boston, etc. R.*, 3 Cush. 25; *Chicago v. Palmer*, 93 Ill. 125; *Reed v. Hanover Branch R. Co.*, 105 Mass. 803; *Atlantic, etc. R.*

Co. v. Kohlentz, 21 Ohio St. 334. See *South Park Com'rs v. Dunlevy*, 91 Ill. 49.

³ *Velte v. United States*, 76 Wis. 278; *Sweaney v. United States*, 62 id. 396.

⁴ *Illinois, etc. R. Co. v. McClintock*, 68 Ill. 296; *Beebe v. Newark*, 24 N. J. L. 47.

If the condemning party, notwithstanding an appeal, may deposit the money for the use of the land-owner or give security for the costs and damages which may be awarded on appeal, and if the money deposited may be taken without prejudice to the owner's right to appeal, interest is only allowable on the amount finally awarded, in excess of the deposit; if no deposit is made, interest on the whole amount is due. *Concord R. Co. v. Greely*, 23 N. H. 237; *Shattuck v. Wilton R. Co.*, id. 269. But if the owner may not take the money deposited under the award of the commissioners and the party condemning may occupy the land, the former is entitled to interest from the time compensation was due him, the damages given being increased on the appeal. *Sioux City R. Co. v. Brown*, 13 Neb. 317; *Hayes v. Chi-*

wise.¹ The right to interest will be affected by circumstances. If the owner has had the profitable use of the premises, or has received rents pending the appeal, these facts should be taken into account, and interest abated accordingly.² So if the owner appeals and is the sole occupant, interest should not be allowed.³ But if the condemning party also appeals, interest should be allowed where collection is thereby stayed.⁴ But until possession is taken interest is not allowed; until then there is a *locus penitentia* to those moving the condemnation,⁵ and the money is not considered as detained.⁶ If [606] the first assessment is set aside on motion of a railroad corporation, which has instituted proceedings for condemnation of private property and taken possession, it is competent for the jury, in making a second assessment, to allow and include in their verdict interest from the time when possession was taken; although the company had paid into court the amount of the damages, and the sum continued to be retained by the court.⁷ The state is liable to pay interest upon the amount of a legal appraisal of damages for land taken for public use only after a demand made by the party entitled of the officers of the law charged with the duty of making payment;⁸ and so with a city where an award is payable upon its confirmation.⁹ If a city is not authorized to institute proceedings for the ascertainment of the damages resulting to property owners from a change in the grade of streets the party claiming compensation cannot recover interest thereon until he exercises his right to have the damages liquidated, and interest will be allowed only from the time he

cago, etc. Ry. Co., 64 Iowa, 753; West v. Milwaukee, etc. R. Co., 56 Wis. 318; Uniacke v. Chicago, etc. Ry. Co., 67 id. 108.

¹ Reisner v. Atchison Union Depot Co., 27 Kan. 382.

² Donnelly v. Brooklyn, 121 N. Y. 9; Hamersly v. Mayor, 56 id. 533; Hilton v. St. Louis, 99 Mo. 199; West v. Milwaukee, etc. R. Co., 56 Wis. 318; Metler v. Easton, etc. R. Co., 36 N. J. L. 222.

³ Metler v. Easton, etc. R. Co., *supra*.

⁴ Id.

⁵ Chicago v. Barbican, 80 Ill. 482.

⁶ Fisk v. Chesterfield, 14 N. H. 240. But see Beveridge v. West Chicago Park Com'rs, 100 Ill. 75.

⁷ Atlantic, etc. R. Co. v. Koblenz, 21 Ohio St. 334; Beebe v. Newark, 24 N. J. L. 47.

⁸ People v. Canal Com'rs, 5 Denio, 401.

⁹ Barnes v. Mayor, 27 Hun, 236.

began proceedings for that purpose.¹ But if the municipality may take the initiative the property owner is entitled to interest from the time the damages were sustained.²

§ 337. **Interest on taxes.** Taxes do not draw interest as contracts or as damages except by force of a statute.³ A county is not liable to the state for interest on taxes by way of damages.⁴ If taxes are illegally demanded and paid under protest interest may be recovered.⁵ Under the Michigan law concerning the taxation of railroads, though the reports of a company to the auditor-general correctly show its gross earnings, interest is not demandable for delay in paying the amount thereby appearing to be due until that officer acts upon the reports and notifies the company.⁶ An assessment made for public improvements does not carry interest unless it is so expressed in the statute.⁷

§ 338. **Infants liable for.** It was the conviction of Lord Ellenborough that an infant could not give security for a debt, and that his bond conditioned for the payment of the principal sum and interest was clearly prejudicial.⁸ Following this view it was held in Vermont that interest could not be allowed on an account against a minor,⁹ but this position was soon receded from on the ground that any general rule exempting infants from interest would be unjust.¹⁰

§ 339. **Allowed on sums due for rent.** Interest is allowable in personal actions for the recovery of specific sums agreed to be paid for rent after the same become due and in arrears on the principles that apply to other debts after it becomes the debtor's duty to pay.¹¹ In New York it is settled

¹ *Tyson v. Milwaukee*, 50 Wis. 78.

² *Cincinnati v. Whetstone*, 24 N. E. Rep. 409; 47 Ohio St. 196.

³ *Camden v. Allen*, 26 N. J. L. 398; *Shaw v. Peckett*, 26 Vt. 482; *Danforth v. Williams*, 9 Mass. 324; *Haskell v. Bartlett*, 84 Cal. 281; *Himmelman v. Oliver*, id. 246; *Perry v. Washburn*, 20 Cal. 818, 850; *Perry Co. v. Selma, etc. R. Co.*, 65 Ala. 391; *Louisville, etc. R. Co. v. Commonwealth*, 89 Ky. 581; *Ormsby v. Louisville*, 79 Ky. 202.

⁴ *State v. Multnomah Co.*, 18 Ore. 287.

⁵ *Atwell v. Zeluff*, 26 Mich. 118;

Shaw v. Becket, 7 Cush. 442; *Galveston Co. v. Galveston Gas Co.*, 72 Texas, 509.

⁶ *Lake Shore, etc. Ry. v. People*, 46 Mich. 193.

⁷ *Road Com'rs v. Hudson*, 45 N. J. L. 173; *Brennert v. Farrier*, 47 id. 75.

⁸ *Fisher v. Mowbray*, 8 East, 380; *Baylis v. Dinely*, 3 M. & S. 477.

⁹ *Taft v. Pike*, 14 Vt. 405.

¹⁰ *Bradley v. Pratt*, 23 Vt. 378.

¹¹ *Vandevoort v. Gould*, 36 N. Y. 639; *Hack v. Norris*, 46 Mich. 587; *Heissler v. Stose*, 181 Ill. 393; *Pear-*

[607] that when the rent is payable in specified kinds of property which the tenant has failed to deliver, interest is recoverable on the value of the rent from the time it became

son v. Sanderson, 128 id. 88 (appraisement of improvements made under terms of a lease; interest allowed from time appraisement made); Elkin v. Moore, 6 B. Mon. 462; Honore v. Murray, 3 Dana, 31; Walker v. Hadduck, 14 Ill. 399; Buck v. Fisher, 4 Whart. 516; Ten Eyck v. Houghtaling, 12 How. Pr. 523; Obermeyer v. Nichols, 6 Bin. 159; Cook v. Farinholt, 3 Ala. 384; Naglee v. Ingersoll, 7 Pa. St. 185; Clark v. Barlow, 4 Johns. 183; Dennison v. Lee, 6 Gill & J. 383; West Chicago A. W. v. Sheer, 8 Ill. App. 367.

In Jackson v. Wood, 24 Wend. 443, it was held that in ascertaining the *mesne* profits or the rents of premises situate in New York city, interest may be computed upon rents from the expiration of the quarter days when payable.

In Stockton's Adm'r v. Guthrie, 5 Harr. (Del.) 204, it was held that interest is recoverable for arrears of rent payable in money on a day certain, though the letting be by parol from year to year. Bayard, J.: "It is sufficient to determine that in this state, whenever a sum certain is payable by contract on a day certain, interest is recoverable of right against the party in default; and this whether the contract be under seal in writing or merely verbal. The interest is allowed as a legal incident to the principal sum existing from the default in the non-performance of his contract by the debtor, whenever there is a certainty in the sum to be paid and the time of payment; nor can any sufficient reason be given for a distinction in the allowance of interest between contracts for the payment of money under seal or in writing and

verbal contracts. The contract being valid the breach is as injurious to the creditor in the one case as in the other, and the exact character of the act or duty to be performed as fully ascertained in the one case as the other, and the consequences of the default should therefore be the same. There would seem to be but one exception to this rule, and that is where interest becomes due on a principal sum on a day certain; yet interest on the interest so in arrears is not recoverable. This exception is founded on the statute which prohibits the taking of more than a certain rate of interest for the use or loan of money; and until the interest in arrears is severed from the principal sum by the agreement of the parties it has been held that it cannot be treated as a new loan. Arrears of rent, however, have no analogy to arrears of interest, and fall neither within the words or intent of the statute. In the case of lands, whether the fee or a life estate be parted with, there can be in reason no difference in the right to interest on the sum payable for the estate acquired by the vendee or tenant; provided it is payable in money on a day certain, and no question could be made as to the right of the vendor to recover interest on the unpaid purchase-money of land sold in fee from the time it became payable, whether there was an express stipulation for the payment of interest or not. Nor can any difference or distinction as to the right to interest arise from the fact that no greater estate at law in lands can, in Delaware, be granted than for one year except by deed; for the estate acquired by the tenant from year to year, holding under a verbal con-

payable.¹ When, however, the landlord seeks his remedy for rent by distress or by re-entry to hold until the arrears are paid, this remedy does not extend to the interest.² A lessee who is ejected is entitled to interest on the fair value of the leased premises to him.³

§ 340. **Interest on damages for infringing patents.** "The general rule is that interest should be allowed on royalties from the time those royalties ought to have been paid, in all cases where a royalty is the measure of the complainant's damages; the theory in such cases being that damages are liquidated at such time as the royalty would have been due if the defendant had elected to purchase instead of to infringe the right to the use of the invention in suit, but that no interest is due on damages measured otherwise than by a royalty because such damages are unliquidated until they are ascertained by an action.⁴ But the latter part of this rule is subject to exceptions, and in equity the allowance of interest appears to have been left largely to the discretion of the court."⁵ The profits allowed in equity for the injury that a patentee has sustained by the infringement of his patent are

tract, for a sum certain, is just as valid as that acquired by the lessee for a term of years, or a vendee in fee under a demise or conveyance by deed. The tenant equally with the lessee for years, or the vendee, acquires the estate for which he is to pay by a contract ascertaining and fixing the sum to be paid, and the day of payment, and in default of payment interest should equally follow as of right in either case. It may be observed that the allowance of interest is, in general, a rule of practice (In re Badger, 2 Barn. & Ald. 691, and Windle v. Andrews, id. 696); and in this state the practice of allowing interest on arrears of rent has been uniform and settled." But see Breckenridge v. Brooks, 2 A. K. Marsh. 335; Cooke v. Wise, 2 Hen. & M. 463; Skipweth v. Clinch, 2 Call, 253; Graham v. Woodson, id. 249; Kyle v. Roberts, 6 Leigh, 495;

Van Rensselaer v. Platner, 1 Johns. 276; Dowe v. Adams, 5 Munf. 21.

¹ Lush v. Druse, 4 Wend. 813; Van Rensselaer v. Jones, 2 Barb. 648; Livingston v. Miller, 11 N. Y. 80; Van Rensselaer v. Jewett, 2 id. 135; S. C., 5 Denio, 135; Vaughan v. Howe, 20 Wis. 523; Gammon v. Abrams, 58 id. 323.

² Lansing v. Rattoone, 6 Johns. 42; Longuell v. Ridinger, 1 Gill, 57; Bantoon v. Smith, 2 Bin. 146; Dougherty's Estate, 9 W. & S. 189; Gaskins v. Gaskins, 17 S. & R. 390.

³ Hodgkins v. Price, 141 Mass. 162.

⁴ Walker Pat., § 571; Truck Co. v. Railroad Co., 2 Fed. Rep. 681; Mowry v. Whitney, 14 Wall. 653.

⁵ Creamer v. Bowers, 35 Fed. Rep. 206, per Wales, J.

It was held in Graham v. Plano Manuf. Co., 35 Fed. Rep. 597, that the allowance by a court of a named sum for each machine manufactured, as

unliquidated, and as a general rule, and in the absence of special circumstances, do not bear interest until after their amount has been judicially ascertained.¹

§ 341. Right to interest as affected by the marital relation. Wherever the wife has a separate estate which she permits her husband to use, they living together and enjoying the benefits of it, and there is no stipulation that interest shall be paid by him for the use of it, it will be presumed, in the absence of any circumstances showing a contrary understanding, that the husband is not liable to account for or pay interest thereon.² The fact that he is the trustee of his wife's estate does not affect the legal presumption.³ But if, from the mode of dealing between them, there are any circumstances from which it may reasonably be inferred that the intention was to charge interest, the husband will be liable for it.⁴

§ 342. Interest as between partners. The right to interest on partnership accounts and dealings, in the absence of agreement to pay it, may depend upon the practice of each particular firm or on the custom of the trade in which it is engaged.⁵ In the absence of both of these or an express agreement the rule is that interest cannot be recovered on capital paid in.⁶ If no demand has been made on a partner who has failed to furnish the amount due under his agreement as capital and the business has not required it, interest is not recov-

damages for the infringement of a patent, the sum not resting on the basis of a customary charge, does not establish a fixed royalty which may be made the basis to calculate interest upon in favor of the patentee in a subsequent suit for another infringement, damages in which were recovered at the same rate, the patentee having in a third suit contended for a larger measure of damages. See vol. 3, ch. 21.

¹ *Tilghman v. Proctor*, 125 U. S. 136, 160.

² *Lishey v. Lishey*, 2 Tenn. Ch. 5; S. C., 6 Lea, 418; *Powell v. Hankey*, 2 P. Wms. 82; *Ridout v. Lewis*, 1 Atk. 269; *Roach v. Bennett*, 24 Miss.

98; *Logan v. Hall*, 19 Iowa, 491; *Hamill's Appeal*, 88 Pa. St. 363.

³ *Lishey v. Lishey*, *supra*; *Caton v. Rideout*, 1 Macn. & G. 599.

⁴ *Roach v. Bennett*, *supra*.

⁵ *Morris v. Allen*, 14 N. J. Eq. 44; *Miller v. Craig*, 6 Beav. 433.

⁶ *Tirrell v. Jones*, 39 Cal. 655; *Day v. Lockwood*, 24 Conn. 185, 198; *Sanford v. Barney*, 50 Hun, 108; *Tutt v. Land*, 50 Ga. 350; *Desha v. Smith*, 20 Ala. 747. Compare *Reynolds v. Mardis*, 17 id. 32.

Monthly balances in partnership transactions do not fairly represent new principal, and interest on them is not compoundable. *Wells v. Babcock*, 56 Mich. 276.

erable on the deficiency on a final accounting.¹ An advance by a partner to the firm is not treated in England as an increase of his capital, but rather as a loan on which interest ought to be paid, and by usage it is payable on money *bona fide* advanced and used for partnership purposes, the advance being made with the knowledge of the other partners.² But in the absence of usage or contract interest is not allowed on advances.³ The rule which applies to unliquidated demands governs in the case of partnership accounts; and ordinarily interest will not be allowed on the latter until a balance has been struck;⁴ if there has been no unreasonable delay in arriving at a settlement.⁵ And if there is uncertainty as to the state of the accounts interest will not be allowed anterior to the institution of the action.⁶ Interest has been allowed where a partner had withdrawn largely more than he was entitled to do from the firm treasury and used the money for personal purposes, harm resulting to the other partners;⁷ where a partner, after the dissolution of the firm, had retained money due his copartners.⁸ Where by mistake a sum largely in excess of that due had been paid a partner as his share of the firm profits, interest was allowed from the time the money was received.⁹

§ 343. Interest on stockholders' statutory liability. The liability of the stockholders of an insolvent national bank under the federal statutes is for the contracts, debts and engagements of the bank to its creditors. Hence the former

¹ Clark v. Warden, 10 Neb. 87. The contrary is assumed, without discussion, in Krapp v. Aderholt, 42 Kan. 247.

² 1 Lindley's Part. *390 (2d Am. ed.); *Ex parte Chippendale*, 4 De G., M. & G. 36; *Denton v. Rodie*, 3 Camp. 491; *Baker v. Mayo*, 129 Mass. 517; *Berry v. Folkes*, 60 Miss. 576.

³ *Godfrey v. White*, 48 Mich. 171; *Sweeney v. Neely*, 53 id. 421; *Prentice v. Elliott*, 72 Ga. 154.

A partner cannot claim interest on money in his possession which was produced by the business of the firm as an advance thereof by him. *Wells v. Babcock*, 56 Mich. 276.

⁴ *Gilman v. Vaughan*, 44 Wis. 646; *Gage v. Parmalle*, 87 Ill. 330; *McKay v. Overton*, 65 Texas, 82; *Sweeney v. Neely*, 53 Mich. 421.

A claim for loss of capital stock does not bear interest until a balance has been found. *Juillard v. Orens' Ex'rs*, 70 Md. 465.

⁵ *Brownell v. Steere*, 128 Ill. 209.

⁶ *Carroll v. Little*, 73 Wis. 52.

⁷ *Masonic Savings Bank v. Bangs' Adm'r*, 10 S. W. Rep. 633; — Ky. —.

⁸ *Wells v. Babcock*, 56 Mich. 276.

⁹ *Atherton v. Cochran*, 9 S. W. Rep. 519; — Ky. —.

are liable for interest to the same extent the bank would have been if it remained solvent, not, however, to exceed the maximum fixed by law,¹ from the time the comptroller of the currency makes his order determining their liability,² and in the case of book accounts in favor of depositors, from the time of the suspension of the bank.³ In Illinois, South Carolina and Maine stockholders are not liable for interest on the amount for which they are responsible to the creditors of the corporation under the statutes.⁴ In New York and Ohio such liability exists from the time suit was begun.⁵ In Wisconsin, Michigan, Missouri and Kansas stockholders are liable for interest on judgments against corporations.⁶

[608] § 344. **Allowed on annuities and legacies.** Annuities, except those which are testamentary, are not very common in this country. In England they do not bear interest;⁷ nor do liquidated demands generally after default, except on commercial securities.⁸ But on the principles which govern on this side of the Atlantic, after a sum is due (which is not interest) and ought to be paid, it bears interest.⁹ There is no reason why an annuity should be an exception.¹⁰ Where a debt is payable by instalments, each instalment will bear interest after it is due.¹¹ The rule as to legacies is that they bear interest after they are payable, which is usually, by legal

¹ *Richmond v. Irons*, 121 U. S. 26, 64.

² *Casey v. Galli*, 94 U. S. 678.

³ *Richmond v. Irons*, *supra*.

⁴ *Munger v. Jacobson*, 99 Ill. 349; *Sackett's Harbor Bank v. Blake*, 3 Rich. Eq. 225; *Cole v. Butler*, 43 Me. 401.

⁵ *Handy v. Draper*, 89 N. Y. 334; *Burr v. Wilcox*, 22 id. 551; *Mason v. Alexander*, 44 Ohio St. 318, following *Wehrman v. Reakirt*, 1 Cin. Super. Ct. 230. See *Wheeler v. Millar*, 90 N. Y. 353.

⁶ *Cleveland v. Burnham*, 64 Wis. 347; *Grand Rapids Savings Bank v. Warren*, 52 Mich. 557; *Shickle v. Watts*, 94 Mo. 410; *Grund v. Tucker*, 5 Kan. 70.

⁷ *Earl of Mansfield v. Ogle*, 4 De

Gex & J. 41; *Booth v. Coulton*, L. R. 5 Ch. 684; *Blogg v. Johnson*, L. R. 2 Ch. 225. See *Buson v. Elliott*, 1 Del. Ch. 368.

⁸ *Higgins v. Sargent*, 2 B. & C. 348.

⁹ *Dobbins v. Higgins*, 78 Ill. 440.

It may be claimed on monthly wages on each sum as it becomes due. *Butler v. Kirby*, 53 Wis. 188.

¹⁰ *Brotzman's Appeal*, 133 Pa. St. 478.

"Where the bequest is of an annuity, in the absence of any direction to the contrary, the annuity will commence from the death of the testator, and the first payment become due at the end of the first year from that event." *Welsh v. Brown*, 43 N. J. L. 37.

¹¹ *Knettle v. Crouse*, 6 Watts, 123.

intendment, at the expiration of one year from the testator's death,¹ unless the will discloses a contrary intention.² A legacy given in satisfaction of a debt carries interest from the time of the testator's death.³ In Vermont legacies, unless otherwise controlled by the will, draw interest after one year from its probate.⁴ There is a difference of opinion concerning the effect of a statute which provides that if no time is fixed in the will for the payment of legacies the executor or administrator shall have one year after its probate to pay and satisfy them. Some courts hold or say that inasmuch as a legacy does not draw interest before it becomes legally payable, the effect of the statute is to postpone the right to interest for one year after the will has been established, no direction being given in it.⁵ The surrogates' courts of New York regard the expressions of the court of appeals in the cases referred to as *dicta*, and hold that the interest runs in favor of a legatee one year after the death of the testator.⁶ This is in accord with

¹ *Bonham v. Bonham*, 88 N. J. Eq. 419; *Dustan v. Carter*, 3 Dema. (N. Y.) 149; *Bliss v. Olmstead*, id. 273; *Vernet v. Williams*, id. 849; *Bartlett v. Slater*, 53 Conn. 102; *Wood v. Hammond*, 16 R. I. 98; *Chambers' Guardian v. Chambers*, 87 Ky. 144; *Sevearingham v. State*, 4 Har. & McHen. 38; *Lyons v. Magagno's Adm'r*, 7 Gratt. 877; *Shobes v. Carr*, 8 Munf. 10; *King v. Diehl*, 9 S. & R. 409; *Page's Appeal*, 71 Pa. St. 402; *Hoagland v. Ex'r of Schenck*, 16 N. J. L. 370; *Bradner v. Faulkner*, 12 N. Y. 472; *Darden v. Orgain*, 5 Cold. 211.

In *Valentine v. Ruste*, 93 Ill. 585, it was held that where legacies or bequests in a will are by their terms to be paid when the testator's estate is settled, the legatees cannot demand the same until the happening of the contingency. If the executors should fail to settle the estate when by law they ought to do so, the county court can compel them to make such settlement, and then the legacies might be demanded; and the legatees will not be entitled to interest upon the lega-

cies before the principal is properly demandable.

A contingent general legacy does not bear interest until the precedent event occurs. *Cannon v. Apperson*, 14 Lea (Tenn.), 558.

² "On bequest of the residue of the testator's estate, or of some aliquot part or portion thereof, in trust to pay the interest or income to a legatee for life with the gift of the principal over at his death, the interest or income payable to the tenant for life will be computed from the testator's death." *Welsh v. Brown*, 43 N. J. L. 87; *Marsh v. Taylor*, 43 N. J. Eq. 1; *Williamson v. Williamson*, 6 Paige, 804; *Lovering v. Minot*, 9 Cush. 151; *Couch v. Eastman*, 29 W. Va. 784; *Townsend's Appeal*, 106 Pa. St. 268.

³ *Clark v. Sewell*, 8 Atk. 99.

⁴ *Bradford Academy v. Grover*, 55 Vt. 462; *Vermont State Baptist Convention v. Ladd*, 58 id. 95.

⁵ *Bradner v. Faulkner*, 12 N. Y. 364; *Thorn v. Garner*, 118 id. 198.

⁶ See *Matter of Gibson*, 24 Abb. N.

the view in New Jersey.¹ Where the legacy is to a child of the testator or one to whom he stood *in loco parentis*, and for whom no other provision is made in the will, interest thereon is given from the death of the testator on the presumption that such was his intention.² The date from which and the rate at which a legacy bears interest is to be determined by the [609] law of the testator's domicile.³ After a legacy is due it bears interest although the fund liable therefor may not have come to the executor's hands within that time, and notwithstanding the delay was occasioned by something in the will;⁴ or the will was not probated at the expiration of a year from the testator's death;⁵ or the executors have not been able to realize from the estate because of unjustifiable proceedings taken by the legatees.⁶ If the legacy produces interest the legatee is entitled to it though the amount is realized con-

C. 45; *Lawrence v. Embree*, 3 Bradf. 354; *Wallace's Estate*, 5 N. Y. Suppl't, 31; *Campbell v. Cowdrey*, 31 How. Pr. 172; *Dustan v. Carter*, 3 Dema. 149; *Carr v. Bennett*, id. 433, 457.

¹ *Davison v. Rake*, 45 N. J. Eq. 767.

² *Keating v. Bruns*, 3 Dema. (N. Y.) 233; *Brown v. Knapp*, 79 N. Y. 136; *Thorn v. Garner*, 42 Hun, 507; *Flinn v. Flinn*, 4 Del. Ch. 44; *King v. Talbot*, 50 Barb. 453; *Martin v. Martin*, 6 Watts, 67; *Magoffin v. Patton*, 4 Rawle, 113; *Heath v. Perry*, 3 Atk. 101; *Harvey v. Harvey*, 2 P. Wms. 21; *Green v. Belchin*, 1 Atk. 506. See *Cooke v. Meeker*, 42 Barb. 533; *Inclendon v. Northcote*, 3 Atk. 438; *Hearle v. Greenbank*, id. 716; *Coleman v. Seymour*, 1 Ves. Sr. 210; *Beckford v. Tobin*, id. 308; *Carey v. Askew*, 2 Bro. Ch. 58.

Where a sum is left in trust, with direction that the interest and income be applied to the use of a person, such person is entitled to interest from the death of the testator. *Cooke v. Meeker*, 36 N. Y. 15.

The rule is not limited to infant children. *Thorne v. Garner*, *supra*.

It does not extend to minor grandchildren nor to an adult child (*Brinkerhoff v. Merselis*, 24 N. J. L. 682; *Howard v. Francis*, 30 N. J. Eq. 444); unless the testator stood *in loco parentis* to the grandchild. *Marsh v. Taylor*, 43 N. J. Eq. 1. The fact that an infant legatee has extraneous means of support does not affect its right to interest from the testator's death. *Neder v. Zimmer*, 6 Dema. (N. Y.) 180.

³ *Welch v. Adams*, 9 L. R. A. 244; 152 Mass. 74; *Graveley v. Graveley*, 25 S. C. 1.

⁴ *Davis v. Rake*, 44 N. J. Eq. 506; *Kent v. Dunham*, 106 Mass. 586; *Huston's Appeal*, 9 Watts, 472; *Hoagland v. Ex'rs of Schenck*, 16 N. J. L. 370; *Martin v. Martin*, 6 Watts, 67; *Addams v. Heffernan*, 9 id. 529. See *Turrentine v. Perkins*, 46 Ala. 631; *Magoffin v. Patton*, 4 Rawle, 113; *Brownlee v. Steel's Ex'rs*, Walk. (Miss.) 179.

⁵ *Ogden v. Pattee*, 149 Mass. 82; *Lawrence v. Embree*, 3 Bradf. (N. Y.) 364.

⁶ *Kent v. Dunham*, 106 Mass. 586.

trary to the testator's direction.¹ The interest is payable at the legal rate though it is in excess of that produced by the fund.² If a legacy consists of sums directed to be paid annually it seems that interest on arrears is not allowed, unless under special circumstances.³ A testamentary annuity to the widow in lieu of dower will be considered as intended for support and looked upon with favor, and interest will be allowed while in arrears;⁴ but not if payable in agricultural products at a particular place, in the absence of proof of a demand at that place.⁵ Where, in execution of an ante-nuptial agreement that the wife should have one-third of all the real and personal property her husband should die seized and possessed of during her life and widowhood, in lieu of her dower and distributive share, the court of chancery, with her consent, decreed a sale of lands of the deceased husband free from all claims of the widow, and prescribed as part of the terms of sale that one-third of the price should be payable on the termination of her life or widowhood, but the interest thereon should be annually paid to her, it was considered that the same rule should apply as to annuities granted for maintenance, and that interest should be allowed on the arrears of interest.⁶

¹ Whitworth v. Ewing, 15 Lea (Tenn.), 595; Stephenson v. Harrison, 3 Head (Tenn.), 729; Stroud v. Gwyer, 28 Beav. 130. See Dimes v. Scott, 4 Russ. 195.

² Welch v. Adams, 9 L. R. A. 244: 152 Mass. 74; Ogden v. Pattee, 149 Mass. 82; Loring v. Woodward, 41 N. H. 381; Kent v. Dunham, 106 Mass. 586.

³ Grant v. Edwards, 92 N. C. 447; Isenhardt v. Brown, 2 Edw. 341; Adams v. Adams, 10 Leigh, 527.

A legatee is not bound, in the absence of an order of court, to accept payment of his legacy in instalments. Welch v. Adams, 152 Mass. 74; 9 L. R. A. 244.

⁴ Waples v. Waples, 1 Harr. (Del.) 394; Houston v. Jamison, 4 id. 330.

If a widow accept the provisions

made for her by will in lieu of dower when she might have rejected them she cannot claim the benefit of the rule which regards her as a purchaser for value, and must accept the interest on her legacy subject to the general rule; interest on the deferred interest will not be allowed. Welch v. Adams, 152 Mass. 74; 9 L. R. A. 244.

⁵ Phillips v. Williams, 5 Gratt. 259.

⁶ Turrentine v. Perkins, 46 Ala. 631; Beavers v. Smith, 11 id. 32; Newman v. Auling, 3 Atk. 579. See Addams v. Heffernan, 9 Watts, 529; Reed v. Reed, 1 W. & S. 235; Smyser v. Smyser, 3 id. 437; Stewart v. Martin, 2 Watts, 200; Knettle v. Crouse, 6 id. 123. See, also, Woodward v. Woodward, 2 Rich. Eq. 23; Gill's Appeal, 2 Pa. St. 221.

§ 345. **Interest on advancements.** Because property or money advanced to a legatee or distributee belongs to him, the general rule is, in the absence of anything to the contrary in the will, that he is not chargeable with interest on it during the life-time of the ancestor,¹ though the amount was originally an indebtedness to him and remained such until he made his will.² In Virginia if there is any liability for interest it does not arise until the estate is ready for final distribution.³ In Pennsylvania interest will be charged from one year after the testator's death;⁴ but in Tennessee it is chargeable from the time of death,⁵ although receipts for the amount provide for its computation from an earlier period.⁶

§ 346. **On money due on policy of insurance.** An illustration of the principle that all moneys certain in amount and time of payment bear interest after they become due is afforded by the rule applied in actions on policies of insurance which contain an agreement to pay at a certain time after loss. Interest is allowed after that time expires until payment is made.⁷ The time fixed by the policy may be waived by the conduct of the insurer, and the money become due before that period expires. It was held to be waived where on proof of loss and demand of payment at an earlier day the insurer, admitting the loss, offered a less sum and refused to pay the full amount.⁸ If the policy provides for the payment of the loss after its adjustment or after proofs of it have been made, in the former case there will be no liability for interest anterior to judicial demand if reasonable efforts are made by the insurer to effect an adjustment;⁹ and so in the latter case if proper proofs are not furnished.¹⁰ If the contract contemplates that a loss is to be paid within a specified

¹ Cabell v. Puryear, 27 Gratt. 902; Co., 73 N. Y. 141; Queen Ins. Co. v. Barrett v. Morris, 33 id. 273; Davis Jefferson Ice Co., 64 Texas, 578; v. Hughes, 86 Va. 909. Field v. Insurance Co. of North

² Patterson's Appeal, 128 Pa. St. 269.

³ Cases cited first to this section.

⁴ Patterson's Appeal, *supra*.

⁵ Johnson v. Patterson, 13 Lea, 626; Williams v. Williams, 15 id. 438; Steele v. Frierson, 85 Tenn. 430.

⁶ Roberson v. Nail, 85 Tenn. 124.

⁷ Home Ins. Co. v. Adler, 71 Ala. 516; Hastings v. Westchester F. Ins.

America, 6 Biss. 121; Knickerbocker Ins. Co. v. Gould, 80 Ill. 388; Peoria M. & F. Ins. Co. v. Lewis, 18 Ill. 553.

⁸ Baltimore F. Ins. Co. v. Loney, 20 Md. 20.

⁹ Gettwerth v. Teutonia Ins. Co., 29 La. Ann. 30.

¹⁰ Trager v. Louisiana Equitable L. Ins. Co., 81 La. Ann. 235.

time if the funds on hand are sufficient, and otherwise that the company shall make an assessment, in case of the insufficiency of the funds, and there is no laches in making the assessment, interest cannot be recovered.¹ If the insurance is payable to the person whose life is insured if he survives a certain day, interest is recoverable only from the time demand is made. If there is also a provision in the policy by which it is payable ninety days after notice of the death of the insured, this clause has no application to the first contingency, and interest is due only as damages.² The insurer is not liable for interest according to the terms of its policy so long as the person entitled to receive the amount due neglects to clothe himself with the legal right to demand and receive it.³ Where the sum sued for in any case is certain and liquidated, it does not cease to be such for the purpose of the allowance of interest, though the jury make an arbitrary deduction therefrom.⁴

§ 347. **Not allowed on unliquidated demands.** It is a general principle that interest is not allowed on unliquidated damages or demands. The term unliquidated applies to the damages recoverable for assault and battery or slander, and also to those recoverable on a *quantum meruit* for goods sold and delivered, or services rendered. Interest is denied when the demand is unliquidated, for the reason that the person liable does not know what sum he owed, and therefore cannot be in default for not paying. Those damages which are wholly at large, depending on no legal standard, and which are referred to the discretion of a jury, can never be made certain except by accord or verdict. There can be no default in respect to their payment, and they are never enhanced by interest.⁵ But demands based upon market values susceptible of easy proof, though unliquidated until the particular subject of the demand has been made definite and certain by agreement or proof, are not so uncertain that no default can be predicated of any delay in making payment. A demand is

¹ Commonwealth v. Massachusetts Mut. F. Ins. Co., 119 Mass. 45.

ing Crossley v. City of Glasgow L. Ass. Co., 4 id. 421.

² Pierce v. Charter Oak L. Ins. Co., 138 Mass. 151.

⁴ Martin v. Silliman, 58 N. Y. 615.

³ Webster v. British Empire Mut. L. Ass. Co., 15 Ch. Div. 169, overrul-

⁵ Couburn v. Muskegon Booming Co., 72 Mich. 134; Mansfield v. New York C. & H. R. R. Co., 114 N. Y. 831.

unliquidated if one party alone cannot make it certain,¹—when it cannot be made certain by mere calculation; but the allowance of interest as damages is not dependent on this rigid test.

[611] In a leading New York case, decided in 1849, suit was brought for the value of rent long in arrear, payable in services and specific articles: “eighteen bushels of wheat, four fat hens, and one day’s service with carriage and horses,” were payable yearly as rent. It was an unliquidated demand, not payable in money, nor was a specified sum to be paid in any other way. But the time of payment was certain, and therefore the claim of interest clearly raised the question whether the uncertainty of amount alone relieved the lessee from liability for interest on the value, he having made default in paying in the particular mode provided for. Bronson, J., delivered the opinion in favor of such liability. He said: “It was decided in 1806, without assigning any reason for the judgment, that interest was not recoverable in such a case.² But since that time the supreme court has deliberately held, on three several occasions, including the present one, that interest is recoverable in such a case.³ The principle to be extracted from these decisions may be stated as follows: Whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which he has done him; and a just indemnity, though it may sometimes be more, can never be less than the specified amount of money, or the value of the property or services at the time they should have been paid or rendered, with interest from the time of the default until the obligation is discharged. And if the creditor is obliged to resort to the courts for redress, he ought in all cases to recover interest, in addition to the debt, by way of damages. It is true that on an agreement like the one under consideration the amount of the debt can only be ascertained by an inquiry concerning the value of the property and services. But the value can be

¹ Clark v. Dutton, 69 Ill. 521; Roberts v. Prior, 20 Ga. 561.

³ Lush v. Druse, 4 Wend. 313; Van Rensselaer v. Jones, 2 Barb. 643.

² Van Rensselaer v. Platner, 1 Johns. 276.

ascertained; and when that has been done the creditor, as a question of principle, is just as plainly entitled to interest after the default as he would be if the like sum had been payable in money. The English courts do not allow interest in such cases; and I feel some difficulty in saying that it can be allowed here without the aid of an act of the legislature [612] to authorize it. But the courts in this and other states have for many years been tending to the conclusion, which we have finally reached, that a man who breaks his contract to pay a debt, whether the payment was to be made in money or in anything else, shall indemnify the creditor so far as that can be done by adding interest to the amount of damage which was sustained on the day of the breach. The rule is just in itself; and as it is now nearly nineteen years since the point was decided in favor of the creditor and eight out of the nine judges of the supreme court have, at different times, concurred in that opinion, we think the question should be regarded as settled.”¹ The doctrine of this case has been adhered to in that state and often re-affirmed.² In other states there is a tendency at least to the same doctrine, and to some extent it is adopted.³

§ 348. **Same subject.** The question is the same, of course, so far as the uncertainty of amount affects it, when the demand is for services rendered, or for property sold and delivered. Such a case was decided in New York in 1867. The referee found that the defendant was indebted to the plaintiff's assignor, on a certain date, in a specified sum. The case shows that the indebtedness was for professional services. But the court remark: “It is not our province and we are not called upon to examine the evidence to ascertain how this indebted-

¹ Van Rensselaer v. Jewett, 2 N. Y. 135. In McMahon v. New York & E. R. Co., 20 id. 463, it is said of this case that the court went as far as it was reasonable to go. See Mansfield v. New York C. & H. R. R. Co., 114 id. 381.

² Adams v. Fort Plain Bank, 86 N. Y. 255; McCormick v. Pennsylvania C. R. Co., 49 id. 803; Mygatt v. Wilcox, 45 id. 406; Dana v. Fied-

ler, 13 id. 40; McMahon v. New York & E. R. Co., 20 id. 463; McCollum v. Seward, 62 id. 316; Pipperly v. Stewart, 50 Barb. 62; Church v. Kidd, 6 Hun, 475.

³ Bartee v. Andrews, 18 Ga. 407; Vaughan v. Howe, 20 Wis. 523; Gammon v. Abrams, 53 id. 823; Ryan v. Baldrick, 3 McCord, 294; Driggers v. Bell, 94 Ill. 223.

ness arose. It is found as a fact that such indebtedness specifically existed in a certain ascertained amount, and consequently it became presently due and payable, and an action could then have been maintained for its recovery, and it follows that interest was recoverable on the amount from the day the same became due.”¹ Where the rule of damages is [613] the difference between the contract price and the market value, as in case of failure to deliver goods according to contract, interest is allowed on that measure from the date of the breach.² Johnson, J., insisted on the duty to pay interest in this forcible language: “The party is entitled on the day of performance to the property agreed to be delivered; if it is not delivered, the law gives as the measure of compensation then due the difference between the contract and market prices. If he is not also entitled to interest from that time, as a matter of law, this contradictory result follows: that while an indemnity is professedly given, the law adopts such a mode of ascertaining its amount that the longer a party is delayed in obtaining it the greater shall its inadequacy become. It is, however, conceded to be law that in these cases the jury may give interest by way of damages in their discretion. Now, in all cases, unless this be an exception, the measure of damages in an action upon a contract relating to money or property is a question of law, and does not at all rest in the discretion of the jury. If the giving or refusing interest rests in discretion, the law, to be consistent, should furnish some legitimate means of influencing its exercise by evidence; as by showing that the party in fault has failed to perform, either wilfully or by mere accident, and without any moral misconduct. All such considerations are constantly excluded from a jury; and they are properly told that in such an action their duty is to inquire whether a breach of the contract has happened, not what motives induced the breach. That by law a party is to have the difference between the contract price and the market price, in order that he may be indemnified, and because the rule affords the measure of his injury when it occurred; that he may not, as a matter of law,

¹ *Adams v. Fort Plain Bank*, 36 N. Y. 255.

² *Driggers v. Bell*, 94 Ill. 223; *Dana v. Fiedler*, 12 N. Y. 40; *Plumb v. Campbell*, 129 Ill. 101.

recover interest which is necessary to a complete indemnity; that nevertheless the jury may, in their discretion, give him a complete indemnity, by including the amount of interest in their estimate of his damages; but that he may not give any evidence to influence their discretion, presents a series of propositions, some of which cannot be law. The case of *Van Rensselaer v. Jewett*¹ establishes a principle broad enough to include this case, and has freed the law from this as [614] well as other inconsistencies in which it was supposed to have become involved. The right to interest in actions upon contract depends not upon discretion, but upon legal right; and in actions like the present, interest is as much a part of the indemnity to which the party is entitled as the difference between the market value and the contract price.”²

Nor is it an objection to the allowance of interest on the contract price of property sold, not paid when due, that there is a dispute between the parties as to the quantity and quality.³ In actions between vendor and purchaser for failure to fulfill the contract, or for breach of warranty—where the measure of recovery is the difference between market price and contract price, or the market price of a warranted property and its actual value in a state or quality inferior to that which was warranted,—interest is to be added to the damages from the time of the breach.⁴ So where the action is on warranty of title.⁵ Money is due immediately, and carries interest from the date of the transaction, where there is a purchase of goods or other things for cash on delivery, or without any

¹ 2 N. Y. 141.

² In *Dana v. Fiedler*, 12 N. Y. 40, 50.

³ *Vaughn v. Howe*, 20 Wis. 523. See *Gammon v. Abrams*, 53 Wis. 323.

⁴ *Clark v. Dales*, 20 Barb. 42; *Hamilton v. Ganyard*, 84 id. 204; *Fishell v. Winans*, 88 id. 228; *Dana v. Fiedler*, 12 N. Y. 40; *Badgett v. Broughton*, 1 Ga. 591; *Enders v. Board Public Works*, 1 Gratt. 372; *Blackwood v. Leman*, Harp. 148; *Bicknall v. Watterman*, 5 R. L. 43; *Merryman v. Criddle*, 4 Munf. 542; *McKay v. Lane*, 5 Fla. 268; *Wolfe v. Sharpe*, 10 Rich. 60; *Buford v. Gould*, 35 Ala. 265;

Marshall v. Wood, 16 id. 806; *Mayo v. Purcell*, 3 Munf. 243; *Sohier v. Williams*, 2 Curtis, 195. See *Curtis v. Innerarity*, 6 How. (U. S.) 146.

After demand made interest may be recovered for the breach of a contract to deliver goods, the price and quantity being agreed upon. *Thomas v. Wells*, 140 Mass. 517.

⁵ *Rowland v. Shelton*, 25 Ala. 217; *Goss v. Dysant*, 31 Tex. 186; *Critten-den v. Posy*, 1 Head, 311; *Eggleston v. Macauley*, 1 McCord L. 237. But see *Ancrum v. Slone*, 2 Speers, 594.

other time being agreed on.¹ If a sale is made on a definite term of credit agreed on or implied from custom, interest is chargeable from the expiration of that term of credit.² In [615] Wisconsin it was held that where a party's right to compensation under a contract is doubtful, is contested upon reasonable grounds, and a suit is required to determine the amount, interest will not be allowed for any time preceding such determination.³

§ 349. **Interest on accounts.** On accounts which were not due when made, nor by the expiration of any term of credit, interest is allowed after demand *in pais* or by suit.⁴ A demand made by rendering the account informs the debtor what is claimed to be due from him and gives him the means of examining it in detail; and if no objection is made it becomes a stated account—from that time a liquidated debt.⁵

¹Wyandotte, etc. Gas Co. v. Case v. Hotchkiss, 3 Keyes, 334; Schliefer, 22 Kan. 468; Foote v. S. C., 3 Abb. (N. S.) 381; 1 Abb. Ct. Blanchard, 6 Allen, 221; Pollock v. of App. 324; Mygatt v. Wilcox, 45 Ehle, 2 E. D. Smith, 541; Salter N. Y. 306; White v. Miller, 78 id. v. Parkhurst, 2 Daly, 240; Clark v. 393; McIlvaine v. Wilkins, 12 N. H. Dalton, 69 Ill. 521; Waring v. Henry, 474; Barnard v. Bartholomew, 22 30 Ala. 721; Smith v. Shaffer, 50 Pick. 291; Wheeler v. Haskins, 41 Me. Md. 132; Atlantic Phosphate Co. v. 432; Hall v. Huckins, id. 574; Goff v. Rehoboth, 2 Cush. 475; Wood v. Hickox, 2 Wend. 501; Brainerd v. Champlain T. Co., 29 Vt. 154; Gam- mel v. Skinner, 2 Gall. 45; Van Hulan v. Kanouse, 13 Mich. 303; Beardslee v. Horton, 3 id. 560; Mc- Cullum v. Seward, 62 N. Y. 316; Harrison v. Conlan, 10 Allen, 85; Adams Exp. Co. v. Milton, 11 Bush, 49; Palmer v. Stockwell, 9 Gray, 237; Hunt v. Nevers, 15 Pick. 505; Barrow v. Reab, 9 How. (U. S.) 366; Enders v. Board of Public Works, 1 Gratt. 389; Ruckman v. Pitcher, 20 N. Y. 9; McFadden v. Crawford, 39 Cal. 662; Young v. Dickey, 63 Ind. 31; Rend v. Boord, 75 Ind. 307; Marsteller v. Crapp, 62 Ind. 359.

²Esterly v. Cole, 3 N. Y. 502; Kennedy v. Barnwell, 7 Rich. 124; Howard v. Farley, 3 Robt. 308; National Lancers v. Lovering, 80 N. H. 511; Moore v. Patton, 2 Port. 451; Raymond v. Isham, 8 Vt. 258; Dickinson v. Gould, 2 Tyler, 32; Leyde v. Martin, 16 Minn. 38; Foote v. Blanchard, 6 Allen, 221; Wiltburger v. Randolph, Walk. (Miss.), 20; Wyandotte, etc. Gas Co. v. Schliefer, 22 Kan. 468.

³Shipman v. State, 44 Wis. 458; Tucker v. Grover, 60 id. 240. See Tyson v. Milwaukee, 50 id. 78.

⁴Ledyard v. Bull, 119 N. Y. 62; De Carriarti v. Blanco, 121 id. 230; Heidenheimer v. Ellis, 67 Texas, 426;

⁵Henderson Cotton Manuf. Co. v. Lowell Machine Shops, 56 Ky. 668, quoting the text; Walden v. Sherburne, 15 Johns. 409; Liotard v.

If a bill is presented and the debtor admits his indebtedness for the items thereof, subject to modification and correction as to the sum charged, interest runs from that time on the items not subsequently objected to, and on the others from the commencement of the action.¹ The accounts of a public officer are liquidated by being submitted to the authorities who have power to pass upon and approve them.² The denial of interest on accounts rests more on the ground that there is a running credit than because the demand is uncertain and unliquidated.³ This latter objection may exist in particular cases; but accounts are not ordinarily unliquidated demands in the sense which prevents the allowance of interest. A demand is not to be assumed to be unliquidated and uncertain merely because it is in the form of an account. A running account implies an indefinite credit, and a [616] demand is necessary to place the debtor in default. Interest is properly due and recoverable on accounts when the items are not controverted nor unliquidated, and where the circumstances are such that the debtor is in default;—has unreasonably neglected to make payment.⁴ To put an account upon interest a demand is often necessary, but not on the ground of uncertainty. And after demand or commencement of suit accounts generally bear interest. The beginning of suit is a form of demand. Accounts are generally made up of items which represent money paid or advanced, goods sold and delivered or services rendered on request. They are, severally, demands on which interest may be claimed, though the price has not been fixed by agreement, and must be established by evidence.⁵

Graves, 8 Cal. 226; Elliott v. Minott, 2 McCord, 125; Beardslee v. Horton, 3 Mich. 560; Van Huse v. Kanouse, 13 id. 303; Underhill v. Gaff, 48 Ill. 198; Richard v. Parrett's Heirs, 7 B. Mon. 379, 883; Barnard v. Bartholomew, 22 Pick. 291; Mygatt v. Wilcox, 45 N. Y. 306; Case v. Hitchcock, 3 Keyes, 834; Martin v. Silliman, 53 N. Y. 615. See Davis v. Smith, 48 Vt. 52.

Under the statute of Illinois interest is not recoverable on a verbal

contract unless there has been an unreasonable and vexatious delay of payment. West Chicago Alcohol Works v. Sheer, 104 Ill. 586.

¹ Hand v. Church, 39 Hun, 303.

² Stern v. People, 102 Ill. 540.

³ Ledyard v. Bull, 119 N. Y. 62; Cox v. McLaughlin, 76 Cal. 60; Rogers v. Yarnell, 51 Ark. 198.

⁴ See cases in note 4, ante, p. 728:

1 Am. Lead. Cas. 505; Kinard v. Glenn, 25 S. C. 590.

⁵ Id.; Smith v. Shaffer, 50 Md. 132.

An account is no more uncertain as to amount, in the aggregate, than are its constituent items; and the fact that they are charged in account can have no adverse effect in respect to interest; entering them in a book has even been emphasized as though it were a circumstance having some influence in favor of interest.¹ Where, however, the account or demand is for particulars, the value or amount of which cannot be measured or ascertained by reference to market rates, and are intrinsically uncertain, or the creditor's demand of payment is excessive or vague, a different case is presented.² Where a plaintiff merely asked the defendant for his pay for labor and materials, an account not being presented and never having been rendered, such request was not considered a demand which could aid any view of the case.³ But a demand of that kind would be sufficient where no information in respect to the amount of the claim need be imparted.⁴

[617] Where no such uncertainty appears, and the subject of the account and the circumstances connected with it indicate that the delay has not been owing to the debtor's ignorance of the amount he had to pay, interest has been allowed after a reasonable credit.⁵ Nor will the want of a demand be any objection to the allowance of interest, where the debtor has absented himself from the state without calling for his account, and thereby prevented any demand being made upon him. In such a case interest was held to be allowable from the time of the latest transaction or service.⁶ A demand of more than is due may well be treated as insufficient to put the debtor in default; for it not only does not tend to liquidate the claim, but actually indicates that the plaintiff pre-

¹ Marsh v. Fraser, 37 Wis. 149. Compare Schmidt v. Limehouse, 2 Bailey, 276; Dillon v. Dudley, 1 A. K. Marsh. 65; Hunt v. Nevers, 15 Pick. 500; Dodge v. Perkins, 9 id. 368; Cannon v. Beggs, 1 McCord, 370; Scudder v. Morris, 1 Penn. (N. J. L.) *419; Wells v. Abernethy, 5 Conn. 222; Breyfogle v. Beckley, 16 S. & R. 264; Nelson v. Cartmel's Adm'r, 6 Dana, 7; Ringo v. Biscoe, 13 Ark. 563.

² Cox v. McLaughlin, 76 Cal. 60. See Clark v. Clark, 46 Conn. 586.

³ Marsh v. Fraser, 37 Wis. 149.

The debtor's request for delay is the legal equivalent of presentment. Babcock v. Hubbard, 56 Conn. 284, 806.

⁴ Gammel v. Skinner, 2 Gall. 45.

⁵ Wells v. Brown, 2 Penn. (N. J. L.) 411; Wood v. Smith, 23 Vt. 706.

⁶ Graham v. Ex'r of Graham, 2 Keyes, 21; Graham v. Chrystal, 3 Abb. App. Dec. 263.

vents both adjustment and payment, or that the claim is intrinsically uncertain.¹

§ 350. **Same subject.** Claims sounding in damages, and accounts where there has been no especial diligence on the part of the creditor, or long and vexatious delay on the part of the debtor, in the absence of a demand, present cases where interest may not be recovered as matter of law, but may be allowed in the name of damages by a jury in their discretion.² The important inquiry is whether the debtor has done all the law required of him in the particular case. If he has, he is not liable for interest; if he has not, he must pay it as a [618] compensation for the non-performance of his contract.³

The cases are very numerous in which it has been held or declared in general terms that interest is not allowed on open running accounts.⁴ But they were those where there had been no demand of payment or other circumstances to impose the immediate duty to pay; or else the claim founded on the

¹ Hoagland v. Segur, 38 N. J. L. 230; Lusk v. Smith, 21 Wis. 28; Goff v. Rehoboth, 2 Cush. 475.

² Frazer v. Bigelow Carpet Co., 141 Mass. 126; Eckert v. Wilson, 12 S. & R. 393; Anonymous, 1 Johns. 815; Constable v. Colden, 2 id. 480; Hagg v. Augusta Ins. & B. Co., Taney, 159; Wiltburger v. Randolph, Walk. (Miss.) 20; Huston v. Crutcher, 31 Miss. 51; Willings v. Consequa, Pet. C. C. 172; Gilpins v. Consequa, id. 85; Dox v. Dey, 3 Wend. 356; Stark's Adm'r v. Price, 5 Dana, 140; Morford v. Ambrose, 3 J. J. Marsh. 688; Delaware Ins. Co. v. Delaunie, 3 Bin. 295; Amory v. McGregor, 15 Johns. 24; Kilderhouse v. Saveland, 1 Ill. App. 65; Chicago v. Allcock, 86 Ill. 334; Newson v. Douglass, 7 Harris & J. 417; Black's Ex'r v. Reybold, 3 Harr. (Del.) 528; Dotter v. Bennett, 5 Rich. 295; Feeter v. Heath, 11 Wend. 477; Tatum v. Mohr, 21 Ark. 350; Rogers v. West, 9 Ind. 403; Bare v. Hoffman, 79 Pa. St. 71; Richmond v. Dubuque, etc. R. Co., 33 Iowa, 422;

McNally v. Shobe, 22 Iowa, 49; Mote v. Chicago, etc. Ry. Co., 27 Iowa, 22; McNear v. McOmber, 18 Iowa, 12; Noe v. Hodges, 5 Humph. 103; Watkinson v. Laughton, 8 Johns. 213; Uhl-land v. Uhlant, 17 S. & R. 265; Graham v. Williams, 16 S. & R. 257. See Wood v. Smith, 23 Vt. 706; § 321, ante.

³ Dodge v. Perkins, 9 Pick. 368. This case is referred to in Foote v. Blanchard, 6 Allen, 221, as correctly stating the law as held in Massachusetts. See Evans v. Beckwith, 37 Vt. 285; also Scroggs v. Cunningham, 81 Ill. 110.

⁴ Polhemus v. Annin, Coxe (N. J. L.), 176; Tucker v. Ives, 6 Cow. 193; Davis v. Walker, 18 Mich. 25; Clement v. McConnell, 14 Ill. 154; Beardslee v. Horton, 3 Mich. 560; Marsh v. Fraser, 37 Wis. 149; Henry v. Risk, 1 Dall. 286; Williams v. Craig, id. 338; Blaney v. Hendrick, 3 Wils. 205; De Haviland v. Bowerbank, 1 Camp. 50; Smith v. Velie, 60 N. Y. 106.

account was exceptionally uncertain and unliquidated. When a promissory note or other instrument expresses no time when it is payable, it is due immediately, and bears interest from date;¹ and other commercial paper payable at day certain will bear interest after maturity.² Notes payable on demand will not bear interest until a demand is made; the creditor, so long as he refrains from making a demand, acquiesces in the debtor's retention of the money.³

[619] It has been held that by consenting to a delay of payment a creditor is precluded from recovering interest during such delay; so, if a person entitled to money resists the reception of it, or fails to qualify himself to receive it, he cannot recover interest.⁴ If a note be payable at a fixed time,

¹ Gaylord v. Van Loan, 15 Wend. 308; Lewis v. Lewis, Mart. & Hayw. 191; Purdy v. Phillips, 1 Duer, 169; Francis v. Castleman, 4 Bibb, 383; Sheehy v. Mandeville, 7 Cranch, 208; Farquhar v. Morris, 7 T. R. 124; Collier v. Gray, Overton, 110; Rogers v. Colt, 21 N. J. L. 19.

² Grantt v. MacKenzie, 3 Camp. 51; Thorndike v. United States, 2 Mason, 1; Hastings v. Wiswall, 8 Mass. 455.

Interest begins to run on a note payable on a certain day with interest after maturity although it is not suable until the expiration of the days of grace. Wheless v. Williams, 62 Miss. 369; Weems v. Ventress, 14 La. Ann. 267.

³ Hudson v. Daily, 13 Ala. 722; Vaughan v. Goode, Minor (Ala.), 417; Freeland v. Edwards, Mart. & Hayw. 207; Hurd v. Palmer, 21 U. C. Q. B. 49; Pate v. Gray, Hemp. 155; Patrick v. Clay, 4 Bibb, 246; Bartlett v. Marshall, 2 id. 469; Wallace v. Wallace, 8 Ill. App. 69; South v. Leary, Hardin, 518; Conyers v. Magrath, 4 McCord, 218; Trotter v. Grant, 2 Wend. 413; Wood v. Hickok, id. 501; McConnico v. Curzen, 2 Call, 301; Kerr v. Love, 1 Wash. (Va.) 217; Hadley v. Ayres, 12 Abb. (N. S.) 240; Wood v. Smith, 23 Vt. 706; Shemel v. Givan, 2 Blackf.

312; Delaware Ins. Co. v. De Launie, 3 Bin. 301; Crawford v. Willing, 4 Dall. 286; Oberinger v. Nichols, 6 Bin. 159; Newell v. Keith, 11 Vt. 214; Esterly v. Cole, 1 Barb. 235; S. C., 3 N. Y. 502; McKnight v. Dunlop, 4 Barb. 36; Hoagland v. Segur, 38 N. J. L. 230.

In Darlington v. Wooster, 9 Ohio St. 518, on a demand note where there was no proof of a demand, it was held that by force of the statute fixing the rate of interest, the plaintiff was entitled to recover interest from the date of the note. The statute provides "that all creditors shall be entitled to receive interest upon all moneys after the same shall become due either on bond, bill, promissory note, or other instrument of writing," etc. In Billingsby v. Billingsby, 24 Ala. 518, it was decided that where a note is payable on a specified day, and contains a stipulation that it shall not bear interest until another specified day after maturity, an action is maintainable after maturity notwithstanding the judgment will bear interest from its rendition even prior to the day specified for interest to begin. See Ijams v. Rice, 17 Ala. 404.

⁴ Craig v. Penick, 3 J. J. Marsh. 16;

as one day after date, and there be a subjoined agreement that suit shall not be brought so long as the maker is alive or the payee is satisfied that he is solvent, interest still runs from the time specified for payment.¹ Where an obligation was written payable in a certain month, it was held that interest did not commence until after the last day of that month.² Interest is not payable before the maturity of the principal unless so expressed. Where a note is for several annual instalments interest is payable on them as they become due, and not annually on the whole sum.³

§ 351. **When demand necessary.** Although money lent bears interest from the lending, it is only so when there is no agreement of the parties modifying the right. If a note for money lent be taken payable on demand it has no advantage on account of that consideration, and only bears interest like all other similar notes from the time of demand.⁴ Besides moneys due on running accounts and demand notes, there are various other kinds of what may be termed passive liabilities in respect to which the party liable cannot be placed in default, and be charged with interest, until the money is demanded, or notice of some fact is given.⁵ The question of notice has been much discussed, and is by no means settled. It is not necessary to enter into it in this connection.⁶ [620] In many cases, as in those of continuing guaranties, it is necessary to a complete cause of action; in others, to place the defendant in default so as to subject him to interest.⁷

Webster v. British Empire Mut. L. Ass. Co., 15 Ch. Div. 169.

¹ *Powell v. Guy*, 3 Dev. & Batt. 70; *Carter v. King*, 11 Rich. 125; *Rallman v. Baker*, 5 Humph. 406.

² *Pollard v. Yoder*, 2 A. K. Marsh. 264.

³ *Bawder v. Bawder*, 7 Barb. 560.

⁴ *Butler v. Austin*, 64 Cal. 3; *Schmidt v. Limehouse*, 2 Bailey, 276; *Pullen v. Chase*, 4 Ark. 120; *Walker v. Wills*, 5 Ark. 166.

⁵ Where no demand has been made upon a co-tenant in possession of the premises, either for their possession or the value of their use, he is not

liable for interest. *West v. Weyer*, 46 Ohio St. 66.

⁶ See 2 Am. Lead. Cas. 33 *et seq.*; *Vinal v. Richardson*, 13 Allen, 521; *Brown v. Curtis*, 2 N. Y. 225; *Bank of Newberry v. Sinclair*, 60 N. H. 100.

⁷ A statutory provision that no interest accruing on a claim after a debtor's death shall be allowed against his estate unless the claim is verified and payment demanded within one year of the personal representative may be waived by the latter if he alone will be affected by the waiver. *Croninger v. Marthen*, 83 Ky. 662. It is not waived by his

Bail are liable for interest on the judgment from the return of the *ca. sa.*, for they are fixed from that time and are bound to take notice of the proceedings of the court.¹ So, on a replevin bond, the sureties are liable for interest on the value of the property adjudged against the principal from the date of the judgment. The undertaking in these and similar cases is specific, depending only on contingencies determinable by the proceedings in the case, and of which the sureties are bound to inform themselves. But in an action for the benefit of a creditor of an insolvent estate brought upon an administrator's bond against a surety, it appeared that the creditor's claims had been allowed and the probate court had made a decree of distribution, and that the administrator died soon thereafter; it was held that interest should be added to the sum found due by the decree of distribution only from the time payment was demanded of the surety.²

It is a general rule that a party is not entitled to notice unless he has stipulated for it, or it is necessary by the very nature of the transaction, as where the act on which payment is to be made is indefinite, and when it occurs will be peculiarly in the knowledge of the payee.³ On a guaranty of payment of notes not exceeding in all a certain amount that should be discounted by a bank for another, it was held that the guarantor was liable to the amount of the guaranty, but not for interest until notice given that the principal had failed to pay.⁴ If the event on which the money is to be payable is one not particularly within the knowledge of the payee, as [621] a death⁵ or a marriage, even though the payee be a party to it,⁶ interest commences to run from the time when the event occurs. The general rule that the debtor must seek his creditor and tender the amount due does not apply when the debtor is a municipal or *quasi*-municipal corporation. In

making payment on an unverified claim. He may therefore insist on compliance with the statute as to the unpaid balance. *Jett's Ex'x v. Cockrill's Ex'x*, 85 Ky. 348. 442; *Hodges v. Holeman*, 2 Dana, 396.

¹ *Constable v. Colden*, 2 Johns. 480.

² *Heath v. Guy*, 10 Mass. 371; overruling *Payne v. McInteer*, 1 id. 69.

³ *Vyse v. Wakefield*, 6 M. & W.

⁴ *Washington Bank v. Shurtleff*, 4 Met. 30; *Henning's Case*, Cro. Jac. 432.

⁵ *Troubar v. Hunter*, 5 Rawle, 257; *Sumner v. Beebe*, 37 Vt. 562.

⁶ *Fletcher v. Pynsett*, Cro. Jac. 102.

such a case, if the creditor desires to secure interest on the obligation he holds, he must present it at the treasury of the debtor; failing to do so, he will not be entitled to interest after its maturity, at least if funds were provided to pay the principal and interest due.¹ While it is the general rule that a depositor cannot maintain an action to recover his deposit until he has made a formal demand, and that the bringing of an action is not a sufficient demand, yet, "if the bank by words or conduct denies the depositor's right to his balance, it becomes presently liable to an action without formal demand," and interest is recoverable as damages; as where it initiates proceedings which result in a transfer of the moneys of its depositors and thus puts it out of its own power to pay on their demand.²

§ 352. When allowed on money had and received. The action for money had and received is equitable; whether interest shall be recovered depends upon the particular circumstances. In some cases it is said the defendant ought to refund the principal merely; and in others that he ought *ex equo et bono* to refund it with interest; each case depends on the justice and equity arising out of its facts.³ If the defendant has derived an advantage from the money, or committed some wrong in obtaining or disposing of it or is in default in not paying it over, he will be charged with interest. Thus where the common property is rented out by one tenant in common, he is accountable to his co-tenants for their share of the rents received, and liable for interest upon his receipts of rent from the end of the rent year, because, having another's money and using it, he should pay interest on it.⁴ A person who bought a slave with notice of a better title was decreed to deliver him and pay profits; and interest was charged against him upon the hires actually received by him from other persons from the date of his receipts, but not upon the profits of such

¹ Friend v. Pittsburgh, 131 Pa. St. 305; South Park Com'rs v. Dunlevy, 91 Ill. 49. v. McRae, 1 Cheves, 61; Porter v. Nash, 1 Ala. 452.

² Chemical Nat. Bank v. Bailey, 12 Blatch. 480; Richmond v. Irons, 121 U. S. 27, 64. ⁴ Early v. Friend, 16 Gratt. 21; Jones v. Williams, 2 Call, 85; Dow v. Adams, 5 Munf. 21; Nuckit v. Lawrence, 5 Rand. 571.

³ Pease v. Barber, 8 Cal. 266; Marvin

slave while in his own possession without being hired, these being unliquidated and conjectural sums, which he was in no default in not paying.¹ If money is paid to the defendant under a mutual mistake, and fraud is not imputable to either party, interest cannot be recovered until after a demand.² So a party receiving from an administrator full payment of his debt against the estate on the supposition that it is solvent, [622] when afterwards sued to recover the excess above the ratable part, on the estate proving insolvent, it was held that interest was not recoverable until after a demand.³ But interest is recoverable from the time money was received if it was wrongfully obtained and fraudulently kept,⁴ unless the plaintiff has been guilty of laches in demanding it and the defendant has not derived advantage from its use.⁵ A mere depository, bailee, stockholder or trustee is not liable for interest by merely having the money in his hands; there must be a wrongful use made of it, refusal to pay on proper demand, or some neglect of duty by which the principal or interest was lost.⁶

¹ Baird v. Bland, 5 Munf. 492.

² Jacobs v. Adams, 1 Dall. 52; Simons v. Walter, 1 McCord, 97; Northrop v. Graves, 19 Conn. 548; Passenger Ry. Co. v. Philadelphia, 51 Pa. St. 465; Lynch v. Debiar, 3 Johns. Cas. 302; Sanders v. Scott, 68 Ind. 130; Georgia R. & B. Co. v. Smith, 83 Ga. 626.

³ Walker v. Bradley, 8 Pick. 261; Stevens v. Goodell, 3 Met. 84.

⁴ Manufacturers' Nat. Bank v. Perry, 144 Mass. 313; Atlantic Bank v. Harris, 118 id. 147.

⁵ United States v. Sanborn, 135 U. S. 271.

⁶ Lake v. Park, 19 N. J. L. 108; Ex parte Walsh, 26 Md. 495; Wade v. Wade's Adm'r, 1 Wash. C. C. 477; Huntley v. York Bank, 21 Pa. St. 291; Roach v. Jelks, 40 Miss. 754; Reynolds v. Walker, 29 id. 250; Fitzgerald v. Jones, 1 Munf. 150; Mickle v. Cross, 10 Md. 352; Ruckman v. Pitcher, 20 N. Y. 9; Union Bank v.

Solle, 2 Strobb. 390; Robinson v. Corn Exchange and Ins. Co., 1 Robt. 14; Jacot v. Emmett, 11 Paige, 142; Parsons v. Treadwell, 50 N. H. 356; Doxey v. Miller, 2 Ill. App. 30; Talbot v. National Bank, 129 Mass. 67; Wood v. Robbins, 11 id. 504; Bell v. Logan, 7 J. J. Marsh. 593; Vance v. Vance, 5 T. B. Mon. 521; Johnson v. Haggin, 6 J. J. Marsh. 581; Taylor v. Knox, 1 Dana, 391; Johnson v. Eicke, 12 N. J. L. 316; Knight v. Reese, 2 Dall. 182; Rayner v. Eryson, 29 Md. 473; Ingersoll v. Campbell, 46 Ala. 282; Dilliard v. Tomlinson, 1 Munf. 183; Karr's Adm'r v. Karr, 6 Dana, 5; Dexter v. Arnold, 3 Mason. 284; Candee v. Skinner, 40 Conn. 464; Stearns v. Brown, 1 Pick. 530; Wyman v. Hubbard, 13 Mass. 232; Newton v. Bennet, 1 Bro. Ch. 359; United States v. Curtis, 100 U. S. 119; United States v. Denvir, 106 id. 536; Scofield's Estate, 99 Ill. 513.

§ 353. When allowed against agents, trustees and officers. An agent who receives money for his principal in the transaction of the latter's business is not liable for interest on it before a demand is made, unless he has received special instructions to remit as fast as collected, or is in default in neglecting to render his accounts; and the same rule applies to an attorney who has collected money for his clients.¹ But where an agent, having received money, unreasonably neglects to inform his principal of it, he is liable to interest from the time when he ought to have given such information.²

Interest is allowed where the law by implication makes it the duty of the party to pay over money to the owner without any previous demand on his part.³ A trustee who has the custody and management of funds, and uses them [623] in his private business; realizes interest by lending; neglects to render the fund productive when it was his duty to do so; fails to account when called upon; or is otherwise guilty of neglect, evasion, fraud, or any wrong administration, will be charged with interest, and even compound interest, according to the culpability of his conduct.⁴

¹ *Bischoffsheim v. Baltzer*, 21 Fed. Rep. 531; *Porter v. Grimsley*, 98 N. C. 550; *Neal v. Freeman*, 85 id. 441; *Chase v. Union Stone Co.*, 11 Daly, 107; *Williams v. Storrs*, 6 Johns. Ch. 353; *Crane v. Dygert*, 4 Wend. 675; *Hauxhurst v. Hovey*, 26 Vt. 544; *Lever v. Lever*, 2 Hill's Ch. 158; *Roland v. Martindale*, 1 Bailey's Eq. 226.

When a financial agent or attorney mixes the money of his principal with his own by depositing it in his general bank account, and draws it out and uses it in his own business, it is presumed that he has gained a benefit, and on his failure to show how much he has derived from its use he is chargeable for interest. When he has interest-bearing securities in his possession which belong to his principal it is presumed that he received interest thereon; and unless he explains away the presump-

tion he will be charged therewith. *Blodgett's Estate v. Converse's Estate*, 60 Vt. 410.

² *Dodge v. Perkins*, 9 Pick. 368.

³ *Ibid.*; *Ellery v. Cunningham*, 1 Met. 112; *Bidell v. Janney*, 9 Ill. 193; *Nisbet v. Lawson*, 1 Ga. 275; *Bank of South Carolina v. Buire*, 3 Strobb. 439; *Anderson v. Georgia*, 2 Ga. 370; *Boyd v. Gilchrist*, 15 Ala. 849; *Harrison v. Long*, 4 Desaus. 111; *Hawkins v. Minor*, 5 Call, 118; *Kimbrel v. Glover*, 13 Rich. L. 191; *McRae v. Malloy*, 87 N. C. 196; *Winslow v. People*, 117 Ill. 152 (a demand need not be made upon a guardian for the money due his ward).

⁴ *Eppinger v. Canepa*, 20 Fla. 262; *Cannon v. Apperson*, 14 Lea (Tenn.), 553; *Grant v. Edwards*, 93 N. C. 488; *First Congregational Society v. Pelham*, 68 N. H. 566; *Aldridge v. McClelland*, 36 N. J. Eq. 288; *Jackson v. Shields*, 87 N. C. 473; *Wilson v.*

Interest is charged against trustees on the principle that all profits made from the employment of the trust funds belong to the beneficiary; and that he is entitled to be indemnified for the loss, through their neglect or fraudulent management, of the profit and increase which would have arisen from a diligent and judicious performance of the trust. If interest is lost by negligence of the trustee, he is charged with interest, either simple or compound, as may be required to compensate that loss, which may be greater or less according to the degree of the delinquency. If in violation of the trust he mingles the trust funds with his own and uses them in his business, he does so at his peril; and if he refuses or neglects to give an account of the profits made, or makes an evasive or unsatisfactory one, compound interest will be charged, with rests long or short, according to circumstances. The interest is thus compounded as a punishment for breach of trust and

Lineberger, 88 id. 416; Thurston, Matter of, 57 Wis. 104; Crosby v. Merriam, 81 Minn. 342; In re Sanderson, 74 Cal. 199; May v. Green, 75 Ala. 162; Riley v. McInlear's Estate, 61 Vt. 254; In re Hilliard, 88 Cal. 423; Morgan v. Fletcher, 56 Mich. 508; Brewer v. Ernest, 81 Ala. 435; Winslow v. People, 117 Ill. 152; In re Newcomb, 82 Fed. Rep. 826; Van Doren v. Van Doren, 45 N. J. Eq. 580; Filmore v. Reithman, 6 Colo. 120; Lomax v. Pendleton, 3 Call, 465; Voorhees v. Stoothoff, 11 N. J. L. 145; Jones v. Ward, 10 Yerg. 160; Amos v. Heatherly, 7 Dana, 48; Singleton's Heirs v. Singleton's Ex'r, 5 Dana, 97; Clay v. Hart, 7 Dana, 17; Nixon's Heirs v. Nixon's Adm'r, 8 id. 5; Hooper v. Winston, 24 Ill. 353; White's Heirs v. White's Adm'r, 3 Dana, 376; Miller v. Beverlys, 4 Hen. & Munf. 415; Quarles v. Quarles, 2 Munf. 321; English v. Harvey, 2 Rawle, 805; Callaghan v. Hall, 1 S. & R. 241; Yundt's Appeal, 18 Pa. St. 575; Witman & Geisinger's Appeal, 28 id. 376; Bronseman v. Frank, id. 475; Verner's Estate, 6 Watts, 250;

Robert's Appeal, 92 Pa. St. 407; Bruner's Appeal, 57 id. 46; Kerr v. Laird, 27 Miss. 544; Pearson v. Darrington, 32 Ala. 227; Thomas v. School, 9 Gill & J. 115; Estate of Isaacs, 80 Cal. 105; Jennison v. Hapgood, 10 Pick. 77.

Where an executor or administrator owes the estate, and is solvent and able to pay, the amount of the debt will be considered in law and equity as so much money in his hands; but if it is shown that he has been and is unable to pay, he will not be charged with the debt as cash. Harker v. Irick, 10 N. J. Eq. 272; Baucus v. Stover, 24 Hun, 109; United States v. Eggleston, 4 Sawyer, 199; Terhune v. Oldis, 44 N. J. Eq. 146. But the proof of inability to pay must be complete and satisfactory; and if it does not show that he could not pay interest he is chargeable with it. Terhune v. Oldis, *supra*. As to the liability of executors and administrators for interest under the statutes of Illinois, see Schofield's Estate, 99 Ill. 513.

as a substitute for the undisclosed profits.¹ A trustee is not chargeable with compound interest unless he receives [625] compound interest, or has been guilty of a gross abuse of his

¹Price v. Peterson, 38 Ark. 494; Barney v. Saunders, 16 How. (U. S.) 539.

In the Matter of Harland's Accounts, 5 Rawle, 328, Gibson, C. J., said: "It is a fundamental rule of equity that a trustee shall not make a profit of the fund for himself; and that substitution of interest for profits not ascertainable is but a modification of it. Such being the admitted basis of the rule, no colorable reason can be assigned why it should not be applied as well to an administrator who has used the trust moneys without having accounted for the profits, as to an executor or trustee bound by instructions or the nature of his office to invest for accumulation. If he trade with the moneys of the fund, he shall, like any other trustee, make good the loss or render the gain; and where it is indeterminate by reason of his refusal to account (always an index of fraud), the presumption is that it was at least equal to simple interest for the year, and that in his hands at the end of it, it became capital and made gain in its turn. If it were no greater in fact than simple interest for the period, he has no more to do, in order to get rid of the presumption of compound profits, than to show the truth by exhibiting the accounts. While he stands out the presumption that he made more than the sum obtained by the method of computation employed against him is an irresistible one, else the result would make it worth his while to disclose the truth. If he kept no accounts he cannot murmur at the adoption of that rule of computation which is most beneficial to the fund,

and but a reasonable penalty for his negligence. Interest is payable periodically; and the matter resolves itself into a question whether a trustee may superinduce a state of things that shall give him the benefit of its earnings in prejudice of the fund. Take the case of an executor plainly bound to accumulate, who deliberately disregards his testator's directions to reinvest, and becomes a borrower from the fund at simple interest; shall not the interest, as it falls due, be principal in his hands, as it would have been if he had received it of a stranger? In such a conjuncture, it is impossible to conjecture how the fund can be rightfully left in a less prosperous condition than it would have attained had he reinvested according to the terms of the will. To suffer a trustee to elude the conditions of the trust, by borrowing from it at simple interest, and using the proceeds for his own advantage, would offer an irresistible temptation to maladministration, by enabling him to benefit by his own wrong. That interest should not bear interest is not a dictate of justice; but the effect, in particular cases, of arbitrary enactment, founded, it is thought by some, on a questionable policy; and in a case distinctly out of the purview of the statute, where the statutory measure is arbitrarily but necessarily assumed for the computation of profits, there is no imaginable reason why the product should not be compounded where there is reason to believe that the profits were compounded; or why the party beneficially entitled should not be put in the condition that a conscientious

trust;¹ or, as is said in some cases, unless he has actually made such interest, or ought to have made it or is presumed

discharge of the trust would have put him. In a case of negligence or omission consistent with good faith, policy dictates a more indulgent course, such as was pursued in *Harvey v. English*, 2 Rawle, '808." *Schieffelin v. Stewart*, 1 Johns. Ch. 620; *Frost v. Winston*, 32 Mo. 489; *Ogden v. Larrabee*, 57 Ill. 389; *Raphael v. Boehm*, 11 Ves. 92; *Smith v. Lumpton*, 8 Dana, 73; *Torbet's Heirs v. McReynolds*, 4 Humph. 215.

¹ *Ames v. Scudder*, 11 Mo. App. 168; *S. C.*, 83 Mo. 189; *Thurston, Matter of*, 57 Wis. 104; *Alvis v. Oglesby*, 87 Tenn. 172; *Peelle v. State*, 118 Ind. 512; *Adams v. Lambard*, 80 Cal. 426; *Falkner v. Hendy*, id. 636; *Rayner v. Bryson*, 29 Md. 473; *Vaughan v. Bibb*, 46 Ala. 153; *Armstrong v. Campbell*, 3 Yerg. 201; *Turney v. Williams*, 7 Yerg. 172.

Bryant v. Craig, 12 Ala. 354, is an instructive case upon this subject. *Ormond, J.*, said: "As the guardian could not be guilty of negligence in not investing the money of his ward, unless the law required him to invest it, the first question which naturally presents itself is, what is the law upon that subject. Our statute law, though very full and particular as to the mode of appointing guardians, making settlements with them, etc., is silent upon this particular. It results, however, necessarily from the nature of the trust, that the estate of the ward should be profitably employed, as otherwise it would be consumed; and where it consists of money, this could only be by lending it out on good security. In England a trustee, whose duty it is to invest the money in his hands, is exonerated from liability by investing it in the public funds, which, as the court

would direct to be done on application, it will sanction if done without such application; and he will be exonerated from liability though the stock should fall in value. *Franklin v. Frith*, 3 Bro. Ch. 433; *Holmes v. Dung*, 3 Cox's Ch. 1. In *Smith v. Smith*, 4 Johns. Ch. 284, Chancellor Kent seems to think that personal security is insufficient, and that a trustee lending money must require adequate real security, or resort to public funds. Here are no public funds in which money may be safely and securely invested. At least there has been none until very recently, and it is not probable we shall be long burthened with a public debt. Personal security, no matter how good it was deemed at the time, would not be sufficient; and it may be added that, with us, real property is subject to such fluctuations that it is by no means an adequate security, and it may very well be doubted whether he would not be personally liable for any loan he may have made of the money without the sanction of the court, no matter what security he may have taken. Our statute appears to have intended to place the whole matter under the direction of the orphans' court, as it invests that court with power to direct a sale of the land of the ward, if the personal estate and the rents and profits of the realty were insufficient for his support; and it appears to follow necessarily that the same court would have the power to direct in what manner the money of the ward should be invested. It was the duty of the guardian, if he desires to exonerate himself from the payment of interest, to apply to the court for direction in the investment of the

to have made it.¹ The general rule is that an agent or trustee is chargeable with the legal rate of interest in the absence of proof that the profits he has made by his misconduct are in excess thereof.² A trustee invested funds in se-

funds, who would have examined the proposed security, and whose approbation would have exonerated the guardian from liability, if afterwards lost without his neglect. The guardian having omitted to make this application must pay interest on the funds in his hands, whether they have been profitable to him or not; and we next proceed to inquire whether this is such gross negligence as will authorize rests to be made in the account for the purpose of charging him compound interest. The general rule undoubtedly is, that where it is the duty of the trustee to invest the trust funds, and he fails to do so, he is chargeable only with simple interest. See cases already cited, and *Newton v. Bennet*, 1 Bro. Ch. 359, in the note to which Mr. Eden has collected all the authorities, establishing conclusively that for neglect merely the practice of the court is to charge interest at the rate of four per centum. Where the trustee is guilty of fraud or corruption, or where, in open violation of the trust, he applies the funds to his own use in trade; converts the property or securities, as for example, stock into money, and applies it to his own use; or otherwise corruptly and fraudulently abuses the trust reposed in him, he may be charged with compound interest.

"The first case, it is said, in which compound interest was charged against an executor is *Raphael v. Boehm*, 11 Vesey, 91. That was a case of gross misconduct, and violation of the terms of the trust, by embarking the funds in trade instead of investing them for the purpose of accumulation as directed by the will. The principle established by this case does not appear to have been followed in cases where the facts appear to be very similar. See *Ashburnham v. Thompson*, 13 Ves. 402; and *Tebbs v. Carpenter*, 1 Madd. 291. In this last cited authority, all the cases are collated and elaborately examined; and although there was in that case a direction in the will that the assets should be invested in the public funds, which was not done, yet the vice-chancellor refused to allow compound interest. He sums up an elaborate and able review of the authorities thus: 'It appears, therefore, from this view of the authorities, that a distinction has been taken, as in every moral point of view there ought to be, between *negligence* and *corruption*, in executors. A special case is necessary to induce the court to charge executors with more than four per cent. upon the balances in their hands. The obligation on executors to lay out balances not wanted for

¹ *Hazard v. Durant*, 14 R. L. 25; *Burdick v. Garrick*, L. R. 5 Ch. 233; *Attorney-General v. Alford*, 4 De G., Macn. & G. 676; *Penny v. Avison*, 8 Jurist (N. S.), 62; *Cruce v. Cruce*, 81 Mo. 676. But see *Dissenger's Case*, 39 N. J. Eq. 227; *Eppinger v. Canepa*,

20 Fla. 262; *Latham v. Wilcox*, 99 N. C. 367.

² *Parker v. Nickerson*, 137 Mass. 487; *Cruce v. Cruce*, 81 Mo. 676; *Rochester v. Levering*, 104 Ind. 526; *White v. Ditson*, 140 Mass. 351. See *Munson v. Plummer*, 59 Iowa, 136.

curities which were repudiated by the *cestui que trust* and condemned by the court. He was held liable for the legal

the exigencies in the testator's affairs is now better understood, since it has been settled that they are indemnified against any loss, in laying them out in the fund which the court sanctions,—the three per cents. If the executor has balances which he ought to have laid out, either in compliance with the express directions of the will, or from his general duty, even where the will is silent on the general subject, yet if there be nothing more proved, in either case, the omission to lay out amounts only to a case of *negligence* and not of *misfeasance*.'

"Chancellor Kent, in *Schieffelin v. Stewart*, 1 Johns. Ch. 620, adopts the stringent rule laid down in *Raphael v. Boehm*, *supra*, without adverting to the distinction between neglect and fraud; but in the subsequent case of *Clarkson v. De Peyster*, Hopk. Ch. 424, the chancellor refused to allow compound interest in a case in all its material features not distinguishable from the case before us; and the decision was affirmed on appeal.

"The cases cited from the Tennessee and Kentucky reports are not applicable in this state. In both these states statutes exist requiring the guardian to invest the money of his ward. *Hughes v. Smith*, 2 Dana, 252; *Torbet v. McReynolds*, 4 Humph. 215; vol. 1, Ky. Statutes, 768; Car. & Nicholson's Dig. 368.

"The charge of compound interest seems to be adopted as a punishment in those cases where, from the gross mismanagement of the trustee, it is difficult, if not impossible, to ascertain what the income of the estate would otherwise have been; but it may safely be asserted that no estate in

money, under the most judicious management, can be made to yield compound interest at the rate of eight per centum.

"If it had been annually invested under the direction of the court, some delay must have been encountered in finding a person desirous to borrow and able to give the necessary security. It is not reasonable to presume that where so lent it would always be punctually paid, so as to be immediately reinvested; nor can it be doubted that it would frequently be necessary to coerce payment by suit; and that after every precaution had been taken, both principal and interest would occasionally be lost. The charge of compound interest, therefore, is unjust, because the estate could not have yielded that by any prudent management in the hands of the owner, had he been of age to manage it himself. The mere omission of the guardian to apply to the court for authority to invest it, and the failure to make annual settlements, are not evidence of fraud, but establish negligence merely; and the court, therefore, acted correctly in refusing to allow compound interest.

"We come to the consideration of the remaining question. In stating the account, the judge of the orphans' court charged the guardian with interest on money received by him, and allowed him interest on the sums disbursed, calculating each from the time it accrued to the time of settlement. This was erroneous. The statute previously cited requires the guardian to render, at least once a year, an account of his receipts and disbursements. If this had been done, the disbursements would have

rate of interest though the securities bore a higher rate.¹ An agent who invests as his own the funds of his principal will be charged with interest at the legal rate in the jurisdiction where they were invested.² Where an agent contracted to invest money at ten per cent. and invested but part of it, using the balance, he was charged with that rate for the

been extinguished *pro tanto* by the interest which the guardian should have charged for the money of the ward in his hands, and he cannot place himself in a better condition by this neglect of duty than if he had performed it. It could not be tolerated that the guardian should hold the estate in his hands for a number of years, all the interest of the ward's capital, or, what comes to the same thing, neglect to apply for its investment, and encroach annually upon the capital for the support of the ward; for this is the effect of the mode of accounting adopted by the court.

"If it was shown that the guardian was compelled to keep on hand a certain sum of money to meet the expenditures of his ward, it would be the duty of the court not to charge interest on such sum. In the absence of such necessity, which is not shown, and which probably did not exist, it was the duty of the court to charge the guardian with interest on all money of the ward in his hands from the time of its receipt, and allow him interest on all disbursements from the time they were made; the interest due from the guardian to extinguish *pro tanto*, or in full, as the case may be, the expenditure of the ward. For which purpose, if necessary, the court will make annual, or longer or shorter, rests in the account, so as to carry fully into effect the objects and purposes of the decree, but so as not in any manner to compound the inter-

est against the guardian. These principles are clearly stated in the case of *De Peyster v. Clarkson*, 2 Wend. 77, and other cases cited."

In *Miller v. Beverlys*, 4 Hen. & Munf. 415, the court laid down this general rule: "that in all cases whatsoever, a trustee is liable to pay interest for the trust money in his hands, unless he can show that it was necessarily kept in hand for the purposes of the trust." *Banks v. Machen*, 40 Miss. 256; *Trotter v. Trotter*, id. 704; *Smithers v. Hooper*, 23 Md. 278; *Garrett v. Carr*, 1 Rob. (Va.) 196; *Rosser v. Depriest*, 5 Gratt. 6.

In *Layton v. Hogue*, 5 Ore. 93, an executor purchased, through an agent, a parcel of land belonging to the estate under his care as such, and afterwards made permanent improvements and paid taxes. In a suit by the heirs this sale was set aside as fraudulent, and allowance was made to the defendants, who were the heirs of the fraudulent trustee, for the permanent improvements and taxes, after deducting rents and profits; this, together with the amount paid at the fraudulent sale, was required to be paid back, but without interest. It was observed that to allow interest in such a case would be allowing them to reap advantage from the wrongful and inequitable act of their ancestor.

¹ *Coghill v. Boyd*, 79 Va. 1.

² *Bischoffsheim v. Baltzer*, 21 Fed. Rep. 531.

amount invested and the legal rate for the balance.¹ A guardian's misconduct subjected him to liability for compound interest, and he was charged with it at the highest legal rate up to the time the ward became of age, and thereafter, because at that time the debt assumed the nature of an ordinary one, at the lowest legal rate.² If the loss resulting from the trustee's neglect is less than the income of the fund at the statute rate of interest, he may be relieved on making it good.³ Trustees are not ordinarily chargeable with interest for failing to invest funds until the lapse of a reasonable time after they have come to their hands. No absolute rule can be announced as to what constitutes such time because the conditions vary; six months has been regarded as sufficient under ordinary circumstances.⁴ If funds are converted,⁵ or when received from the sale of trust property are not applied and paid over according to a trustee's duty,⁶ he is chargeable with interest from the conversion or time when it was his duty to pay the money.⁷

[628] Public officers who fail to pay over money in their hands, according to their official duty, will be charged with interest from the time they should have paid it.⁸ The damages resulting to a creditor from the escape of his debtor, against whom he has recovered judgment, includes the amount of the judgment with interest, and the sheriff is liable for the latter.⁹

§ 354. On money obtained by extortion or fraud. Money obtained wrongfully, or by extortion or fraud, is recoverable

¹ *Rogers v. Priest*, 74 Wis. 538.

² *Armstrong v. Walkup*, 12 Gratt. 608; *Tanner v. Skinner*, 11 Bush, 120; *Clay v. Clay*, 8 Met. (Ky.) 548; *State v. Richardson*, 29 Mo. App. 595.

³ *Livermore v. Wortman*, 25 Hun, 341.

⁴ *Crosby v. Merriam*, 31 Minn. 342; *Dunscomb v. Dunscomb*, 1 Johns. Ch. 508; *Thurston, Matter of*, 57 Wis. 104.

⁵ *McKim v. Blake*, 139 Mass. 593.

⁶ *Judd v. Dike*, 30 Minn. 380; *Yeatman's Appeal*, 102 Pa. St. 297.

⁷ *Shickler's Estate*, 13 Phila. 504;

Ramsey's Appeal, 4 Watts, 71; *Tomlinson's Appeal*, 90 Pa. St. 224.

⁸ *Sheridan v. Van Winkle*, 43 N. J. L. 125; *Cassady v. Trustees of Schools*, 105 Ill. 560; *Stern v. People*, 102 id. 540; *Commonwealth v. Porter*, 21 Pa. St. 385; *Magner v. Knowles*, 67 Ill. 325; *People v. Gasherie*, 9 Johns. 71; *Slingerland v. Swart*, 13 id. 255; *Lawrence v. Murray*, 3 Paige, 400; *Board of Justices v. Fennimore, Coxe* (N. J. L.), 242; *Hudson v. Tenney*, 6 N. H. 456; *Crane v. Dygert*, 4 Wend. 675; *Board of Supervisors v. Clark*, 25 Hun, 282.

⁹ *Dunford v. Weaver*, 84 N. Y. 445.

with interest from the time it was obtained;¹ and if money received to another's use is wrongfully withheld or disposed of it carries interest;² and so does money received by a party for property tortiously taken or converted by him.³

§ 355. Interest in actions for torts. In actions for [629] torts in order to give the injured party full indemnity, interest is allowed in trover, or, where any analogous remedy is sought, on the value of the property from the date of conversion;⁴ in trespass, also, on the value from the date of the tak-

¹ Arthur v. Wheeler & W. Manuf. Co., 12 Mo. App. 335; Atlantic Nat. Bank v. Harris, 118 Mass. 147; Conyer's Adm'r v. Magrath, 4 McCord, 218; Winslow v. Hathaway, 1 Pick. 211; Trustees, etc. v. Lawrence, 11 Paige, 80; Boston & S. Glass Co. v. Boston, 4 Met. 181; Greenly v. Hopkins, 10 Wend. 96; Adkins v. Ware, 35 Tex. 577; Wood v. Robbins, 11 Mass. 504; Clayton v. O'Connor, 35 Ga. 193; Kornegay v. White, 10 Ala. 255; Goddard v. Bulow, 1 Nott & McCord, 45; Greggs v. Greggs, 56 N. Y. 504; Mason v. Waite, 17 Mass. 560.

In Chew v. Bank of Baltimore, 14 Md. 299, a transfer of stock under a bill of sale and power of attorney executed by a lunatic was avoided, and it was held that the defendant should pay simple interest on the dividends accrued on the stock since the transfer, from the time the defendant knew of the lunacy. See Lincoln v. Clafflin, 7 Wall. 182.

² Rapelie v. Emory, 1 Dall. 849; Shipman v. Miller, 2 Root, 405; Black v. Goodman, 1 Bailey, 201; Simpson v. Feltz, 1 McCord's Eq. 213; Commonwealth v. Crevor, 3 Bin. 121.

³ McBeth v. Craddock, 28 Mo. App. 380; Chauncey v. Yeaton, 1 N. H. 151.

⁴ Arpin v. Burch, 68 Wis. 619; Bonesteel v. Orvis, 22 id. 523; Schmidt v. Nunan, 68 Cal. 371; Hudson v. Wilkinson, 61 Texas, 610;

Grimes v. Watkins, 59 id. 140; Watson v. Harmon, 85 Mo. 443; Kamerick v. Castleman, 29 Mo. App. 658; Hyde v. Stone, 7 Wend. 354; McCormick v. Pennsylvania Cent. R. Co., 49 N. Y. 303; Dows v. National Exch. Bank, 91 U. S. 618; Taylor v. Knox, 1 Dana, 400; Bissell v. Hopkins, 4 Cow. 53; Richmond v. Bronson, 5 Denio, 55; Garrard v. Dawson, 49 Ga. 434; Wehle v. Butler, 43 How. Pr. 5; Schwerin v. McKie, 51 N. Y. 180; Beals v. Guernsey, 8 Johns. 446; Kennedy v. Whitwell, 4 Pick. 466; Johnson v. Sumner, 1 Met. 172; Hogg v. Zanesville C. & M. Co., 5 Ohio, 410; Hepburn v. Sewell, 5 Harr. & J. 212; Kennedy v. Strong, 14 Johns. 128; Ekins v. East India Co., 1 P. Wms. 895; Thomas v. Sternheimer, 29 Md. 268; Fowler v. Davenport, 21 Tex. 626; Pease v. Smith, 5 Lans. 519; Vaughan v. Howe, 20 Wis. 497; Chauncey v. Yeaton, 1 N. H. 151. See Pierce v. Rowe, id. 179; Hamer v. Hathaway, 38 Cal. 117; Northern T. Co. v. Sellick, 52 Ill. 249; Tarpley v. Wilson, 33 Miss. 467.

If there has been a recovery of profits lost by reason of the wrong done the property, interest cannot be allowed. McGuire v. Montague, 53 Mich. 453.

In Montana interest cannot be recovered in an action for conversion for any period before judgment. Randall v. Greenhood, 3 Mont. 506;

ing.¹ But if a statute fixes the damages for the wrongful cutting of timber at the highest market value thereof in whatsoever place, shape or condition, manufactured or unmanufactured, the same may have been at any time before the trial while in possession of the defendant, interest is not allowed on the value so found before judgment. By pursuing his statutory right the plaintiff waives that which he had independently of it.² In replevin interest is allowed to the plaintiff on the value of the property during the period of wrongful detention; and this is the ordinary measure of damages where no special damage is shown;³ but in the absence of any statute allowing damages to the defendant for wrongful detention by means of the suit interest is not recoverable by him in that action.⁴ Where chattels are destroyed, or their value diminished by wrongful negligence, interest is in some jurisdictions likewise a part of the compensation to which the injured party is entitled.⁵ This rule is not established in some states. The question was recently passed upon for the first time in *Mas-*

Palmer v. Murray, 8 id. 174; S. C., id. 812.

¹ *Baker v. Railroad Co.*, 56 Vt. 802; *Platt v. Continental Ins. Co.*, 19 Atl. Rep. 687; 62 Vt. 166; *Yellow Pine Lumber Co. v. Carroll*, 69 Texas, 185; *Blackie v. Cooney*, 8 Nev. 41; *Shepherd v. McQuilkin*, 2 W. Va. 90; *Beals v. Guernsey*, 8 Johns. 446; *Bradley v. Geiselman*, 22 Ill. 494.

² *Smith v. Morgan*, 73 Wis. 375.

³ *Wegner v. Second Ward Savings Bank*, 76 Wis. 242; *Schmidt v. Nunan*, 63 Cal. 371; *Brizsee v. Maybee*, 21 Wend. 144; *Bigelow v. Doolittle*, 36 Wis. 115; *Gillies v. Wofford*, 26 Tex. 76; *McDonald v. Scaife*, 11 Pa. St. 381; *Scott v. Elliott*, 63 N. C. 45; *McDonald v. North*, 47 Barb. 530; *Robinson v. Barrows*, 48 Me. 186; *Oviatt v. Pond*, 29 Conn. 479.

In Delaware the allowance of interest is discretionary with the jury. *Boyce v. Cannon*, 5 Houst. 400.

⁴ *Chapman v. Kerr*, 80 Mo. 158, following *Pope v. Jenkins*, 30 id. 528, and disapproving *Woodburn v. Cog-*

dall, 39 id. 228, and *Miller v. Whitson*, 40 id. 101; *Andrews v. Costican*, 30 Mo. App. 29; *McCarty v. Quimby*, 12 Kan. 494. See *Booth v. Ableman*, 20 Wis. 602.

⁵ *Chicago, etc. Ry. Co. v. Schultz*, 55 Ill. 421; *Chapman v. Chicago, etc. Ry. Co.*, 26 Wis. 295; *Whitney v. Same*, 27 Wis. 827; *Buffalo & H. Turnpike Co. v. Buffalo*, 58 N. Y. 639; *Parrott v. Knickerbocker Ice Co.*, 46 id. 361; *Hogg v. Zanesville C. & M. Co.*, 5 Ohio, 410; *Walrath v. Redfield*, 18 N. Y. 457; *Hinds v. Barton*, 25 id. 544; *Kendrick v. Towle*, 60 Mich. 368; *Mote v. Chicago, etc. R. Co.*, 27 Iowa, 22 (carrier liable for interest on value of baggage stolen); *Arthur v. Chicago, etc. R. Co.*, 61 id. 648; *Johnson v. Same*, 77 id. 666; *Fremont, etc. R. Co. v. Marley*, 25 Neb. 138; *Galveston, etc. Ry. v. Horne*, 69 Texas, 643; *Varco v. Chicago, etc. Ry. Co.*, 30 Minn. 18; *Houston, etc. Ry. v. Jackson*, 62 Texas, 209; *T. & P. Ry. v. Tankersley*, 63 id. 57. *Contra*, *Damhorst v. Missouri P. Ry. Co.*, 32 Mo.

sachusetts.¹ The court, by Holmes, J., said: Interest "is allowed as of right in trover and other like actions; and although it is suggested that in such cases the defendant may be presumed to have had the use of the goods since the conversion, this is not necessarily the fact, and if it were, would have no bearing on the indemnity due the plaintiff. . . . We will assume that the sum ultimately found by the jury cannot be said to have been wrongfully detained before the finding, in such a sense that interest is due *eo nomine*. But we have heard no reason suggested why, if a plaintiff has been prevented from having his damages ascertained, and, in that sense, has been kept out of the sum that would have made him whole at the time, so long that that sum is no longer an indemnity, the jury, in their discretion, and as incident to determining the amount of the original loss, may not consider the delay caused by the defendant. In our opinion they may do so; and, if they do, we do not see how they can do it more justly than by taking interest on the original damage as a measure." In Pennsylvania there are discordant expressions in the opinions as to the right to interest in tort actions;² the latest cases, however, establish the rule that it cannot be allowed as such, but that in computing the damages the time elapsed since the cause of action arose may be considered.³ In

App. 350, and Missouri cases cited. See *Black v. Camden & A. R. & T. Co.*, 45 Barb. 40; *Richmond v. Bronson*, 5 Denio, 55; *Lakeman v. Grinnell*, 5 Bosw. 625.

¹ *Frazer v. Bigelow Carpet Co.*, 141 Mass. 126 (1886).

² See *Pittsburgh Ry. Co. v. Taylor*, 104 Pa. St. 306; *Alleghany v. Campbell*, 107 id. 530; *Railroad Co. v. Gesner*, 20 id. 242; *Delaware, etc. R. Co. v. Burson*, 61 id. 380.

³ *Plymouth v. Graver*, 125 Pa. St. 24; *Pennsylvania, etc. R. Co. v. Ziener*, 124 id. 560; *Emerson v. Schoonmaker*, 135 id. 437; *Richards v. Citizens' N. Gas Co.*, 130 id. 37; *Reading & P. R. Co. v. Balthaser*, 126 id. 1.

In *Richards v. Gas Co.*, Mitchell, J., said interest cannot "be recovered in

actions of tort, or in actions of any kind where the damages are not in their nature capable of exact computation, both as to time and amount. In such cases the party chargeable cannot pay or make tender until both the time and the amount have been ascertained, and his default is not therefore of that absolute nature that necessarily involves interest for the delay. But there are cases sounding in tort and cases of unliquidated damages, where not only the principle on which the recovery is to be had is compensation, but where also the compensation can be measured by market value or other definite standards. Such are cases of the unintentional conversion or destruction of property, etc. Into these cases the

Indiana the jury in ascertaining the damages resulting to lands from the wrongful removal of material therefrom may, in their discretion, add interest to the damages without finding that there has been unreasonable delay of payment.¹ The tendency is to increase the number of actions in which the jury may allow interest as damages;² but this may not be done where exemplary damages are given at discretion.³ There is a divergence of view as to the right to interest on damages resulting from the killing of animals by the negligence of railroad companies. Under the statutes of Missouri,⁴ Colorado,⁵ Georgia,⁶ Kansas⁷ and Illinois⁸ interest is not allowed. It is otherwise in Minnesota,⁹ Arkansas¹⁰ and Alabama¹¹ from the time of the injury, and in Wisconsin¹² from the commencement of the action. If the statute makes the company liable for double the damage the owner of the animal has sustained interest on the value of it is not recoverable.¹³ A distinction has been made in respect to interest in cases of an agent or trustee becoming liable for property in his hands [630] between loss by negligence and misfeasance. Where his liability is not for any actual or intended benefit to himself, as by conversion of the property to his own use, he is

element of time may enter as an important factor and the plaintiff will not be fully compensated unless he receive, not only the value of his property, but receive it, as nearly as may be, as of the date of his loss. Hence it is that the jury may allow additional damages in the nature of interest for the lapse of time. It is never interest as such, nor as a matter of right, but compensation for the delay, of which the rate of interest affords the fair legal measure."

¹ Pittsburgh, etc. Ry. Co. v. Swinney, 97 Ind. 586.

² Lawrence R. Co. v. Cobb, 35 Ohio St. 94; Duryee v. Mayor, 96 N. Y. 477; Central R. Co. v. Sears, 66 Ga. 499 (negligent killing of husband; time elapsed between death and trial considered by jury).

³ Western & A. R. Co. v. Young, 81

Ga. 397; Ratteree v. Chapman, 79 id. 574.

⁴ De Steiger v. Hannibal, etc. R. Co., 78 Mo. 33.

⁵ Denver, etc. Ry. Co. v. Conway, 8 Colo. 1.

⁶ Western & A. R. Co. v. McCauley, 68 Ga. 818.

⁷ Atchison, etc. R. Co. v. Gabbert, 34 Kan. 132.

⁸ Toledo, etc. Ry. Co. v. Johnston, 74 Ill. 83.

⁹ Varco v. Chicago, etc. Ry. Co., 30 Minn. 18.

¹⁰ St. L. etc. Ry. Co. v. Briggs, 50 Ark. 169.

¹¹ Alabama, etc. R. Co. v. McAlpine, 75 Ala. 113; Georgia P. R. Co. v. Fullerton, 79 id. 298.

¹² Chapman v. Chicago, etc. Ry. Co., 26 Wis. 295.

¹³ Brentner v. Chicago, etc. Ry. Co., 68 Iowa, 530.

only liable for the value without interest; but if he has derived a private advantage out of the property he will be liable for interest.¹

In actions for damages caused by collision, interest is allowed on the cost of repairs and rental value while the vessel is undergoing repairs.² It is allowed on all pecuniary elements of damage resulting from torts, consisting of moneys, property or labor, the value of which is reasonably certain.³ The rate of interest allowable in an action of tort is governed by the statute in force when the verdict is rendered⁴ and the law of the forum.⁵

SECTION 6.

THE LAW OF WHAT PLACE AND TIME GOVERNS.

§ 356. **Importance of subject.** As interest is generally regulated by statutes, and these are not the same in all jurisdictions and fluctuate more or less in each, it is of great practical importance that definite rules or principles should exist for determining the force and effect of these laws, and by which of them any contract or liability is to be governed. Owing to the wide domain of commerce, international and interstate, questions of interest arising under statutory regulations and restrictions are not of local concern. They arise upon every form of indebtedness incident to that commerce; and often between parties widely separated not only by distance but by national and state lines, each performing his part of

¹ *Marshall v. Schricker*, 63 Mo. 308; *Dawes v. Winship*, 5 Pick. 97, note; *Thompson v. Stewart*, 3 Conn. 171; *Rootes v. Stone*, 2 Leigh, 650; *Ricketson v. Wright*, 3 Sumner, 335; *Short v. Skipwith*, 1 Brock. 103.

² *Straker v. Hartland*, 2 H. & M. 570; *The Mary J. Vaughan*, 2 Bene. 47; *Mailler v. Express Propeller Line*, 61 N. Y. 312; *Warrall v. Munn*, 38 id. 151; *Whitehall T. Co. v. New Jersey S. Co.*, 51 id. 639.

But where both vessels are at fault interest on the amount awarded is chargeable only from the date of the decree. *The Manitoba*, 122 U. S. 97.

If strippings are rescued from the offending ship and the owners realize large sums therefrom the court will exercise its discretion in allowing interest thereon. *The Scotland*, 118 U. S. 507.

³ *Mailler v. Express Prop. Line*, 61 N. Y. 312; *Jay v. Almy*, 1 Woodb. & M. 262; *Remke v. Clinton*, 2 Utah, 230; *Grosvenor v. Ellis*, 44 Mich. 452; *Snow v. Nowlin*, 43 Mich. 383.

⁴ *Salter v. Utica, etc. R. Co.*, 86 N. Y. 401, disapproving *Ewing v. Never-sink Steamboat Co.*, 23 Hun, 578.

⁵ *Bischoffsheim v. Baltzer*, 21 Fed. Rep. 531.

the transaction at home, or in different jurisdictions and under [631] the influence of dissimilar laws. These transactions involve expenditures, independent or subsidiary contracts, and the performance of them in places having no common rate of interest.

§ 357. **General rule as to contracts.** The general rule is that the contract in respect to its construction and force, in other words its meaning and validity, is governed by the law of the place where it is made and to be performed.¹ If valid there it is *jure gentium*, valid everywhere;² and if void there is void everywhere.³ What is the place of contract is not always easy to determine; nor have the courts arrived at the same conclusion from the same or similar facts. The inquiry is made for two objects — one to ascertain the amount of interest which the creditor is entitled to receive on an agreement for interest generally, specifying no rate; the other to determine whether the contract when it contains an agreement for a specific rate of interest, or on one which at its inception interest was taken, is usurious. It is a general rule that where the contract stipulates for interest it is payable agreeably to the law of the place where made, but if it is made with reference to the laws of another state or country, [632] and is to be performed there, the interest is to be calculated according to the law of the place where the contract is

¹ Archer v. Dunn, 2 W. & S. 327; § 242; Andrews v. Herriot, 4 Cow. Ralph v. Brown, 3 id. 395; Findlay v. 510; Watson v. Orr, 3 Dev. L. 161; Hall, 12 Ohio St. 610. Chartres v. Cairnes, 4 Mart. (N. S.) 1;

² Reiff v. Bakken, 36 Minn. 333; Matthews v. Paine, 47 Ark. 54; Pear- Courtois v. Carpenter, 1 Wash. C. C. 876; Brackett v. Norton, 4 Conn. 517; sall v. Dwight, 2 Mass. 88; Willings Palmer v. Yarrington, 1 Ohio St. 253; v. Consequa, 1 Pet. C. C. 317; De So- Harper v. Hampton, 1 H. & J. 458, bry v. De Laistre, 2 H. & J. 193; 622; Warrender v. Warrender, 9 Trimby v. Vignier, 1 Bing. N. C. 151; Bligh, 110.

³ Ibid.; United States v. La Jeune Houghton v. Page, 2 N. H. 42; Dyer Eugenie, 2 Mason, 409; Van Schaick v. Hunt, 5 id. 401; Andrews v. Pond, v. Edwards, 2 Johns. Cas. 355; Rob- 18 Pet. 65; Whiston v. Stodder, 8 inson v. Bland, 2 Burr. 1077; Touro Mart. 95; Bank of United States v. v. Cassin, 1 N. & McC. 178; Van Donnally, 8 Pet. 361; Wilcox v. Hunt, Rumsdyk v. Kane, 1 Gall. 871; Alves 18 id. 378; French v. Hall, 9 N. H. v. Hodgson, 7 T. R. 241; McAllister 187; Andrews v. Creditors, 11 La. 464; v. Smith, 17 Ill. 328; Kanaga v. Tay- Smead v. Mead, 3 Conn. 253; Med- lor, 7 Ohio St. 184. bury v. Hopkins, id. 472; 2 Kent's Com. 457 *et seq.*; Story's Conf. L.

to be performed or the money paid. The place of performance is chiefly regarded; it locates the contract; the parties are presumed to have the law there in force in view in making their contract.¹ Where no other place is specified for performance of a contract, it is to be performed where made.² The law of that place determines its construction, obligation and place of payment.³

The place of contracting is *prima facie* where the instrument is dated; but if written, dated and signed in one place and delivered at another, the latter is the place of its consummation. A contract takes effect according to the law of the place where it is consummated, or where, if it is written,

¹ *Sutro Tunnel Co. v. Segregated Belcher M. Co.*, 19 Nev. 121, quoting the text; *Jaffray v. Dennis*, 2 Wash. C. C. 253; *Cowqua v. Landeburn*, 1 id. 521; *Bushby v. Camac*, 4 id. 296; *Bank of Illinois v. Brady*, 8 McLean, 268; *Moore v. Davidson*, 18 Ala. 209; *Leffler v. McDermotte*, 18 Ind. 246; *Van Hemert v. Porter*, 11 Met. 210; *Winthrop v. Carleton*, 12 Mass. 4; *Ferguson v. Fyffe*, 8 Cl. & F. 121; *Cubbedge v. Napier*, 62 Ala. 518; *Cash v. Kennion*, 11 Ves. 311; *Robinson v. Bland*, 2 Burr. 1077; *Fanning v. Consequa*, 17 Johns. 511; *S. C.*, 3 Johns. Ch. 587; *Houghton v. Page*, 2 N. H. 42; *Lapice v. Smith*, 13 La. 91; *Mullen v. Morris*, 2 Pa. St. 85; *Slacum v. Pomery*, 6 Cranch. 221; *Champant v. Ranelagh*, Prec. Ch. 128; *Thompson v. Ketcham*, 4 Johns. 285; *Smith v. Smith*, 2 id. 235; *Ruggles v. Keeler*, 3 id. 263; *Van Schaick v. Edwards*, 2 Johns. Cas. 355; *Licardi v. Cohen*, 3 Gill, 430; *Lewis v. Owen*, 4 B. & Ald. 654; *Quin v. Keefe*, 2 H. Bl. 553; *Bainbridge v. Wilcocks*, Baldw. C. C. 536; *Royce v. Edwards*, 4 Pet. 111; *Smith v. Buchanan*, 1 East, 6; *Frazier v. Warfield*, 9 Sm. & M. 220; *Lloyd v. Scott*, 4 Pet. 205; *Hosford v. Nichols*, 1 Paige, 220; *Bayle v. Zacharie*, 6 Pet. 634, 648; *Ekins v. Last India*

Co., 1 P. Wms. 395; *Barnes v. Newcomb*, 9 Cush. 46; *Bell v. Bruen*, 1 How. (U. S.) 169; *Andrews v. Pond*, 18 Pet. 77; *Scofield v. Day*, 20 Johns. 102; *Healy v. Gorman*, 15 N. J. L. 328; *Arrington v. Gee*, 5 Ired. 590; *Irvine v. Barrett*, 2 Grant's Cas. 73; *Roberts v. McNeeley*, 7 Jones' L. 506; *Sevett v. Doge*, 4 Sm. & M. 667; *Gaillard v. Ball*, 1 N. & McC. 67; *Peck v. Mayo*, 14 Vt. 33; *Hunt v. Hall*, 37 Ala. 702; *Hanrick v. Andrews*, 9 Port. 9; *Chumasero v. Gilbert*, 24 Ill. 293; *Hawley v. Sloo*, 12 La. Ann. 815; *Little v. Riley*, 43 N. H. 109; *Bolton v. Street*, 3 Cold. 31; *Summers v. Mills*, 21 Tex. 77; *Whitlock v. Castro*, 22 Tex. 108; *Butler v. Myer*, 17 Ind. 77; *Bent v. Lauve*, 3 La. Ann. 88; *Howard v. Branner*, 23 id. 369.

² *Shipman v. Bailey*, 20 W. Va. 140; *Kavanaugh v. Day*, 10 R. L. 393; *Pomeroy v. Ainsworth*, 22 Barb. 119; *Davis v. Coleman*, 11 Ired. 303; *Don v. Lippman*, 5 Cl. & F. 1; *De Wolf v. Johnson*, 10 Wheat. 367, 383; *Wilson v. Lazier*, 11 Gratt. 477; *Blodgett v. Durgin*, 32 Vt. 361; *Thompson v. Ketcham*, 8 Johns. 189; *Short v. Trabue*, 4 Met. (Ky.) 299.

³ *Bryant v. Edson*, 8 Vt. 325; *Bank of Orange v. Colby*, 12 N. H. 520; *Sherrill v. Hopkins*, 1 Cow. 103; *Clark v. Searight*, 135 Pa. St. 173.

[633] it is delivered and put in force.¹ Where a note is expressly made payable at a designated place, its legal effect in this particular cannot be changed by parol evidence.² But if it is payable generally, extrinsic evidence may be resorted to to show that it was intended to be paid at a particular place, and thereby subject it to the law of that place. In such case interest will be allowed at the rate established by the law in force there.³ A debt was payable in Great Britain, and the creditor agreed with the debtor, for the latter's accommodation, that it might be paid in one of the states in this country; and it was held that the interest accruing upon it thereafter should be computed according to the rate in that state.⁴ If no place of payment or rate of interest is specified, and there is no proof of the intention of the parties as to the former, the instrument is payable anywhere and the rate of interest is determinable by the law of the jurisdiction in which suit is brought upon it.⁵

§ 358. Rule as to notes and bills. Bills of exchange and promissory notes illustrate these principles in respect to the *lex loci contractus*. The maker of a note and the acceptor of a bill are bound to pay the money therein mentioned at the places severally specified for payment. To those places they have given express assent. They are the parties primarily bound, and the agreements appearing by the face of the paper are respectively theirs. The place of making the note or accepting the bill is that where the contract is made, and where, but for the appointment of another place for payment, they would be bound to perform it. As the place of performance, when expressly fixed, is the place of contract within the sense of the *lex loci*, these parties are held to pay the bill or note according to its interpretation and force by the law of that place.⁶ Bills of exchange are usually addressed to a drawee at a particular place; the place so mentioned is that at which the

¹ Hyde v. Goodnow, 8 N. Y. 266; Cook v. Litchfield, 5 Sandf. 830; Davis v. Coleman, 7 Ired. 424; Fant

v. Miller, 17 Gratt. 47; Cook v. Mof-fat, 5 How. (U. S.) 295; Whiston v. Stodder, 8 Mart. (La.) 95; Snaith v. Mingay, 1 W. & S. 87; Lenwig v. Ralston, 1 Pa. St. 139.

² Thompson v. Ketcham, 8 Johns. 189; Frazier v. Warfield, 9 Sm. & M.

³ Austin v. Imus, 23 Vt. 286. See Senter v. Bowman, 5 Heisk. 14.

⁴ Pearce v. Wallace, 1 Har. & J. 48.

⁵ Kopelke v. Kopelke, 112 Ind. 435.

⁶ See *ante*, § 357.

drawer agrees that his bill shall be honored; and, when accepted, it is the place where the acceptor agrees to pay it unless the bill specifies another place of payment; the [634] place of payment is the place of contract, and the laws there in force govern it.¹

The drawer of a bill and the indorser of a note or bill contract by the act of drawing and indorsing. Their contracts are implied. The undertaking of the former is that the drawee will accept the bill and pay the amount of it where, according to its face, it is payable; and that if the bill is dishonored and due notice of the dishonor is given him, he will himself pay the amount to the holder. His agreement, so implied, is not to pay at the place mentioned in the bill; but at the place where he draws it, and where, consequently, he is legally bound to perform, no other place of performance being implied or specified.² The act of drawing is interpreted [635]

¹ Todd v. Bank, 3 Bush, 626.

² Story on Prom. Notes, § 839, note; Story on Bills, § 154.

Rothschild v. Currie, 1 Q. B. 43, proceeded upon the opposite theory, that the law of the place of payment governed as to all the parties. It was the case of a bill drawn in England on, and accepted by, a house in France, payable at Paris, in favor of a payee domiciled in England, by whom it was indorsed there to an indorsee who was also domiciled there. The bill was dishonored at maturity, and due notice was given to the payee according to the law of France; but not, as it was suggested, according to the law of England. And it was held, in a suit brought by the indorsee against the payee, that the notice was good, being according to the law of France, the *lex loci contractus* of acceptance. In a note to § 839 of Story on Prom. Notes this decision is criticised by the author: "With the greatest deference for that learned judge (who delivered the opinion), it seems to me that the decision of the court is not sustained by the reason-

ing on which it purports to be founded. The court there admit that the notification of the dishonor is parcel of the contract of the indorser; and, if so, then it must be governed by the law of the place where the indorsement was made, upon the very rules cited by the court from Pothier. The error (if it be such) seems to have arisen from confounding the contract of the acceptor with the contract of the drawer and the indorser." In a preceding part of the same note the learned author says: "The acceptor agrees to pay in the place of acceptance, or the place fixed for the payment (Cooper v. Waldegrave, 2 Beav. 282); but upon his default, the drawer and the indorser do not agree, upon due protest and notice, to pay the like amount in the same place; but agree to pay the like amount in the place where the bill was drawn or indorsed by them respectively. Hence it is that the notice to be given to each of them must and ought to be notice according to the law of the place where he draws or indorses

by the law of the place where it is drawn. Its validity and effect are determined by that law;¹ and the money due there, by reason of the violation of the drawer's undertaking that the drawee should accept and pay according to the tenor of the bill, is the amount specified in it, together with interest, after his own default, if not fixed by the bill at the rate [636] allowed by the law of the place of drawing.² The dam-

the bill, as a part of the obligations thereof. The drawer and indorser, in effect, contract in the place where the bill is drawn or indorsed a conditional obligation; that is, if the bill is dishonored, and due notice is given to them of the dishonor according to the law of the place of their contract, they will respectively pay the amount of the bill at that place. The law of the place of the acceptance or payment of the bill has nothing to do with their contract; for it is not made there, and has no reference to it." See *Shanklin v. Cooper*, 8 Blackf. 41, overruled in *Hunt v. Standart*, 15 Ind. 83.

¹ *Cooper v. Waldegrave*, 2 Beav. 282; *Ayrman v. Sheldon*, 12 Wend. 439; *Everett v. Vendryes*, 19 N. Y. 436; *Yeatman v. Cullen*, 5 Blackf. 240; *Slacum v. Pomery*, 6 Cranch, 221; *Powers v. Lynch*, 8 Mass. 77; *Williams v. Wade*, 1 Met. 82; *Trimbey v. Vignier*, 1 Bing. N. C. 151; *Potter v. Brown*, 5 East, 124; *Hicks v. Brown*, 12 Johns. 142; *Hunt v. Standart*, 15 Ind. 83; *Van Raugh v. Van Arsdaln*, 3 Cal. 154; *Burrows v. Hannegan*, 1 McLean, 815.

² *Bailey v. Heald*, 17 Tex. 102; *Bank of U. S. v. United States*, 2 How. 711; *Raymond v. Holmes*, 11 Tex. 54; *Crawford v. Branch Bank*, 6 Ala. 12.

In *Gibbs v. Fremont*, 9 Exch. 25, the action was by the indorsers of several bills of exchange drawn by the defendant in California, on James Buchanan, at Washington, D. C.

The bills were made payable to F Hattmann, and discounted by him at the place where they were drawn; they were dishonored, and the question was whether the plaintiff was entitled to recover against the defendant six per cent, the rate in Washington, where they were payable, or twenty-five per cent, the rate of interest in California, where they were drawn. The court of exchequer in England gave the plaintiff interest according to the rate in California.

In *Hunt v. Standart*, 15 Ind. 83, a note made and indorsed in Indiana was payable in New York. The indorsement was sufficient according to the law of New York, but it was not sufficient under the law of Indiana. The question was by what law the sufficiency of the indorsement was to be tested. It was held that the indorsement was governed by the law of Indiana, where it was made. The following cases involved a similar question and were decided in the same way: *Ayrman v. Sheldon*, 12 Wend. 439; *Everett v. Vendryes*, 19 N. Y. 436; *Yeatman v. Cullen*, 5 Blackf. 240; *Williams v. Wade*, 1 Met. 82; *Trimbey v. Vignier*, 1 Bing. N. C. 151; *Burrows v. Hannegan*, 1 McLean, 815; *Holbrook v. Vibbard*, 3 Ill. 465; *Currie v. Lockwood*, 40 Conn. 349; *Lowry's Adm'r v. Western Bank*, 7 Ala. 120. See *Trabue v. Short*, 5 Cold. 293; *Short v. Trabue*, 4 Met. (Ky.) 299; *Artisans' Bank v. Park Bank*, 41 Barb. 599; *Trabue v. Short*, 18 La. Ann. 257;

ages are to be ascertained by the same law,¹ for not having the money for the holder at the place where, according to the bill, it should have been paid. The contract implied from indorsement is in legal effect the same as that implied from drawing a bill; the language of an indorsement expressed in full is a bill of exchange.² It is a new and substantive contract;³ and the obligations of the parties are to be determined according to the law of the country in which it is made.⁴ This seems now to be the doctrine of both the English and American courts; but it has not been established without dissent.⁵

The contract of the drawer or indorser in relation to the payment is twofold: that the acceptor or maker will pay according to the tenor of the paper the amount therein mentioned, at the specified time and place; and that in case the parties primarily bound fail to make such payment, then, upon due notice of such default, the drawer or indorser will pay that amount. The measure of their liability rests upon the theory that they should pay a sum which will be a full compensation to the holder for the acceptor's and maker's default, consisting of damages for being obliged to receive the money at a different place, and interest during the delay of payment. The interest that the primary parties are chargeable with is the rate of the country or state where the paper was payable. They are liable to that rate because the contract was to be there performed. Although these secondary parties did not agree to pay at the same place, they agreed to pay the same debt; that is, the face of the paper. Now, if the interest which the primary parties are liable for

Allen v. Kemble, 6 Moore P. C. 314;
Allen v. Merchants' Bank, 22 Wend.
215.

¹ Slacum v. Pomery, 6 Cranch, 221.

² Bayley on Bills, ch. 5, § 8; Story on Bills, § 108; Ayrman v. Sheldon, 12 Wend. 439; Ballingallis v. Glosster, 3 East, 482; Heylyn v. Adamson, 2 Burr. 674; Ogden v. Saunders, 12 Wheat. 213, 341.

³ Slacum v. Pomery, 6 Cranch, 221; Edw. on Bills, 263; Everett v. Vendryes, 19 N. Y. 436.

⁴ Ibid.; McClintock v. Cummins, 3 McLean, 158; Mix v. State Bank, 18 Ind. 521; Butters v. Olds, 11 Iowa, 1.

⁵ Shanklin v. Cooper, 8 Blackf. 41; Mullen v. Morris, 5 Pa. St. 87; Hanrick v. Andrews, 9 Port. 10; Peck v. Mayo, 14 Vt. 83; Rothschild v. Currie, 1 Q. B. 48; Phillips v. Im Thurn, L. R. 1 C. P. 468; Able v. McMurray, 10 Tex. 350.

[637] is an incident to that debt, and follows it as the shadow follows the substance, why should not the subsidiary obligation in respect to the amount be the same as the primary? But the cases appear to proceed upon the principle that on the default of the primary parties, the immediate requisite steps being taken to render the conditional liability of the drawer and indorser absolute, the amount specified in the bill or note becomes their debt; that they are not responsible for the continued default of the principals; nor therefore liable for the interest chargeable to them; but only for their own default in not paying the sum which becomes their absolute debt, in pursuance of their contract as drawer or indorser. And their agreement is to pay at the place where their contract was made. They are liable on account of their own default to pay interest according to the law of that place. Their default for which interest is computed against them dates from receiving notice of the dishonor of the bill or note.¹

§ 359. **Bonds to the United States.** An apparent exception exists in the case of official bonds executed to the federal government. It sometimes happens that they are executed by the principals in one state and the sureties in another or in different states. The rights and duties of sureties are known to be dissimilar in the several states. It has been decided, however, that such bonds must be treated as made and delivered and to be performed by all the parties at the seat of government, upon the ground that the principal is bound to account there; and therefore, by necessary implication, all the other parties look to that as the place of performance, by the law of which they are to be governed.²

§ 360. **Between parties in different states.** Where parties meet together, and face to face make contracts, the place of making is fixed with certainty; and also the place of performance [638] where no other is designated. But all obligations to

¹ Walker v. Barnes, 5 Taunt. 540. comes due and the day when the drawer of a bill which is dishonored receives notice of the dishonor.

by the acceptor is not liable to pay interest for the time which elapses between the day when the bill becomes due and the day when the bill is presented for payment. ²Story Conf. L., § 290; Cox v. United States, 6 Pet. 172, 202; Dun- can v. United States, 7 Pet. 435.

pay money are not initiated in this manner. The same rule, however, applies to less formal or more complicated transactions. Interest is allowed according to the law of the place where an indebtedness arises, and where the money ought to be paid. In cases of accounts and advances between parties residing in different countries inquiry is made to ascertain, as a matter of fact, where by their intention the balance is to be repaid, whether in the country of the creditor or that of the debtor.¹ When ascertained, the law of that place governs as to interest. In the absence of any stipulation on the subject, or circumstances indicating a different intention, the party advancing money for another is entitled to interest at the rate established at the place where the advance is made; for the contract to refund, implied by law, is to pay with interest according to the rate which prevails where the transaction takes place.² This rule was applied in favor of the consignee of a ship in South Carolina who paid certain charges on account of the last sickness and funeral of the master, in accordance with the custom of the port where the ship was. The owner in Massachusetts was held liable to reimburse him according to the rate of interest of the place where the money was advanced.³ So when a balance of account exists in favor of a commission merchant residing and doing his business in one state, against his correspondent in another, the cause of action is deemed to arise where the creditor resided and did the business.⁴ And in a case where an agent advanced his money at New Orleans for his principal residing in another state, upon an undertaking of the principal to replace it by accepting and paying drafts drawn by the agent at New Orleans, it was held that the debtor was liable to New Orleans interest if he suffered the bills to be dishonored, as well as to any necessary loss on account of the difference of exchange.⁵

A Chinese merchant residing at Canton consigned goods to a merchant in New York to be sold by him, the net proceeds to be remitted to the consignor at Canton, at which [639]

¹ *Grant v. Healey*, 8 Sumn. 523.

⁴ *Coolidge v. Poor*, 15 Mass. 427.

² *Winthrop v. Carleton*, 12 Mass. 4; *Arnott v. Redfern*, 2 C. & P. 88; *Edwards on Bills*, 713.

⁵ *Lanusse v. Barker*, 8 Wheat. 101; *Milne v. Moreton*, 6 Bin. 353; *Bainbridge v. Wilcocks*, Baldw. C. C. 586.

³ *Winthrop v. Carleton*, 12 Mass. 4.

place the goods were delivered to the agent of the consignee. The question was whether interest at twelve per cent., according to the custom of Canton, should be charged during the delay of payment, or whether the creditor was entitled only to the rate in New York. It was held that the goods consigned were at the risk of the consignor on their voyage to New York, and the entire duty of the consignee to make sale and remittance of net proceeds was to be performed there. The duty of remitting meant no more than a delivery of the money on board a proper vessel at New York, to a suitable agent, for the purpose of being transported to Canton by the usual route, and duly consigned to the principal.¹ Hence, the place of contract may be determined in cases of this sort, where no other intention is manifest, by a rule of easy application: that advances ought to be deemed reimbursable at the place where they are made, and sales of goods to be accounted for where they take place or are authorized to be made.² So it has been held that if a trustee receive money as such in a foreign state, and apply it to his own use, he must account for interest according to the law of the place where it was received.³ Loans bear the interest of the place where made unless payable elsewhere.⁴

§ 361. **Same subject.** On the same principle of paying indebtedness where it arises, moneys due on purchases will be referred to the law of the place where a party, personally or by letter, orders or requests to be supplied, or a seller negotiates and completes a sale, unless there is an agreement by note or otherwise to pay somewhere else.⁵ If a written obligation for the purchase-money, payable generally, is dated and delivered where the sale is actually consummated by negotiation of its terms and delivery of the property, and especially if one of the parties resides there, it is the place of contract; and this conclusion will not be affected though

¹Fanning v. Consequa, 17 Johns. 511; Cartwright v. Greene, 47 Barb. 9.

²Ibid.; Grant v. Healey, 3 Sumn. 523; Bainbridge v. Wilcocks, Baldw. C. C. 535; Story's Conf. L., §§ 283-285; Hall v. Woodson, 13 Mo. 462.

³Bischoffsheim v. Baltzer, 21 Fed. Rep. 581; Neill v. Neill, 81 Miss. 36.

⁴Consequa v. Willings, Pet. C. C. 229; Anonymous, Martin & Hayw. 149; Stewart v. Ellice, 2 Paige, 604.

⁵McIntyre v. Parks, 8 Met. 207; Whiston v. Stodder, 8 Mart. (La.) 93

such obligation be signed by other parties as sureties or as co-obligors at other places.¹

A contract for the payment of money entered into [641] with such circumstances as alone would bring it under the

¹ *Arrington v. Gee*, 5 Ired. L. 590, is an instructive case upon the doctrine of *lex loci contractus*. A citizen of North Carolina took a number of slaves to Alabama, and there sold them to a citizen of that state, who agreed to give him a bond, with sureties, for the price; this bond was executed by the principal at Mobile, Ala., where it bore date; afterwards two sureties signed it in North Carolina, where they resided; the bond mentioned no place of payment. It was held that the sureties, as well as the principal, were bound for the payment of interest according to the laws of Alabama.

The court say: "The contract of sale from which the bond sued on had its origin was made and completed in Alabama, and the money which the purchaser engaged to pay to the seller would, if not paid when due, thereafter bear interest at the rate of eight per cent.; it not being stipulated by the parties that the payment should be made in any other place. For it is an undoubted principle of law that not only the validity of the contract depends on the *lex loci contractus*, but its effects, including the right of the creditor to interest and its amount, depends on it also. The only question in this case, then, is which is the *locus contractus*, so as to apply to this transaction the above-mentioned principle. We think clearly it is Alabama. Beyond question, that is true of the original contract: namely, that of the purchase, sale and delivery of the negroes. And 'the rate of interest which the debtor should pay is a part of that contract,' so that taking

a new security here expressing that the rate of interest should be eight per cent., or including therein eight per cent. for interest accrued (unless it be a new contract for further forbearance here), would not be in violation of our law, but would be valid. *McQueen v. Burns*, 1 Hawks, 476. Such is even the case when a loan is made in one country and a subsequent collateral security is taken on real estate in another. *De Wolf v. Johnson*, 10 Wheat. 367. Much more must that be true when the security taken in a foreign place is merely personal. For the original contract obliged the debtor to pay a particular rate of interest and the new security is merely the means of more readily enforcing the performance of that obligation. If, then, Charles J. Gee, the principal debtor, had executed his note for this debt in this state, that would not have altered the rate of interest, provided the note should become payable when the debt would fall due according to the original contract and did not designate some other place of payment; in other words, if the note was but a security for the pre-existing debt and in no respect changed its character.

"But in truth, this security by bond was given by him in Alabama, as well as the debt originally contracted there; and the bond is dated at Mobile, and specifies no other place of performance. Now, although it be true that the rule of the *lex loci contractus*, before stated, is subject to the modification that it must yield to the *lex loci in quo solveret*, yet that is so only in those cases in which it appears from the contract that the

operation of the laws of a particular place as the place of contract will not be withdrawn from the effect of those laws merely by taking security for the performance of the contract [642] by mortgage upon lands situated in another jurisdiction.

performance is to be at some other place. For when a contract states that the parties had in view the law of another country, when they made it, then it is but right to say that the contract should be governed by the law the parties thus appear to have intended, rather than by that of the *loci contractus*. Thus notes made and dated in Dublin for £100 mean Irish and not English currency, unless they be payable on their face in England; in which latter case the money would be English. *Kearney v. King*, 2 B. & Ald. 301; *Sproule v. Legge*, 1 B. & C. 16; *Don v. Lippman*, 5 Clark & F. 1. For debts have no *situs*, and are payable everywhere, including the *locus contractus*; and therefore the law of that place shall govern, since it does not appear from the contract that the parties contemplated the law of any other place. There cannot be any other rule but that of the place of the origin of the debt, unless it be that where the creditor may be found; since the debtor must find the creditor for the purpose of making payment. But, manifestly, this last can never be adopted, because it would vary with every change of domicile or residence of the creditor. Then, as was observed by Lord Brougham in *Don v. Lippman*, a contract, payable generally, naming no place of payment, is to be taken to be payable at the place of contracting the debt, as if it was expressed to be there payable. Being payable everywhere, the rate of interest must be determined by the law of the origin, since there is nothing else to give a rule. . . . We are to suppose that as to Charles S. Gee

the bond expressed that it was payable at Mobile. When the others executed it, can it also be supposed that they insisted that, as to them, the bond should be payable in North Carolina? Certainly not; for to say nothing more, it cannot be presumed that the same debt is payable at two different places, unless it be so expressed. It is said, indeed, that, as in our law the contract is several, it is the same thing as if these parties had given distinct notes in this state for the debt. But it is to be recollected that the bond is also joint; and therefore that all three of the obligors obliged themselves jointly to do the same thing; that is to say, to pay a certain sum of money; and the only question is, whether we are to understand them as contracting to pay the sum at one and the same place. For, if we are so to understand, there can be no doubt, from what has been already said, that the place is Mobile; and then, according to the rule that the interest is to be regulated by the law of the place of performance, the bond would bear Alabama interest. There would have been nothing unlawful in taking a bond in this state for that interest, as we have before seen, as it would merely be a supplemental security for a previous lawful contract. Now, it is impossible to suppose that these defendants could have contemplated the payment being made here by them, and not at Mobile, by the principal. The very statement of the case is, that they executed the bond as the sureties of Charles S. Gee; and in the nature of things, therefore, they expected to be only secondarily liable,

Taking such security does not necessarily draw after it the consequence that the contract is to be fulfilled where the security is taken. The legal fulfillment of a contract or a loan on the part of the bondsman is repayment of the money; and the security given is but the means of securing what he has contracted for, which in the eye of the law is to pay where he borrows unless another place of payment be expressly designated by the contract.¹ But when there is nothing else to indicate where the transaction took place, or where the contract to pay is to be performed, the law of the place where the real estate is situated on which the money is secured will govern as to the rate of interest. A marriage settlement, though made in another state, was held to bear interest according to the law of South Carolina because secured on lands in that state.² Creditors residing in Pennsylvania, where the limit of interest is six per cent., held a mortgage made in the state of New York upon lands situate in that state. In the absence of anything indicating where the securities [643] were payable, or showing that a different rate of interest from that of New York was intended, the rate of that state was adopted.³ The general doctrine is that the law of the place

and they were to be liable for what he had bound himself. If that were not so it would lead to endless confusion. For, suppose a principal in Alabama and three sureties, one living and executing the bond in Louisiana, one in North Carolina and one in New York, would there be four distinct contracts as to the rate of interest? It would be absurd to hold so. In reality the contract of sureties, in reference to the question under consideration, is one of guaranty for the performance of his contract by his principal; and therefore each surety, no matter where he lives, must be liable for precisely the same, which is that for which the principal is liable, neither more nor less."

In Findlay v. Hall, 12 Ohio St. 610, three persons owed a debt in New Mexico on a promissory note pay-

able there. Two of them assumed to renew it, and accordingly executed a new note at Santa Fe. Afterwards the third executed the same note in Missouri, with a knowledge of all the facts. It was held that he ratified the agreement made by his co-debtors, and that the new note was to be regarded as made in and to be governed by the laws of New Mexico in respect to the stipulation for interest.

¹ Shipman v. Bailey, 20 W. Va. 640; Sheldon v. Haxtun, 91 N. Y. 124; De Wolf v. Johnson, 10 Wheat. 367; Varick v. Crane, 4 N. J. Eq. 123; Story's Conf. L., § 287a; Kavanaugh v. Day, 10 R. I. 393; Hosford v. Nichols, 1 Paige, 220; Butters v. Olds, 11 Iowa, 1.

² Quince v. Callender, 1 Desaus. 160.

³ Lewis v. Ingersoll, 8 Abb. App. Dec. 55.

where the contract is made is to determine the rate of interest, when the contract specifically gives interest; and this will be the case though the loan be secured by a mortgage on lands in another state unless there are circumstances to show that the parties had in view the laws of the latter place in respect to interest. When that is the case the rate of interest of the place of payment is to govern.¹ Where a mortgage is a mere incident to the debt, as security for the performance of a personal obligation, it will, as a security, follow the condition of the contract in respect to interest.²

Contracts and securities executed to take the place of others previously made for the same debt will be construed in the light of the antecedent facts, and by the law which governed the former contracts or securities, if executed and to be performed in the same place; but they may by new provisions be brought under other laws.

§ 362. Where usury is involved. On the question of usury courts have another function than that of merely interpreting the contract of the parties to effectuate their intention. If the contract is tainted with usury the intention of the parties is wholly or in part set aside and frustrated.³ In determining, therefore, the place of contract with a view to disposing of the defense of usury, courts do not limit themselves to a consideration of where, by the terms of the agreement, the parties say it was made or to be performed. The transaction in its incipient details is looked into, and even if fair on its face and conformable to the law it may be shown to be a transaction belonging to a different place and to include unlawful interest.⁴

[644] When the contract specifying the amount reserved is express, its form will not hinder the inquiry whether the parties resorted to it as a means of disguising usury in violation of the law of the state where it was made and to be executed;

¹ Central Trust Co. v. Burton, 74 Wis. 829; 2 Kent's Com. 460; De Wolf v. Johnson, 10 Wheat. 867.

² Sands v. Smith, 1 Neb. 108; Fitch v. Remer, 1 Biss. 837; Cope v. Wheeler, 41 N. Y. 303; Williams v. Fitzhugh, 37 N. Y. 444.

³ Church v. Malloy, 9 Hun, 148.

⁴ Pratt v. Adams, 7 Paige, 615; McAllister v. Smith, 16 Ill. 328; Claves v. Hooker, 6 T. & C. 448; S. C., 4 Hun, 231; Agricultural Nat. Bank v. Sheffield, 4 Hun. 421; Richardson v. Brown, 9 Baxter (Tenn.), 242.

and in arriving at this intention all the facts are to be taken into consideration.¹ Two citizens of Massachusetts cannot make a contract in that state payable there or in New York, and agree to be governed by the law of Iowa or California, and thereby avoid the consequence of the usury. Nor can a citizen of one state make his note in another to a resident there, payable in a third, with interest as allowed in a fourth.² Parties by a mere mental operation cannot import the law of one state into another for the purpose of altering the character of a loan made in the latter and to be there retained, without any undertaking or duty to use the money anywhere else, or any understanding that in respect to the use or repayment of it the loan shall differ from any other.³

But where there is no intention to evade the laws against usury parties whose transactions for legitimate purposes extend into several states may conform their interest contracts to the law of the state where the debt is contracted or to the law of that where it is to be paid; in other words, they may adopt the highest rate allowed by the law of either. There are many cases in this country which illustrate both parts of this proposition.⁴ A leading case arose and was decided in Louisiana upon a note given in that state, payable in New York, for a large sum, bearing interest at ten per cent., the legal rate of Louisiana, that of New York being only seven. The defense of usury was set up; but it was held that the note was not usurious; that although it was payable in New York, the interest might be stipulated for either according to the law of Louisiana or that of New York.⁵ In a Wisconsin case the loan was made in that state, by parties residing there, and for use there; but the note given was payable in New York, with interest at a higher than the legal rate of that state, and was transferred to a New York bank, and [645] afterwards renewed by a note, made and signed by a part of the makers in Wisconsin and by one in New York; this note was given for the same amount, provided for the same rate of interest as the other, and was also payable in New York. It, however, was made to the payee in the first note, which

¹ Arnold v. Potter, 22 Iowa, 194.

² Id.

³ Cope v. Wheeler, 41 N. Y. 808.

⁴ Miller v. Tiffany, 1 Wall. 298.

⁵ Depeau v. Humphreys, 8 Mart. (N. S.) 1.

was thus paid by that party. The facts are discussed in the opinion, and considerable emphasis is put upon the conclusion that it was a Wisconsin transaction. Upon the point that merely making the note payable in New York did not make it a New York contract, Cole, J., said: "The authorities . . . are too clear and emphatic and leave no room for doubt. They certainly establish the proposition that if the rate of interest be specified in the contract, and it be according to the law of the place where the contract was made, though the rate be higher than is lawful by the law of the place where payment is to be made, still the contract will be valid and binding."¹

§ 363. **Same subject.** The same liberal rule is applied to contracts for a greater rate than that allowed by the law of the place where they are made, such stipulated rate not exceeding that allowed at the place of payment.² An instructive case upon this point was decided in Iowa in 1867. A resident of that state negotiated a loan in Massachusetts. The notes were dated at Keokuk, Iowa, but delivered in Massachusetts, and the money there received; they were payable in New York, and included interest at a higher rate than was allowed by the law of Massachusetts or New York, but legal in Iowa. The payment of the notes was secured by a trust deed of Iowa land, acknowledged by the borrower in Massachusetts, and by [646] his wife in Iowa, to an Iowa trustee.³ The notes, though dated at a place in Iowa, were delivered and therefore had their legal inception in Massachusetts; the deed of trust, though conveying Iowa lands, being a mere security, would

¹ Richards v. Globe Bank, 12 Wis. 692; Kilgore v. Dempsey, 25 Ohio St. 413; Bank of Georgia v. Lewin, 45 Barb. 340; Balme v. Wombough, 88 id. 352; Houston v. Potts, 64 N. C. 33; Duncan v. Helm, 22 La. Ann. 418; Andrews v. Pond, 13 Pet. 77; Pratt v. Adams, 7 Paige, 615; Peck v. Mayo, 14 Vt. 38; Chapman v. Robertson, 6 Paige, 633; Fitch v. Remer, 1 Biss. 337; Atwater v. Rodofson, 4 Am. L. Reg. 549; S. C., 2 Handy, 19; Merchants' Bank v. Griswold, 9 Hun, 561; Berrien v. Wright, 26 Barb. 208; Carnegie v. Morrison, 2 Met. 381;

Kellogg v. Miller, 2 McCrary, 395; Wayne County Bank v. Law, 81 N. Y. 566; Pancoast v. Travelers' Ins. Co., 79 Ind. 172; Thornton v. Dean, 19 S. C. 583; New England Mortgage Security Co. v. Vader, 28 Fed. Rep. 265; Brown v. American Finance Co., 31 id. 516; United States v. North Carolina, 136 U. S. 211, 222.

² Lines v. Mack, 19 Ind. 223; Newman v. Kershaw, 10 Wis. 333; Bolton v. Street, 3 Cold. 31; Butters v. Olds, 11 Iowa, 1; Cockle v. Flack, 93 U. S. 344.

³ Arnold v. Potter, 22 Iowa, 194.

not change the *situs* of the loan; the securities were delivered and the money loaned received in Massachusetts. These facts could not influence the interpretation of the contract, but they were material on the question of its validity in respect to the defense of usury. Stating the case according to its legal effect, independently of the question of usury, it was briefly this: A loan was obtained in Massachusetts, and a contract was there made for its repayment in New York. Had the notes contained a promise generally to pay interest without specifying the rate, there can be no doubt that the law of New York would have interpreted that promise, and the rate of that state would have been adopted. The courts of any state or country where suit on the note might be brought would have adopted that rate because it would be deemed of the substance of the contract. If the notes, instead of being founded on a loan, had been given for lottery tickets sold and delivered in a state where such sales were unlawful, and were written payable in a state where such sales were not unlawful, there can be no doubt that the illegality of the consideration by the law of the state where the sale took place would vitiate and render the note invalid everywhere. The circumstance that the maker of the note was a resident of Iowa would give no recourse to the laws of that state to determine the force and effect of the interest contract and supply the rate, in the one case supposed; nor would his residence in a state permitting traffic in lottery tickets affect the question of illegality in the other. Chancellor Kent says:¹ "According to the case of *Thompson v. Powles*,² it is now the received doctrine at Westminster Hall that the rate of interest on loans is to be governed by the law of the place where the money was to be *used* or paid, or to which the loan has reference."³ And since the letter of a contract does not preclude inquiry into the facts and situation of the parties to establish usury, it is [647] doubtless equally competent to show where the loaned money was intended to be used and other facts to repel such a charge. In delivering the opinion of the court in the Iowa case, just mentioned, Wright, J., said: "The plaintiff claims that the parties in good faith contracted with reference to the laws of

¹ 2 Kent's Com. 461.

² 2 Sim. 211.

³ See *Cockle v. Flack*, 93 U. S. 344; *Cope v. Wheeler*, 41 N. Y. 308.

this state, intending to make this an Iowa contract, and upon this subject the court instructed as follows: 'If defendant went to Boston and urged the loan and promised ten per cent. under the laws of Iowa, and all the arrangements and contracts were made as to the laws of Iowa in good faith, and no more than ten per cent. was contracted for, then the defense fails and the plaintiff can recover.' Our opinion is that if the parties acted in good faith, that is, if there was no intention to evade the law, it was competent for them thus to contract, and that the defense could not avail; . . . the parties may, in good faith, contract with reference to the law of the place where the payer resides, and where the property upon which the security is taken is located."¹

§ 364. **Same subject.** As a promissory note or bill of exchange has no validity until it has been delivered, such paper may be dated, signed, indorsed and written payable in any place for a greater rate of interest than is there allowed, and not be subject to the defense of usury by the law of that place, if it is afterwards delivered and has its inception where the rate of interest therein specified is lawful; if such delivery is upon an actual transaction at the place where it occurs, as by the instrument being there discounted. Such a note or bill will be regarded as though made where it is delivered.²

¹ Scott v. Perlee, 39 Ohio St. 63; Jones v. Rider, 60 N. H. 452.

² Pratt v. Adams, 7 Paige, 636; City Savings Bank v. Bidwell, 29 Barb. 325; Bowen v. Bradley, 9 Abb. (N. S.) 395; First Nat. Bank v. Morris, 1 Hun, 680; Connor v. Donnell, 55 Texas, 167.

A bond dated in North Carolina and delivered in Virginia specified no place of payment, and was held to be subject to the usury laws of the former; but if it had appeared that it was given pursuant to a contract made in Virginia, it is suggested that it would have been otherwise. Morris v. Hockaday, 94 N. C. 286.

In Tilden v. Blair, 21 Wall. 241, a draft dated in one state and drawn by a resident thereof on a resident of

another state, and accepted by the latter purely for the accommodation of the drawer, and returned to him for negotiation in the state of his residence, the proceeds to be used there, and payment of it to be made by him, was negotiated to an innocent holder for value. Held, that it was to be governed by the law of the state in which it was dated and drawn, though by the terms of its acceptance it was payable at the acceptor's residence; and if by the law thereof the holder is entitled to the sum to be paid for it, though he bought it usuriously, he may recover such sum, notwithstanding the law of the state where the acceptance was made declared the contract void for usury.

In the former edition of this work

It is the first delivery of the executed instrument which determines the law by which its validity is to be tried. If the original delivery is made where the execution took place and where the instrument is payable, any subsequent use of it

the author expressed his dissent from the doctrine laid down in *Jewell v. Wright*, 30 N. Y. 259. Subsequent decisions in New York have more clearly explained the ruling there made and settled the law more nearly in harmony with the text than it was understood to be before the later cases were decided. In *Wayne County Savings Bank v. Low*, 81 N. Y. 566, 570, Rapallo, J., says: "In *Dickinson v. Edwards*, 77 N. Y. 578, the decision in *Jewell v. Wright* was adhered to, and it was held that where a promissory note was made in this state by a resident thereof, bearing date and by its terms payable in this state, with no rate of interest specified, and was delivered to the payees without consideration, to be used by them for their accommodation, without restriction, and was first negotiated by them in another state at a rate lawful there but greater than that allowed by law in this state, it was usurious and void, there being no evidence in the case of any intention on the part of the maker that the note should be discounted or used out of this state. That case, as well as *Jewell v. Wright*, was distinguished from *Tilden v. Blair*, 21 Wall. 241, expressly upon the ground that in *Tilden v. Blair*, although the acceptance was made payable in New York by the acceptors who were residents of New York, yet, after having accepted in New York, they returned the acceptance to the drawer in Illinois for the purpose and with the intention that it should be negotiated by him in that state. And this court says in its opinion in *Dickinson v. Edwards* that that was

the controlling fact in *Tilden v. Blair*, and that the ruling consideration was the intention of the acceptors that the draft should be used in Illinois, while in *Jewell v. Wright* and in the case then before the court there was nothing to show an intention on the part of the maker of the note to give authority to deal with it otherwise than as the law of this state would allow. The case of *Bank of Georgia v. Lewin*, 45 Barb. 340, and other cases are distinguished from *Jewell v. Wright* on the same ground, and it may safely be said that the case of *Dickinson v. Edwards* rests upon the ground that there was no evidence of knowledge or intention on the part of the maker of the note that it was to be used out of this state, and that, in the absence of such proof, it must be governed by the law of the place of payment.

"In the present case the fact which was wanting in *Jewell v. Wright* and *Dickinson v. Edwards* clearly appears, and the case is brought within the principle of *Tilden v. Blair*, and the cases which have followed it. The note now in suit was dated and made payable in New York, but it was made for the express purpose of being used in renewal of another note for the same amount then held by the plaintiffs, a bank in Pennsylvania. The note in suit was actually written in Pennsylvania in the form in use in that state, by the cashier of the plaintiff, at the defendant's request, and forwarded by the cashier to the defendant for signature, and was signed by the defendant in New York, and then mailed by him to the plaintiff in Pennsylvania, together

then contemplated by the parties cannot affect its validity.¹ If preliminary negotiations for a loan are made in one state, and it is agreed that the security shall be executed and recorded in the state of the borrower's residence, the contract is complete and the papers are delivered to the lender when they are put in possession of the proper officer to be recorded, though they are subsequently mailed to the creditor.²

[648] How is a contract to be considered which is usurious where it was made, and also by the law of the place where, by its terms, it is to be performed by payment? If the inter-
[649] est allowed by the law of the place of performance is higher than that permitted by law where the contract was made, the parties may, as has been before stated, stipulate

with a check for the discount at the rate of eight per cent. per annum, which was lawful in Pennsylvania. The note and interest were consequently received by the plaintiff in Pennsylvania, and all this was done in performance of a previous agreement which had been entered into in Pennsylvania between the plaintiff and the defendant. All that was done by the plaintiff in New York was simply in execution of that agreement, and as is said in *Dickinson v. Edwards* in citing *Tilden v. Blair*, the designation of the place of payment of the note was an incidental circumstance for the convenience of the maker and not an essential part of the contract or with the intent to affix a legal consequence to the instrument. It cannot be contended that a party who goes into another state and there makes an agreement with a citizen of that state for a loan or forbearance of money, lawful by the laws of that state, can render his obligation void by making it payable in another state according to whose laws the contract would be usurious. Neither can it be claimed that because the obligation, instead of being signed in the state where the contract was made, is signed in another state and

sent by mail to the place of the contract, it must be governed by the usury laws of the place where it was signed." See *Sheldon v. Haxtun*, 91 N. Y. 124; *Western Transportation & C. Co. v. Kilderhouse*, 87 id. 430; *Merchants' Nat. Bank v. Southwick*, 67 How. Pr. 324; *Bowen v. Bradley*, 9 Abb. (N. S.) 395.

In *Hanrick v. Andrews*, 9 Port 9, a loan was made in New York, and the interest was paid there on it, and the bill there drawn payable in Alabama, without interest—and it was held to be governed by the law of New York, and usurious. The interest contract was made and performed in that state at the time of the loan. The court held that an instrument, as to its form, and the formalities attending its execution, the mode of construing it, the meaning to be attached to the expressions by which the parties have contracted, and the nature and validity of the contract, is subject to the law of the place where it is made; and that the law of the place where is to be executed must regulate its performance.

¹ *Merchants' Nat. Bank v. Southwick*, 67 How. Pr. 324.

² *Kellogg v. Miller*, 2 McCrary, 395.

for the higher interest without incurring the penalties [650] of usury. But if the contract is made payable in another state for the mere purpose of evading the usury law of [651] the place where it was made the form of the transaction will not sustain it. The contract will be disposed of by the [652] law of the state in which it is made. The court will decide according to the real object of the parties.¹ An action [653] was brought on a bill of exchange drawn in New York, payable in Alabama, for an antecedent debt, which included a sum in addition greater than the interest in either state for the time of forbearance. The court say, the defendants allege that the contract was not made with reference to the law of either state, and was not intended to conform to either; that a rate of interest forbidden by the law of New York, where the contract was made, was reserved on a debt actually due; and that it was concealed under the name of exchange in order to evade the law. If this defense be true, and shall be so found by the jury, the question is not which law shall govern in executing the contract, but which is to decide the fate of a security taken upon a usurious contract which [654] neither will execute. Unquestionably it must be the law of the place where the agreement was made and the instrument taken to secure its performance. It was remarked that a contract of this kind cannot stand on the same principles with a *bona fide* agreement made in one place to be executed in another. In the last mentioned case the agreement was permitted by the *lex loci contractus*; and will even be enforced there if the parties be found within that jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws and designed to evade them. In such cases the legal consequences of such an agreement must be decided by the law of the place where the contract was made.² What would be the fate of a contract made with express reference to the law of the place of payment, though stipulating interest above the rate allowed there, as well as where it was made, is not decided by that case. The contract, if intended to evade the usury law of New York, and usurious, if governed by that law, is void. But if made with reference to the law of Ala-

¹ Story's Conf. L., § 293a.

² Andrews v. Pond, 13 Pet. 65.

bama, and usurious by it, it is not wholly void. A contract of the latter kind is in part enforced by that law. parties in New York, where the limit of interest is seven per cent., make a contract in a transaction which legitimately extends into Alabama for the payment of money there at a rate exceeding both the rate of New York and that of Alabama, and have the benefit of the law of the latter state to determine their rights, if the defense of usury be made?

In an Indiana case a resident of that state borrowed money there of a domestic corporation upon a draft drawn there on New York, specifying six per cent. interest for the time it had to run; it was discounted at the rate of twelve per cent., and the question was, by what law the fate of the contract was to be determined. It was held to be an Indiana contract because the transaction was a loan made there, and because the bill specified the Indiana rate of interest.¹

A resident of Massachusetts applied to a citizen of New York for a loan, and the latter agreed to lend him a sum at [655] eight per cent. on security of real estate situate in Massachusetts; the lender wrote the borrower to send him the note and mortgage, which were accordingly sent, and the lender caused the loan to be paid over to the borrower in Massachusetts. Hence, the contract sued on had its legal inception in New York; and the consideration therefor, the loan, passed to the maker of the note in Massachusetts; the contract was held to be governed by the law of that state, though the agreed rate of interest was usurious by the law of both states. It was deemed a Massachusetts contract because the important facts of the transaction took place in that state.² An important case in New York seems to answer the question just stated.³ A New York corporation negotiated a loan of two bank corporations of Philadelphia; the bargain was made in New York, and the contract for repayment, in the form of certificates of deposit, was made there, stating the deposit of the money loaned with the borrowing corporation in New York; these certificates were payable on time, at Philadelphia, with interest at six per cent., the legal rate in Pennsylvania. The loan was to be in depreciated paper, but was

¹ Mix v. Madison Ins. Co., 11 Ind. 117.

² Pine v. Smith, 11 Gray, 88.

³ Curtis v. Leavitt, 15 N. Y. 9-296.

paid in an equivalent of cash funds; and the difference between the amount received and that stated in the certificates of deposit, it was claimed, rendered it usurious by the laws of both states. Without deciding absolutely whether the contract was usurious, a majority of the court concurred in the conclusion that if it was usurious by the laws of both states it should be governed by the law of Pennsylvania, where the loan was to be repaid.

In an Illinois case¹ a suit in chancery was commenced for the purpose of settling the rights of different creditors in the proceeds of a mortgage given for their common benefit. The demand of one creditor, a bank, was upon acceptances of bills of exchange drawn and accepted in Indiana, and payable in New York. These bills were based upon actual transactions, namely, the shipment of hogs and cattle. Where the transactions took place does not very distinctly appear; but from some indications in the report it is inferred that they occurred in Indiana. Two of the bills were purchased by the bank with a reservation of seven and a half per cent. in- [656] terest, which was greater than the amount allowed by law in either Indiana or New York; and the question was discussed, by the law of which state the fate of the security should be determined. It was held that the law of Indiana was to govern because the contract was made there.²

¹ Adams v. Robertson, 37 Ill. 45.

² On a rehearing of this case the court adopted an opinion prepared by one of the judges who sat at the first hearing but not at the second. In this the writer said: "Great conflict of opinion has prevailed in respect to the laws affecting the validity of contracts made in one country but to be performed in another. The laws of a country where a contract is made are obligatory upon the parties; and, upon principle, no contract declared void by these laws ought to be enforced in any other country. As an exception to the rule, it has been held that no nation is bound to take notice of or to protect the revenue laws of another country; but

this exception has no foundation in principle, although it is so firmly established that courts cannot now overturn it. No man ought to be heard in a court of justice to enforce a contract founded in or arising out of moral or political turpitude, or in fraud of the just rights of the country in which the contract was made. Story's Conf. L., p. 435. The laws of every country allow parties to enter into obligations with reference to the laws of the country where such obligations are to be performed; and although such obligations may not be in accordance with the laws of the country where they are made, as regards obligations to be performed in that country, they may be strictly in

[657] § 365. Same subject. By the interest laws of many states usurious contracts are not wholly void. In states where there is any interest limit there are various provisions under which the debtor may defend on the ground of usury, either

accordance with such laws as to obligations to be performed in other countries. The right to enter into contracts with reference to the laws of another country is one allowed by nations for the convenience of those transacting business within their respective territorial limits, to enable them to obtain such rights as they could have secured in the country where the contract is to be performed, by a just observance of its laws. No nation can justly be required to allow persons subject to its laws to enter into contracts without reference to and not in accordance either with its own laws or with the laws of the country where the contract is to be performed. A limitation in the laws of all nations of the right to enter into contracts to be performed in other countries requires that they shall be in accordance with the laws of the country where they are made, or else in accordance with the laws of the country where they are to be performed. The laws of a country have no extraterritorial force, and do not prohibit persons from doing any act or making any contract in another country. The courts of any country may refuse to enforce contracts made in another country where they are immoral or unjust, or where the enforcing of them would injure the rights, interests or convenience of that country or its citizens; but the laws of a country, as such, have no operation or effect upon acts done or contracts made beyond its territorial limits. The rights enforced by courts, where contracts are made in one country to be performed in another, are those

given by the law of the country where the contract was made, and such rights are to be enforced in the country where the contract is to be performed, not as a matter of right, but as a matter of comity extended towards the country where the contract was made. Persons making contracts with reference to the laws of the country where such contracts are to be performed may expressly or impliedly stipulate for the rights and benefits given by the laws of that country as part of the contract; and the laws of the country where the contract is made secure to the parties the rights and benefits thus agreed upon, in the same manner as if the laws in reference to which they contracted were incorporated into the contract.

“In determining the consequences attendant upon making a contract in one country, to be performed in another, which is not in accordance with the laws of either country, we should inquire which country's laws have been violated. As, for example, the laws of Illinois allow parties to contract for interest at the rate of ten per cent., while the laws of New York allow only seven per cent. Persons who make contracts in Illinois for interest at the rate allowed by its laws violate no law of the state of New York, and are not subject to the penalties imposed by the laws of that state upon persons who enter into contracts within its territorial limits in violation of such laws. A creditor who has made no contract in New York does not violate its laws by receiving money from his debtor in that state, or

against the excess of interest above the legal rate, [658] against the entire interest or against the whole interest and some portion of the principal. Some question has arisen how far the courts of one state, in which the remedy is sought on such contracts made in another state, will enforce such statutes as laws governing the contract. It is a general rule that penal laws are strictly local; confined in their operation to the territory of the power enacting them, and affect nothing more than they can reach.¹ The statute of New York limits the rate of interest to seven per cent., and declares void all usurious contracts and securities. Any contract governed by this law, and which would be held void there, would be held void everywhere.² The effect of this statute is penal, and for this reason the courts hold that statutes taking away the forfeiture or diminishing it may be made to apply to existing contracts.³ The contract in such cases has no legal inception; the illegality in its origin prevents its coming into being, the

undertaking in another state to receive it there. The laws of Indiana allow persons to contract for interest at the rate of six per cent. in case the contract is to be performed in that state, and at the rate of seven per cent. if the contract is to be performed in New York, but prohibit contracting for a greater rate in either case. Persons entering into contracts in Indiana, reserving a greater rate of interest than is allowed by its laws in such cases, thereby violate the laws of that state, and incur the penalties imposed for such violation. The courts of neither state will enforce the contract, because the rights asserted under it are in violation of the laws of the state where it was made. The fate of such a contract depends upon the laws of the place where it was made, being subject to the legal consequences attendant upon the violation of those laws. *Andrews v. Pond*, 18 Pet. 65. In *McAllister v. Smith*, 17 Ill. 328, this court held that

pleas setting forth that the bills of exchange upon which the suit was brought were made in Illinois and payable in the state of New York, under a contract not in accordance with the laws of either state, ought not to have been stricken from the files for immateriality. While the reversal of the judgment in the court below upon that ground was undoubtedly correct, upon a careful review of the subject we are not satisfied with all the reasons given on that occasion."

¹*Folliott v. Ogden*, 1 H. Bl. 185; *Ogden v. Folliott*, 3 T. R. 733; *Wolff v. Oxholm*, 6 M. & S. 99; *The Antelope*, 10 Wheat. 123; *Scoville v. Canfield*, 14 Johns. 338; *Commonwealth v. Green*, 17 Mass. 515.

²See *ante*, § 357.

³*Curtis v. Leavitt*, 15 N. Y. 9, 229; *Welch v. Wadsworth*, 30 Conn. 149; *Parmelee v. Lawrence*, 44 Ill. 405; *Wood v. Kennedy*, 19 Ind. 68; *Pollock v. Glazier*, 20 id. 262.

law being more potent than the will of the parties. When money is parted with on the faith of such an agreement it is irrecoverably forfeited; not by judicial sentence; not because the law prescribes a fine graduated to the sum lent at usury; but because the law is passive and will not aid a party who has voluntarily risked his money in an unlawful venture. The recognition by the courts of other states of this innate infirmity of the contract, involving a forfeiture of everything of value invested in it, though that be a penalty for making a forbidden contract, is not deemed the enforcement of the penal laws by the effect of which such contracts are void *ab initio*. The same principle applied to a contract which by the *lex loci* is avoided in part would require the same abatement of the debt when sued for in another state.

By the statute of Iowa the creditor is entitled, in an action for a usurious debt, to recover only the principal, without [659] interest or costs; but the courts of that state are directed in such action to give judgment for ten per cent. interest to the school fund of the county. The creditor loses the interest, but the debtor is relieved only from paying the excess over ten per cent. In an action in Illinois upon a contract made in the former state the plaintiff was permitted to recover only according to the same rule; that is, the principal without interest.¹ There, of course, the penalty to the school fund was not adjudged; nor could the provision in regard to costs be executed. The court say: "Here unlawful interest was contracted for and the interest was incorporated with the principal, and the law in effect says that the interest shall be expunged from the note, and it shall be read and adjudged the same as if the principal sum alone had been expressed in dollars and cents. And this law, entering into and forming part of the contract, goes with it wherever it goes. It is admitted that such would be the effect of this law if it had declared that the plaintiff should have judgment for nothing. How much more so in common sense when it allowed him to take judgment for the principal sum borrowed. The distinction in the two cases is not only without reason, but is against all reason and all sound law and the philosophy of the law."

¹ Barnes v. Whitaker, 22 Ill. 606.

The statute of Massachusetts fixes the rate of interest at six per cent. If more is reserved the contract is not void, but the defendant recovers full costs, and the plaintiff forfeits threefold the amount of the whole interest reserved, and shall have judgment for the balance only which shall remain due after deducting the threefold amount. In an action in Iowa upon a contract claimed to be usurious under the laws of Massachusetts the trial court instructed the jury that "this court will not enforce the penal statute of another state relating to usury, when that statute does not make the contract wholly void; and, therefore, the statute of Massachusetts is not to be considered by the jury." This was held, on appeal, to be erroneous, and that the legal effect of the contract could not vary in different states; and it is according to such effect that all courts are bound to enforce contracts.¹

¹Arnold v. Potter, 22 Iowa, 194. In this case Wright, J., said: "If the law affixed a penalty, and the defendant was in this case seeking to collect it; or if, as under our statute, the defendant forfeited a certain amount to the school or other fund, and we were asked to declare the same, we would have cases to which the instruction in question would apply. Is forfeiture the same as penalty in this connection? This is easily answered. If the law attaches a penalty as the consequence of an act, it may be sued for and recovered; but it will be enforced alone in the state declaring the same. If, on the other hand, a person's property may be forfeited or lost by some fault or offense, the forfeiture is not enforced, except in the prosecution of the fault or offense; and if the party guilty of the fault seeks to enforce the contract which he has obtained as the fruit of such offense, he can take no part of the forfeiture. And when he declares and seeks to recover upon such a contract in another state, if the courts of that state hold that his contract shall be carried out as interpreted by the

laws of the state where made, they inflict upon him no penalty; they are not enforcing the penal laws of another state, but enforcing the statute of a sister state so far as it effects a discharge of the claim. Gambling is punished by our statute, and a gambling contract is void. Suppose our laws declared that a party holding such a contract might recover one-half and no more. Now, the penalty, the penal statute, would not be enforced in another state, but, in an action upon the contract there, the holder would be limited in his recovery to the one-half. The Massachusetts statute not only uses the word 'forfeit,' but says the plaintiff shall only have judgment for so much; thus unmistakably keeping up the distinction between a law of this kind and one penal in its nature. But take other illustrations. A stockholder fails to comply with the terms of the articles in the payment of his stock, and these articles declare that for such non-compliance his share shall become forfeited. Will any one pretend that this is a penalty within the meaning of the law? Then, again, equity recognizes

[660] It is obvious that where the *lex loci* provides that the interest contract shall not be void, but declares certain consequences of the usury, and, among them, that a deduction shall be made in any action brought upon the contract from the amount to which it purports to entitle the creditor, such consequences are penal in their nature in the same sense, and no other, as the law which declares the whole contract void.

[661] Neither law means, in an absolute sense, what it says by "void," and "not void." If a usurious contract were absolutely *void* anybody could allege its invalidity. But the law confines the privilege of making that objection to the debtor party to the contract, and those standing in certain relations of privity to him. The law which declares the contract void, itself qualifies the declaration by specifying certain effects of the usury which substantially obliterate a part of the contract from its inception.¹

the distinction when it is said that a party will *always* be relieved from a penalty, if compensation can be made, because it is deemed as a mere security; and yet, though compensation can be made, relief will not always be given against a *forfeiture*. So, again, we speak of a forfeiture in case of a breach of a covenant, but never of it as a *penalty*. So of a penalty as contradistinguished from liquidated damages, but never of *forfeiture* in the same connection. Then, again, of *forfeiture* as a recompense to an injured party for the wrongful or illegal act of another, by which the latter loses his interest in the thing. But penalty carries a very different idea. It is the punishment inflicted for not executing a prior obligation, the object being to insure the primary engagement of covenant. Bouvier's Inst., vol. 1, 292; 2, 146; 4, 217." The learned judge, referring to *Sherman v. Gasset*, 9 Ill. 521, maintaining a different doctrine, said: "It was decided by a divided court, Lockwood, J., delivering the opinion of six of the judges, and Koerner, J., the dissenting opinion of

the other three. We do not propose to examine it at length. The argument of the majority of the court strikes us as being based upon improper assumptions, and as equally inconclusive in its reasoning; and most pertinently does the dissenting opinion dispose of the whole argument by saying: 'To maintain that we are bound to declare a usurious contract wholly void, when the laws of the place of contract make it so, whereby the creditor is deprived of the whole of his claim, but that we are not bound to regard the law where it provides for a forfeiture only by which the creditor loses but a part of his claim, seems to involve a singular inconsistency. It, in other words, involves the following remarkable syllogism: The law everywhere avoids usurious contracts, when they are declared wholly void by the law of the place. This contract was void in part, and consequently it is good in whole.'

¹ *Ewell v. Daggs*, 108 U. S. 143.

If a usurious contract is wholly abandoned and the securities given to insure its performance are can-

The statute which makes usury a total or partial defense [662] may hamper it by making it depend on some special method of local practice, and thereby confine its allowance to the courts of the state by whose law the contract and the remedy are governed. This is illustrated by a case in Massachusetts, upon a note usurious by the law of New Hampshire, by which law the benefit of the defense depended on the defendant offering a particular mode of trial; that is, by the oath of the parties. If the usury was thus proved a certain amount was required to be deducted from the principal and interest due on the contract in assessing damages. These provisions were held to apply to the remedy, and, of course, to extend only to suits brought in New Hampshire; they could have no effect when a remedy was sought in the courts of another state.¹

celed, a subsequent promise by the borrower to pay the money he borrowed is binding. *Sheldon v. Haxtun*, 91 N. Y. 124; *Hammond v. Hopping*, 18 Wend. 505; *Kilbourn v. Bradley*, 3 Day. 356; *House v. Planters' Bank*, 57 Ga. 95.

Willis v. Cameron, 12 Abb. 245, proceeds wholly upon the ground that the statute of usury of Massachusetts, which applied to the contract in question, is penal, and therefore that the deduction of threefold the amount of the whole interest reserved can only be allowed in the courts of that state. *Hilton, J.*: "The second defense, although very ingeniously pleaded, must, I think, be regarded as sham. It assumes to be a defense in bar of the plaintiff's right to recover anything upon the note in suit;—whereas, by the statutes of Massachusetts, as interpreted by the courts of that state (*Kendall v. Robertson*, 12 Cush. 156), although the rate of interest there is declared to be six per cent. per annum on all contracts for the payment of money, yet the taking of a greater sum does not avoid the entire

contract, but merely imposes upon the person taking it, by way of penalty, a forfeiture of threefold the amount of interest unlawfully reserved, *and no more*; and which is to be allowed to the defendant in the action upon the contract when he establishes the fact of taking such unlawful rate, together with his full costs in the suit; or when the illegal interest has been paid, the party paying it may recover it back threefold. (See *De Wolf v. Johnson*, 10 Wheat. 367, as to the effect of such a statute.) It will not, I suppose, be contended that the defendant, if he had paid the illegal interest, could maintain an action in this state to recover the penalty thus imposed by the statute of Massachusetts upon the party receiving it; and this being the case I think it must follow, as a necessary consequence, that he cannot, in this state, avail himself of the statute, by way of defense." See *Sherman v. Gassett*, 9 Ill. 521.

¹ *Gale v. Eastman*, 7 Met. 14. The distinction between the law of the contract and the remedy is very distinctly stated by *Shaw, C. J.*, who

§ 366. The law of what place governs the rate on damages. Interest before a debt is due is the creature of agreement; afterwards it is given by law as damages for detention of the money; but it may be governed as to rate by contract. In the absence of contract the amount is regulated by law. [663] And there is much authority for saying that the law which governs the rate is that of the place where the debt is payable.¹ That law is supposed to have been in the minds of the parties when the debt was contracted; at all events, the money is deemed to be worth the legal rate of interest at the place where it was the debtor's duty to pay it. The creditor may bring suit wherever a court can obtain jurisdiction, but the damages for detention of the debt have generally been assessed according to the law of the place where payment was due, if that law is shown.² This rule does not appear to be recognized in Massachusetts, except in respect to contracts containing an express or implied agreement to pay interest. It is now declared settled that in an action there

delivered the opinion of the court in this case: "The general rule is that those provisions of law which determine the construction, operation and effect of a contract are part of the contract and follow it, and give effect to it wherever it goes; but that in regard to remedies, the *lex fori*, the law of the place where the remedy is sought, must govern. We therefore cannot be governed by the law of New Hampshire, which professes only to regulate the remedy on a usurious contract. The law of Massachusetts, though somewhat analogous, cannot apply because, although the *mode* of enforcing the law against usury is by applying it to the remedy, yet the law to be enforced is the law of Massachusetts. The law of this commonwealth, declaring what shall be the rate of interest, and what contracts shall be deemed usurious, also directs, when suits are brought, what deductions shall be made; but it is suits brought

on *such* contracts; that is, contracts made in violation of its own provisions."

¹ Healy v. Gorman, 15 N. J. L. 328; Evans v. Clark, 1 Port. 388; Evans v. Irvin, id. 390; Hall v. Kimball, 58 Ill. 58; Hoppins v. Miller, 17 N. J. L. 185; Burton v. Anderson, 1 Tex. 93; Gibbs v. Fremont, 9 Exch. 25; Bushby v. Camac, 4 Wash. C. C. 296; Winthrop v. Carleton, 12 Mass. 4; Jaffray v. Dennis, 2 Wash. C. C. 253; Lanusse v. Barker, 3 Wheat. 101; Winthrop v. Pepoon, 1 Bay, 468; Gaillard v. Ball, 1 Nott & McC. 67; Robinson v. Bland, 2 Burr. 1077; Thompson v. Ketcham, 4 Johns. 285; Cocke v. Conigmaker, 1 A. K. Marsh. 254; Porter v. Munger, 22 Vt. 191; Crawford v. Simonton, 7 Port. 110; Evans v. White, Hemp. 296.

² 2 Par. on Con. 585; 2 Par. on Notes and Bills, 370; Fanning v. Consequa, 17 Johns. 511; Chambliss v. Robertson, 23 Miss. 302.

upon a note made payable on a day certain in another state, without any agreement express or implied to pay interest, the plaintiff can only recover at the legal rate in Massachusetts, although less than such rate in the state where the note was made and payable.¹ In Indiana if a note sued upon was made in another state and does not provide for interest nor specify the place of payment the court will award interest according to the local law.² Interest as damages, in the absence of a contract, is governed by the law of the forum.³

§ 367. Allegation and proof of foreign law. Courts [664] of one state do not take judicial notice of the laws of other states or countries. Hence, where a contract is sued out of the jurisdiction within which it was to be performed, and the

¹ *Ayer v. Tilden*, 15 Gray, 178; *Ives v. Farmers' Bank*, 2 Allen, 236.

In *Ayer v. Tilden* the action was upon a New York note in which there was no agreement for the payment of interest. Hoar, J.: "That rate is six per cent. from the maturity of the note. The interest is not a sum due by the contract; for by the contract no interest was payable, and is not, therefore, affected by the law of the place of the contract; it is given as damages for the breach of the contract, and must follow the rule in force within the jurisdiction where the judgment is recovered. *Grimshaw v. Bender*, 6 Mass. 157; *Eaton v. Mellus*, 7 Gray, 566; *Barringer v. King*, 5 Gray, 9. The contrary rule has been held to be applicable when there was an express or implied agreement to pay interest. *Winthrop v. Carleton*, 12 Mass. 4; *Von Hemert v. Porter*, 11 Met. 210; *Lanusse v. Barker*, 3 Wheat. 101. Perhaps it would be difficult to support the decision in *Winthrop v. Carleton* upon any sound principle; because the court in that case held that interest could only be computed from the date of the writ; thus clearly showing that it was not considered as due by the contract, and yet

adopted the rate of interest allowed at the place of the contract. But the error would seem to be in not treating money paid at the implied request of another as entitled to draw interest from the time of payment. An objection to adopting the rule of the rate of interest in the jurisdiction where the action is brought, as the measure of damages, may be worthy of notice; that this rule would allow the creditor to wait until he could find his debtor or his property within a jurisdiction where a much higher rate of interest was allowed than at the place of contract. But the debtor could always avoid this danger by performing his contract; and the same difficulty exists in relation to the action of trover and replevin. If such a case should arise, it might with more reason be argued that the damages should not be allowed to exceed those which would have been recovered in the state where the contract was made and to be performed." See, also, *Chase v. Dow*, 47 N. H. 405.

² *Kopelke v. Kopelke*, 112 Ind. 435; *Shaw v. Rigby*, 84 id. 375.

³ *Goddard v. Foster*, 17 Wall. 128; *Bischoffsheim v. Baltzer*, 21 Fed. Rep. 531.

plaintiff seeks to recover interest according to the law of the place of contract, he must set forth that law in his pleading and prove it on the trial.¹ Interest, though generally regulated by statute, is not necessarily so; it may, in the absence of statute, be payable, and its rate governed by custom.² Where the rate of another state is alleged to be established by statute the party so alleging it should prove the statute, as foreign statutes are required by the law of the forum to be proved. But if the allegation does not specify that the foreign rate is so established, the court would not assume that the [665] foreign rate was governed by a written law. It would seem to be as competent to take judicial notice of the statutory rate of another state as that the rate of another state is fixed by statute. The rate of another state, and the law, written or unwritten, which is the foundation of it, is matter of fact to be alleged, proved, and found by the jury.³

¹ *Balfour v. Davis*, 14 Ore. 47; *Ramsey v. McCauley*, 2 Tex. 189; *Swett v. Dodge*, 4 Sm. & M. 667; *Davidson v. Gohagin*, 2 Bibb, 634; *Richardson v. Williams*, 2 Port. 239; *Jaffray v. Dennis*, 2 Wash. C. C. 253; *Peacock v. Banks*, Minor (Ala.), 387; *Hunt v. Mayfield*, 2 Stew. 124; *Harrison v. Harrison*, 20 Ala. 629; *Nalle v. Ventress*, 19 La. Ann. 373; *Ingraham v. Arnold*, 1 J. J. Marsh. 406; *Johnson v. Williams*, id. 489; *Russell v. Shepherd*, Hardin, 44; *Pawling v. Sartain*, 4 J. J. Marsh. 238; *Cavender v. Guild*, 4 Cal. 250; *Thompson v. Monrow*, 2 Cal. 99.

In *Foden v. Sharp*, 4 Johns. 183, action was brought against the acceptors of a bill of exchange drawn and payable in England. On the inquiry of damages the only evidence was the bill and a protest for non-payment. The jury allowed seven per cent. interest, the rate where the action was brought. The court ordered a reduction of the interest to five per cent., the rate in England, of which the court seemed to take judicial notice.

In *Schell v. Stetson*, 12 Phila. 187, a suit upon a New York judgment rendered for costs, the court took judicial notice of the fact that the laws of that state allowed interest on such judgments, and assumed that it was bound to do so by virtue of the federal constitution. But this is not a tenable position. *Clark v. Child*, 136 Mass. 344.

² *Young v. Godbe*, 15 Wall. 562.

³ See cases cited in n. 1, § 366. In *Kermott v. Ayer*, 11 Mich. 181, suit was brought on a Canada note. The court held that it could not take judicial notice of the rate of Canadian interest; and it also held that it was not a presumption of law that the rate of interest in a foreign country is the same as that established in Michigan by statute. *Campbell, J.*, said: "The evidence of the attorney from Canada concerning the Canadian law of interest could not properly be received to show the terms of a Canadian statute. Foreign statutes cannot be proved by parol, without some showing why secondary evidence becomes necessary. This doc-

Where there is an allegation of a foreign rate of interest of the place of contract, differing from the rate at the place where the action is brought, unsupported by proof; or, in the absence of any allegation of the rate where the contract is payable, whether interest should be denied altogether, or should be allowed according to the rate allowed by the law of the forum, does not appear to be entirely settled. In [666] Texas it is held that no interest at all can be recovered upon a contract payable in another jurisdiction, unless the rate there prevailing is alleged and proved.¹ So in Alabama.² The more general rule, and, as we think, the more reasonable one, is, in such case, to allow interest according to the *lex fori*.³ The law of the forum is adopted in some states in the absence

trine has been recognized in this court in *People v. Lambert*, 5 Mich. 349, and is the settled American doctrine. 1 Greenlf., §§ 587-8.

"The rate of interest is a matter of such common notoriety that there might be reason for excepting it from this general rule, and there is no doubt that, in many cases, it has been proved by parol, without objection. But there would be danger in allowing such an exception as an arbitrary one; and the mistakes made in works current among business men on the rates of interest in different states show that business knowledge of statutory provisions is not always reliable. We have been in some doubt whether, for this reason, there was not error in admitting the evidence objected to. But it does not appear that Canadian interest is regulated by statute; and we are not justified in making any inference not required by facts set out, in order to establish error; the presumption must always be in favor of the judgment. It is, therefore, affirmed." But, in *Talbot v. Peebles*, 6 J. J. Marsh. 200, on a similar record, the court thus treated the subject. The only witness who was sworn to prove the rate of interest in Illinois stated

that the legal rate was six per cent. Consequently, if he proved anything, he proved that the rate of interest in Illinois was fixed by law. The law must necessarily be a public and written law; for if it be not a positive statute, enacted by the legislature of Illinois, it must be some pre-existing statute of England or Virginia, recognized by the constitution of Illinois, or must be an express provision of her constitution.

¹ *Wheeler v. Pope*, 5 Tex. 262; *Able v. McMurray*, 10 id. 350; *Prigdon v. McLean*, 12 id. 420; *Ingram v. Drinkard*, 14 id. 351. See *Cooke v. Crawford*, 1 id. 9; *Burton v. Anderson*, id. 98.

² *Evans v. Clark*, 1 Port. 888; *Peacock v. Banks*, Minor, 387; *Spain v. Grove*, id. 177.

³ *Surlott v. Pratt*, 3 A. K. Marsh. 174; *Chumasero v. Gilbert*, 26 Ill. 39; S. C., 24 id. 651; *Deem v. Crume*, 46 Ill. 69; *Goddard v. Foster*, 17 Wall. 123; *Prince v. Lamb*, 1 Ill. 378; *Lougee v. Washburn*, 16 N. H. 134; *Hall v. Woodson*, 13 Mo. 462; *Hall v. Kimball*, 58 Ill. 58; *Booty v. Cooper*, 18 La. Ann. 565; *Leavenworth v. Brockway*, 2 Hill, 201; *Kopelke v. Kopelke*, 112 Ind. 435; *Shaw v. Rigby*, 84 id. 375; *Thomas v. Beckman*, 1 B.

of proof of the rate at the place of contract on the principle that it should be presumed, until the contrary is shown, that the law of the state where the contract was to be performed is the same as of that where the action is brought.¹

§ 368. **Effect of change in law of place of contract.** One branch of the present inquiry remains to be considered; that is, what is the effect of changes in the law in regard to the rate of interest while the contract on which the question of interest arises is pending, or after the principal becomes due. At first blush the principle which fixes the rate by the law of the place of contract might seem to require the rate to be the same throughout the period of forbearance or default as at the making of the contract, or when the contract duty or liability to pay interest attaches. It is so when interest is expressly or tacitly agreed to be paid. But where it is recoverable for mere default in not paying money due either *ex contractu* or *ex delicto* it is governed by the law in force when the interest accrues; the rate will change to conform to the law if any change takes place.²

[667] In a California case decided in 1859 suit was brought against an administrator for the balance of an account due from his intestate. It did not appear when the account was made. It had been presented to the defendant, who rejected it. The case was tried without a jury. The account was found to be correct by the trial court, and interest allowed on the balance for a certain time at the Mexican rate, which prevailed until an interest statute was adopted increasing the rate, and from the time that statute took effect at the rate fixed thereby. This was held to be erroneous. Baldwin, J., announced this general principle: that interest is governed by the law in force at the time and place of contracting.³

Mon. 84. See *Gordon v. Phelps*, 7 J. J. Marsh. 619; *Whidden v. Seelye*, 40 Me. 247.

¹ *Desnoyer v. McDonald*, 4 Minn. 515; *Fouke v. Fleming*, 13 Md. 893; *Martin v. Martin*, 1 Sm. & M. 176. See *De La Chaunette v. Bank of England*, 9 B. & C. 208; *Kermott v. Ayer*, 11 Mich. 181.

² *Sanders v. Lake Shore, etc. Ry.*

Co., 94 N. Y. 641; *First Nat. Bank v. Fourth Nat. Bank*, 84 id. 412; *O'Brien v. Young*, 95 id. 428.

A statute changing the rate of interest cannot operate retrospectively so as to diminish the amount due under the rate established by a prior statute. *Reese v. Rutherford*, 90 N. Y. 644.

³ *Aguirre v. Packard*, 14 Cal. 171.

Later cases in that state recognize the distinction above stated. In the absence of a contract to pay interest it is only allowed as damages for failure to pay money due; and it is competent for the legislature to fix the amount which shall be recovered.¹ Interest for money lent may be recovered, though the loan was made when the law was otherwise.² This point was decided in New York in 1839, in a case which presented the question in this form. After the debt sued upon became due, and while interest as damages was accruing, the legislature passed a general interest law which provided that "for the purpose of calculating interest a month shall be considered the twelfth part of a year, and as consisting of thirty days; and interest for any number of days less than a month shall be estimated by the proportion which such number of days shall bear to thirty." The assistant vice-chancellor said: "I am of opinion that when an account is stated after this provision went into effect, including items arising before, the interest must be computed in the manner therein directed upon the prior as well as the subsequent items from the passage of the act. The terms of the section are sufficiently comprehensive for this. They are for the purpose of calculating interest, etc. The only objection is whether an unlawful retrospective effect is given to the statute. To put the point more clearly: If a promissory note was dated before the 1st of January, 1830 (when [668] that act was passed), and was sued for afterwards, the interest should be computed at three hundred and sixty-five days to a year for the time down to that date and three hundred and sixty days subsequently. The statute in question does in effect raise the rate of interest. Suppose it did so in terms, changing it to eight per cent., and then a prior demand is sued upon. Now, where interest is not specified in a contract, as a part of it, it is allowed as damages for the refusal to pay the debt. The rate of interest is undoubtedly subject to the existing law during the continuance of that law. But is there any implied contract between the parties restricting the interest to such rate? A fresh demand of the debt, and a refusal, is a new assertion of a right, and imposes a new liability upon the party; so does a neglect without a new de-

¹ *White v. Lyons*, 42 Cal. 279; ² *Dilworth v. Sinderling*, 1 Bin. 488.
Randolph v. Bayne, 44 Cal. 866.

mand. The damages are imposed for this renewed violation of a contract. I do not perceive that in this the great principle of treating statutes as prospective only in their operation is infringed. The new law takes effect upon a new violation of an obligation. It has no retrospective effect upon previous rights. The previous right was to discharge the debt with interest at a given rate. That right has not been asserted. By the general rule of law, if there was no statute regulating interest, damages of an uncertain amount would be recoverable for the detention of money, as for that of any other property. The statute then prescribes that for the continued refusal or neglect to discharge the debt those damages shall be at another rate of interest.”¹

¹ *Bullock v. Boyd*, 1 Hoff. Ch. 294. The assistant vice-chancellor continued the discussion upon authority. He said: “There are some English cases which bear upon this question. By the terms of the act (2 Charles, 2), no person from and after the 29th of September, 1660, upon any contract, shall, from and after the said 29th of September, take, etc., more than at the rate of six per cent. The interest under the previous act was eight per cent. In the case of *Walker v. Penry* the point was whether, where interest upon a mortgage, made before the statute, had been paid at the rate of eight per cent., so much of the extra two per cent. as accrued after the act of 1660 should be applied in reducing the principal. The mortgagee had entered in 1675. Lord Chancellor Jeffries decided that the statute had reference only to subsequent contracts, and would give no relief; but he gave interest at six per cent. only from the entry in 1675. On a rehearing he adhered to his opinion. See 2 *Vernon*, 42 and 78. Mr. Ord cites this case as settling that the statute had no effect upon prior contracts (on *Usury*, p. 40); and Mr. Comyn treats the question as undecided. The latter writer notices,

however, the subsequent reversal of the decree upon a bill of review. See 2 *Vernon*, 145. Both writers have omitted to state that the case was first determined by Lord Nottingham upon a bill of foreclosure, who held that the extra two per cent. should go towards reducing the principal. Then, upon a bill to redeem, Lord Jeffries determined as before stated. Upon the bill of review Lord Commissioner Trevor said: ‘Being there was a decree already made he would not reverse:’ but Lord Rawlinson and Hutchins held that the act had a retrospect, and makes it unlawful to take more than six per cent. upon any contract, whether made before or after the act of parliament. The note of the decree in Mr. Raithby’s edition plainly shows that they meant six per cent. after the new statute of 1660. Thus, so far as this case goes, we have the authority of Lord Nottingham and Commissioners Rawlinson and Hutchins against the opinion of Lord Jeffries. But there is also the express authority of Sir Matthew Hale to the same effect. *Hedworth v. Pimate*, *Hardress*, 818. By Hale, chief baron: ‘Since the new act which reduces interest to six per cent., more shall not

§ 369. **Same subject.** There is a distinction made in [669] respect to the nature of the obligation to pay interest subsequent to maturity between cases where there is an express or tacit agreement to pay it before maturity of the principal

be allowed upon any contract, though made before the statute, by reason of the words of the statute, which are, etc. He then notices the difference in the language of the act and that of the 21 Jac. 1, cap. 27.

“His observations reconcile also the position in 1 Eq. Cas. Ab. 288, pl. 1, and in Hawkins’ Pleas of the Crown, 82, § 10, that under the statute of usury (12 Anne, ch. 16) there was no retrospect to any debt contracted before its passage. The language is express, limiting its operations to contracts made after the 29th of September, 1714.

“There is another case (*Procter v. Cooper*, Prec. in Ch. 116), in which the master of the rolls held upon a bill to redeem a mortgage made before 1660, that interest should be allowed at eight per cent. to the time of the passage of the act. See *Bodley v. Bellamy*, 1 W. Black. 267.

“The case of *Towler v. Chatterton* (6 Bing. 258) is also of weight upon this question. By an act of 9 George IV., c. 14, called Lord Tenterden’s act, passed May 9, 1828, it was provided that in actions of debt, or in cases grounded on any simple contract, no acknowledgment or promise by words only should be sufficient evidence of a new or continuing contract, whereby to take any case out of the enactment of the statute of limitations; but such acknowledgment or promise must be made or contained by or in some writing signed by the party chargeable thereby. The act also contained a provision that it should not go into effect until the 1st of January, 1829. The action was *assumpsit*, and commenced in Hilary term, 1829.

The debt was then of more than six years’ standing. In February, 1828, a declaration was made by parol to pay, under instruction from the judge to find upon that point. The judge then nonsuited the plaintiff on the ground that the promise should have been in writing under the statute. The court of common pleas refused to set aside the nonsuit. Two other cases were cited in the judgment upon the same statute to the same effect. One of them was before Lord Tenterden, where the action had been brought before the statute went into effect, though not tried until afterwards.

“I have carefully read the leading cases in the courts of our own country upon the subject of retrospective statutes, especially *Dash v. Van Kleeck*, 7 Johns. 477, in which the strength of the old supreme court of our state was fully put forth. I see nothing in the principles there advocated, or the decision there made, to change the result I have arrived at. *Calder v. Bull*, 3 Dall. 386; *Bedford v. Shilling*, 4 S. & R. 401; *Woart v. Winnick*, 3 N. H. 473; *Hackley v. Sprague*, 10 Wend. 113; *Sayre v. Wisner*, 8 Wend. 66.” *Stark v. Olney*, 3 Ore. 88; *Perrin v. Lyman*, 32 Ind. 16; *Woodruff v. Scruggs*, 27 Ark. 26.

But see *Cox v. Marlatt*, 36 N. J. L. 389. In this case the court decided that the rate of interest which a judgment will bear immediately after its rendition cannot be changed by subsequent legislation. *Scudder, J.*, said: “The effect of a judgment is to fix the rights of the parties thereto by the solemn adjudication of a court having jurisdiction. How these rights can be affected by subsequent

debt, and cases in which there is no interest contract what-[670] ever. It is true that some courts hold that if the agreement is to pay the debt with interest at a specified rate on a day certain, and does not expressly stipulate the interest afterwards, the interest obligation expires at the day fixed for payment; and the interest which the debtor is obliged to pay while he detains the money after it is due is only computed at the legal rate as damages.¹ In these courts, on the doctrine [671] that the interest agreement has no effect after maturity, doubtless the interest after that time would be computed at whatever might be the legal rate, changing the rate in the computation as the legal rate may change. The rule, however, as we have before stated, is more generally to continue the rate agreed on before maturity until the debt is paid or put in judgment.² But there is yet another distinction:—courts which concur in continuing the interest rate, if agreed on for the period of credit, to payment or judgment, differ in the reasoning by which they reach that result; and this difference will naturally produce a divergence on the point we are now discussing. When the agreement in respect to the rate of interest before maturity is construed as tacitly continuing so long as the debt remains in contract unpaid, the interest after maturity rests on a basis of contract, and is not subject to be reduced or altered by any law subsequently enacted.³ But when the continuance of the rate agreed on before matu-

legislation is not apparent. This contract of the highest authority cannot be disturbed so long as it remains unreversed and unsatisfied. Changing the rate of interest does not affect existing contracts or debts due prior to such enactment, whether they be evidenced by statute, judgment or agreement of the parties. Such has been the uniform course of decision in our courts. . . . If it be said that the interest is given as damages for the detention of the debt, and that the damages are greater when seven per cent. interest can be had than when only six per cent. can be obtained, and for such detention after the rate is increased there should be

additional damages allowed, the answer is that there can be no such second assessment where the amount of the debt or liability has been once adjudged, and the cause of action remains the same. The interest is the measure of damages for the detention, and that must relate to the time when the amount is fixed by the entry of the judgment." See *North R. M. Co. v. Shrewsbury Church*, 22 N. J. L. 424.

¹ See *ante*, § 309.

² *Id.*

³ *Lee v. Davis*, 1 A. K. Marsh. 897; *Association v. Eagleson*, 60 How. Pr. 9.

rity is not put upon the ground that the agreement continues it, but upon the theory that the rate which was agreed to before maturity as a just compensation for the use must be deemed a just and proper compensation afterwards for the detention of the money, then the rate rests not upon the contract, and is not so fixed as to be beyond the effect of subsequent legislation which is plainly intended to modify it.

This distinction is illustrated by two cases in Connecticut. In one of them¹ the action was brought upon a promissory note, made payable in that state, for a specified sum, "with taxes, and interest at the rate of fifteen per cent. after maturity." Here the contract in respect to interest after maturity was not a tacit but an express contract. The difference is immaterial, so far as the effect is concerned. A tacit agreement is as inviolable as an express contract. Notes which provide for interest, generally, and are construed to mean interest until paid, are equivalent to the contract made in the case just mentioned. When that note was made the law of Connecticut permitted parties to contract for any rate of interest. But before it matured an act was passed which provided that no greater rate of interest than seven per [672] cent. should be recovered for money loaned "for the time after the money loaned becomes due." It was held that the fifteen per cent. was to be regarded as interest recoverable under the contract, and not as damages; that the act was not intended to apply to contracts in which there was an agreement as to the rate of interest after maturity, and if it was intended to apply to such contracts then existing, it was so far unconstitutional and void as impairing their obligation.

The other case² was an action upon a note made in 1869, and payable in Connecticut in three years, with interest at seven and three-tenths per cent. per annum. The statute in force when this note was made provided that when interest was reserved at a higher rate than six per cent. the contract should be void so far as related to interest. In 1872 an act was passed "validating and confirming" usurious contracts,

¹ Hubbard v. Callahan, 42 Conn. 570, approved in Hinman v. Goodyear, 56 524. See Hagood v. Aikin, 57 Tex. 511. id. 210.

² First Ecclesiastical Society of Suf-

and providing that they might be enforced. It will be observed that this note contained a promise of interest which was general as to time, and in Connecticut meant from date to maturity. If not affected by usury, nor changed by subsequent legislation, the conventional rate would be continued, not as an agreed rate but as a just one, being considered just after maturity because the parties had adopted it during the period of credit.¹ In 1873 the validating act of 1872 was repealed. It was held that the contract in this note was validated by the act of 1872, and the repeal of it could not annul the validating effect. The note, with the agreed interest to maturity, was recoverable; but the interest afterwards at the conventional rate, not being secured by the contract, was unaffected by these acts, and the conventional, being in excess of the legal, rate when the note was made, it could not be deemed a just rate.²

It results from this brief review of the adjudications that whenever interest after maturity of the debt is not fixed by an agreement of the parties binding for that purpose by the law of the place of contract it is competent for the legislature [673] of that jurisdiction to change the rate to be computed as damages, and by parity of reason it is fair to conclude also that a statute enacted in another jurisdiction where the remedy is sought, applying the law of the forum to the computation of such interest as damages, would be valid. On the other hand, if the interest after maturity is fixed by contract, valid for that purpose by the law of the place of contract, whether it be by a promise in express terms of interest after maturity at a specified rate, or by a promise of interest at a specified rate generally, it is as sacred and secure against the impairing effect of subsequent legislation as the agreement before maturity or for payment of the principal itself.³

§ 370. **Same subject.** The question has been considerably discussed and differently decided by the courts, whether a contract for the payment of money which is subject to be avoided either wholly or in part for usury can afterwards be

¹ *Beckwith v. Trustees, etc.*, 29 Conn. 268.

³ *Lee v. Davis*, 1 A. K. Marsh. 397; *Association v. Eagleson*, 60 How.

² See *Simpson v. Hall*, 47 Conn. Pr. 9. 417.

validated by legislation so as to deprive the debtor entirely of that defense.¹ A usurious contract, although declared wholly or in part void, is not void in an absolute sense; it is only voidable at the election of the debtor. When he elects to avail himself of the defense the effect of the law in discharging any part of the obligation to pay the principal of the debt and lawful interest is penalty, and is imposed not so much to benefit or relieve the debtor as to maintain by this sanction the general policy of the law of restricting interest transactions within what are deemed reasonable limits for the general welfare. It is even regarded as unconscientious and inequitable for him to claim and accept such a discharge.² It is, at all events, purely statutory, and is not distinguishable in principle from penal damages given in certain actions in which simple or actual damages are allowed to be doubled or trebled. Although the usurious contract may be so far void, if the debtor chooses to set up the defense of usury, that the creditor may not be able to sustain an action for the whole or even a part of the debt for reasons of policy, yet a moral [674] obligation remaining to perform the contract, it would be going very far to say that the legislature may not, in furtherance of the original intention of the parties, add a legal sanction to that obligation when those reasons have ceased or such policy is abandoned;³ especially as the repeal of a penalty provided by law would have this effect, and thereby establish matters in the condition in which it was the intention of all concerned to place them.⁴

The privilege of a debtor to repudiate his contract by pleading usury; or the privilege, by making an unconscionable de-

¹See *Mitchell v. Doggett*, 1 Fla. 371; *Springfield Bank v. Merrick*, 14 Mass. 323; *Wood v. Kennedy*, 19 Ind. 68; *Perrin v. Lyman*, 32 Ind. 16; *Morton v. Rutherford*, 18 Wis. 398.

²*Curtis v. Leavitt*, 15 N. Y. 9.

³See *Lewis v. McElvain*, 16 Ohio, 347; *Trustees v. McCaughy*, 2 Ohio St. 155; *Johnson v. Bentley*, 16 Ohio, 97; *Boyce v. Sinclair*, 3 Bush, 204; *Hess v. Werts*, 4 S. & R. 361; *Syra-*

cuse Bank v. Davis, 16 Barb. 188; *Bleakney v. Farmers', etc. Bank*, 17 S. & R. 64; *Satterlee v. Matthewson*, 16 id. 191; *Menges v. Wertman*, 1 Pa. St. 218; *Woodruff v. Scruggs*, 27 Ark. 26; *Perrin v. Lyman*, 32 Ind. 16; *Gibson v. Hibbard*, 18 Mich. 214; *Welch v. Wadsworth*, 80 Conn. 149; *Woolley v. Alexander*, 99 Ill. 188.

⁴*Hinman v. Goodyear*, 56 Conn. 210; *First Ecclesiastical Society v. Loomis*, 42 Conn. 570.

fense, to have the benefit of a penalty given by statute for a violation of law, is not a vested right.¹ Statutes which take away the defense of usury in respect to existing contracts, or produce the same effect by expressly validating and confirming them, are generally, and by a decided weight of authority, sustained.² When they go no farther than to bind a party by

¹ *Jenness v. Cutler*, 12 Kan. 500; *Ayers v. Probasco*, 14 id. 175.

"But the legislature has no power to substitute one penalty for another except where that which is substituted is, as in the present case, in effect a mere reduction or modification of the original penalty, and where a penalty is once released or abrogated it ceases to be subject to legislative control." *Woolley v. Alexander*, 99 Ill. 188. See *Hardin v. Trimmer*, 27 S. C. 110.

² *Ibid.*; *Pattison v. Jenkins*, 38 Ind. 87; *Andrews v. Russell*, 7 Blackf. 474; *Grimes v. Doe*, 8 id. 371; *Thompson v. Morgan*, 6 Minn. 292; *Parmelee v. Lawrence*, 48 Ill. 331; *Curtis v. Leavitt*, 17 Barb. 309; S. C., 15 N. Y. 9; *Wood v. Kennedy*, 19 Ind. 68; *Rathbun v. Wheeler*, 29 Ind. 601; *Washburn v. Franklin*, 36 Barb. 599; *Wilson v. Hardesty*, 1 Md. Ch. 66; *Pollock v. Glazier*, 20 Ind. 262; *Burns v. Anderson*, 68 id. 181; *Sager v. Schneewind*, 88 id. 204; *Danville v. Pace*, 25 Gratt. 1; *Ewell v. Daggs*, 108 U. S. 143.

Mr. Justice Matthews, writing the opinion in the case last cited, said in reference to some of the other cases referred to in this note: "These decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is that the right of a defendant to avoid his contract is given to him by statute for purposes of its own, and not be-

cause it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains *in fieri*, and not realized by having passed into a completed transaction, may by a subsequent statute be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he (the borrower) has received as the consideration of the contract, which, contrary to law, he actually made, is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. *Read v. Plattsmouth*, 107 U. S. 568; and see *Lewis v. McElvain*, 16 Ohio, 347; *Johnson v. Bentley*, id. 97; *Trustees v. McCaughey*, 2 Ohio St. 152; *Satterlee v. Mathewson*, 16 S. & R. 169; S. C. in error, 2 Pet. 880; *Watson v. Mercer*, 8 Pet. 88."

The Virginia code of 1873, ch. 15, § 18, provides that if by a new law, repealing a former law, any penalty, forfeiture or punishment be mitigated by any provision of the new law, such provision may, with the consent of the parties affected, be applied to any judgment pronounced after the new law takes effect. Under this it has been ruled that though the statute of usury in force when a contract was made declares it to be null and void, if at the time a judgment is rendered on the contract the statute has been amended so as to avoid a

a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law, the question which they suggest is one of policy, and not of constitutional power.¹ The legislature has power to impose on all debtors interest from the date of the enactment for [675] delay in the payment of money already due.²

SECTION 7.

INTEREST AS AN INCIDENT TO THE PRINCIPAL.

§ 371. Interest due by agreement a debt. With a certain propriety interest may be said always to be an incident to the principal; not only when it is a part of the contract, but also when it is allowed as damages. In the former case it is, however, not strictly an incident; or rather, it is more than that. There must be a principal sum; but after interest has accrued it is no longer dependent on the principal; it does not necessarily follow it. Conventional interest is of itself a debt, and payment of the principal alone will not affect the right to re-

usurious contract only so far as the interest is concerned, such statute should govern. *Mosby v. St. Louis Mut. Ins. Co.*, 31 Gratt. 629; *Bain v. Savage*, 76 Va. 904.

¹ *Cooley's Const. Lim.*, p. 874. See *Head v. Ward*, 1 J. J. Marsh. 280; *Outen v. Graves*, 7 id. 629; *Cox v. Marlatt*, 86 N. J. L. 389; *Pond v. Horne*, 65 N. C. 84; *Williams v. Smith*, id. 87.

It was held in *Mucklar v. Cross*, 82 N. J. L. 423, that a bond made in 1865, when the legal rate of interest was six per cent., conditioned for the payment of the principal sum in five years after date, with lawful interest for the same, payable annually, at such rate as then was or thereafter might be fixed upon as the legal rate of interest in that state by the legislature, did, after the passage of the

act of March 15, 1866, increasing the legal rate of interest to seven per cent., carry interest at such increased rate, though that act in terms only applied to contracts made after its passage; the increased rate of interest being payable, not by virtue of the statute, but by force of the agreement of the parties.

In *Drake v. Latham*, 50 Ill. 270, suit was brought on a ten per cent. note. This note was made while the law of 1849 was in force, which only allowed six per cent. to be contracted for, and forfeited the excess. The act of 1857 repealed all the penalties; but it was held that the creditor could not, as a mere effect of that repeal, recover a larger rate than he might lawfully have contracted for. *Simpson v. Hall*, 47 Conn. 417.

² *Dunne v. Mastick*, 50 Cal. 244.

cover the interest;¹ and yet it is so allied to the principal that if it is recovered without recovery of the interest when the latter is not secured by a separate instrument, it is barred; not because [676] it cannot exist as a valid demand distinct from the principal, but because demands arising upon one agreement for principal and interest due to the same party at the same time cannot be divided and each made the subject of a separate action. In that respect there is no difference between principal [677] and interest;² an action brought for one would bar

¹ *Watts v. Garcia*, 40 Barb. 656; *Howe v. Bradley*, 19 Me. 81; *Canfield v. Eleventh School Dist.*, 19 Conn. 529; *Still v. Hall*, 20 Wend. 51; *Stone v. Bennett*, 8 Mo. 51. See *Foster v. Harris*, 10 Pa. St. 45.

Where the debt only was seized and condemned by the enemy in war, it was held that the interest due might not be recovered by the original creditor. *Bordley v. Eden*, 3 Har. & McH. 167.

² In *Doe v. Warren*, 1 Me. 48, suit was brought on a promissory note payable with interest annually. The chief justice says: "What is interest? It is an accessory or incident to the principal; the accessory is a constantly accruing one. The former is the basis, or the substance, from which the latter arises, and on which it rests."

In *Howe v. Bradley*, 19 Me. 81, *Shepley, J.*, says: "The holder in such cases may maintain a suit to recover the interest payable before the principal, but cannot have a separate action for it after the principal becomes due and while it remains unpaid, because he may recover it in an action for the principal." The question in this case was whether an indorser of a note on which interest became due before the principal was payable was entitled to the same notice in respect to the interest as in regard to the principal, in order to

be held liable for it. It was held he was not; that if on the note becoming due it was dishonored, and the indorser then duly notified, he was fixed not only for the principal and interest then maturing, but also for interest which was payable before and not paid.

In *Chinn v. Hamilton*, Hemp. C. C. 438, the court said: "The promise to pay the debt, and the promise to pay the interest from the date of the contract, are two separate and distinct promises or undertakings; one may be performed without performing the other. In declaring upon a covenant or a parol contract in writing containing various undertakings, the plaintiff has his election to complain of the breach of one or of all of the covenants or promises. If he complains of the breach or non-performance of one only of the covenants or promises, he thereby admits that the others have been performed. The intendment is to be made most strongly against the pleader, and as he complains of the breach of only one of the covenants or obligations, the presumption arises that the others have been performed. It at all events waives any right of action upon them; for having sued upon the contract once he is forever barred from suing again [in respect to any cause that existed at the time of that suit and which might

both, whether included in the claim or recovery or not. But such interest made payable before the principal is due may be sued for alone before the latter becomes due.¹

§ 372. Interest as damages accessory to principal. Interest which is allowed as damages, and which is not liquidated, nor covered by any contract to pay it, is strictly incidental to the debt. It cannot exist after the debt ceases by payment or otherwise.² Being accessory and incidental to the principal, it adheres to and follows it; ownership of the fund on which the interest accrues includes the interest. Where attached property becomes by process of law changed into money in the officer's hands, and is invested by him so as to produce interest, the accretion does not belong to the officer, but to the party entitled to the money.³ A specific legacy carries interest from the death of the testator; it becomes then the property of the legatee.⁴

have been included in it]. It will not be allowed to split up the various covenants and promises contained in one contract and sue upon each of them; he can have but one recovery upon one contract, which then becomes merged in the judgment of the court."

This language must be understood as referring to the facts then before the court—to a contract for principal and for interest, both due. It is broad, but is obviously not used in so general a sense as to be applicable to a contract requiring a series of acts to be performed at different times. A suit for a breach in respect to the first would not necessarily involve the whole contract, and the judgment would not merge it so far as it contained other executory provisions. For instance, a note or other instrument may provide for instalments of principal or interest. Undoubtedly successive actions could be brought for their recovery. Yet it is quite as clear that all instalments of either interest or principal or both, due at the time of bringing action, must be declared for in one action; at all

events the judgment will be a bar in respect to all.

¹ *Ibid.*; *Greenleaf v. Kellogg*, 2 Mass. 568; *Cooley v. Rose*, 8 id. 221; *Catlin v. Lyman*, 16 Vt. 44; *Hastings v. Wiswall*, 8 Mass. 455; *Estabrook v. Moulton*, 9 id. 258.

² *Moore v. Fuller*, 2 Jones' L. 205; *Tillotson v. Preston*, 3 Johns. 229; *Burr v. Burch*, 5 Cranch C. C. 506; *Jacot v. Emmett*, 11 Paige, 142; *Consequa v. Fanning*, 8 Johns. Ch. 587; *Gillespie v. Mayor*, 3 Edw. 512; *Southern C. R. Co. v. Moravia*, 61 Barb. 180; *Potomac Co. v. Union Bank*, 3 Cranch C. C. 101; *Dixon v. Parkes*, 1 Esq. 110; *Fake v. Eddy's Ex'r*, 15 Wend. 76; *Johnston v. Brannan*, 5 Johns. 268; *Williams v. Houghtaling*, 5 Cow. 36; *People v. County of N. Y.*, 5 Cow. 331; *Stevens v. Barringer*, 18 Wend. 639; *American Bible Society v. Wells*, 68 Me. 572; *Cutter v. Mayor*, 92 N. Y. 166.

³ *Richmond v. Collamer*, 38 Vt. 68; *Jackson v. Smith*, 52 N. H. 9; *Farley v. Moore*, 21 id. 146; *Chase v. Monroe*, 30 id. 427.

⁴ See *Ingraham v. Postell's Ex'r*, 1 McCord Ch. 94; *Hilyard's Estate*, 5

SECTION 8.

INTEREST UPON INTEREST.

[678] § 373. **Compound interest.** Strictly, all interest which is computed upon interest is compound interest. But that which is commonly denominated such is interest annually or at other successive periods added to the principal to bear interest for the next interest period; in other words, interest computed with annual rests, or rests at the end of the longer or shorter interest periods, regularly adding the interest for the preceding period to the principal, thenceforth to bear interest. Compound interest in this latter sense is never computed by way of damages except against persons acting in a fiduciary capacity,¹ who grossly abuse their trust in respect to money.² Nor will a contract in advance to pay such interest generally be enforced at law or in equity.³ But after simple interest has accrued an agreement that it shall thereafter bear interest is valid.⁴ Such interest, when contracted for at the

W. & S. 30; *Angerstein v. Martin*, 1 Turn. & Russ. 232; *Hewett v. Morris*, id. 241; *Jones v. Ward*, 10 Yerg. 160; *Huston's Appeal*, 9 Watts, 472; *Beal v. Crafton*, 5 Ga. 301; *Stephenson v. Axson*, *Bailey's Eq.* 274; *Graybill v. Warren*, 4 Ga. 528; *Yandt's Appeal*, 13 Pa. St. 575; *Darden v. Orgain*, 5 Cold. 211.

A. received \$6,000 from B. and in consideration thereof executed a bond by which he bound himself to pay the interest on that sum, or so much thereof as might be necessary for B.'s support to B. for life, and at her death to pay the principal and what might remain unexpended of the interest to C. A. was held liable for interest at the legal rate, six per cent., according to the legal effect of the bond; and not the interest received by him from his investment of the money. *Granger v. Pierce*, 112 Mass. 244. See *Cory v. Leonard*, 56 N. Y. 494.

¹The assignee of a mortgage in possession has no right to cast interest to the time he took possession and make that a new principal upon which to calculate interest. *Lewis v. Small*, 75 Me. 323.

²See *ante*, § 358.

³Such contracts are valid in Oregon, *New England Mortgage Co. v. Vader*, 28 Fed. Rep. 265; in Dakota, *Hovey v. Edmison*, 3 Dak. 449; and South Carolina, *Bowen v. Barksdale*, 33 S. C. 142.

⁴*Young v. Hill*, 67 N. Y. 162; *Fitzhugh v. McPherson*, 3 Gill, 408; *Gunn v. Head*, 21 Mo. 432; *Grimes v. Blake*, 16 Ind. 160; *Niles v. Board of Com'rs*, 8 Blackf. 158; *Forman v. Forman*, 17 How. Pr. 255; *Van Benschooten v. Lawson*, 6 Johns. Ch. 313; *State v. Jackson*, 1 id. 18; *Toll v. Hiller*, 11 Paige, 228; *Barrow v. Rhinelander*, 1 Johns. Ch. 550; *Leonard v. Villars*, 23 Ill. 377; *Henderson v. Hamilton*, 1 Hall, 314; *Baker v. Scott*, 62 Ill. 86;

time the debt accrues or the loan is made, is refused on grounds of policy as tending to usury and oppression. But after interest is due, no matter at how short intervals it is payable, the creditor may sue for it; or the parties by a new agreement may put it upon interest. It has, moreover, been [679] decided that there is a moral obligation to pay interest on interest for the time it has been in arrears; and that a subsequent promise to pay it for the time already elapsed is binding.¹ Accounts may be judicially stated by computing interest according to the practice of the parties, both as to charging it on the items on each side from their dates, and also as to periodical rests.²

§ 374. Instances of interest on interest. When a demand consisting of principal and interest passes into a judgment or decree, as a general rule, it bears interest because the original claim is merged therein. It is thenceforth a demand of a different nature. The principal and interest are blended together and adjudged to the creditor for immediate payment, or to be at once collected.³ Where strict foreclosure was stipulated for in the mortgage, and six months given to pay the debt, with interest at the rate of ten per cent., the legal rate being six, it was held that inasmuch as the complainant was entitled to strict foreclosure it was not error to require a higher rate than is provided for by the statute upon the extension of the time of payment.⁴

In a suit for specific performance by the vendee after he has made default in the payment of purchase-money on which interest was payable annually, the purchase-money to be paid on a decree in his favor should include interest on the instalments of interest from the time they became due.⁵ In such a case the court said: "We express no opinion whether interest upon such instalments of interest could have been recov-

Doe v. Warren, 7 Me. 48; Cox v. Smith, 1 Nev. 161; Lewis v. Bacon, 8 Hen. & Munf. 89; Stone v. Locke, 46 Me. 445; Thayer v. Star Mining Co., 105 Ill. 540; Denver B. & M. Co. v. McAllister, 6 Colo. 261; Case v. Fish, 58 Wis. 58; Leonard v. Patton, 106 Ill. 99.

¹ Rose v. Bridgeport, 17 Conn. 247; Camp v. Bates, 11 Conn. 497.

² Emerson v. Atwater, 12 Mich. 814; Carpenter v. Welch, 40 Vt. 251; Schieffelin v. Stewart, 1 Johns. Ch. 620; Backus v. Minor, 3 Cal. 231.

³ See Stevens v. Coffeen, 89 Ill. 148; State v. Jackson, 1 Johns. Ch. 13.

⁴ Bissell v. Marine Co., 55 Ill. 165.

⁵ Morris v. Hoyt, 11 Mich. 1.

ered by the vendor in a suit for damages, or on a bill for specific performance brought by him. But the complainant comes into court acknowledging his default in making the payments when due, and asks specific performance on making the payments now. As he asks equity he must do equity, and [680] put the vendor in the same condition as if the payments had been made when agreed. Had this money been paid when due it would have earned interest from that time." It was held that interest should be computed on the several instalments of interest from the time they respectively became due.¹

§ 375. Interest on instalments of interest. The question on which the court in the preceding case refrained from expressing an opinion is one upon which the American courts are divided. Where the principal is payable on long time, and interest is payable annually, or at shorter periods, and the latter is not paid when due, according to the older cases, and as the law seems to be settled in a majority of the states, no interest can be collected upon such arrears of interest.² In

¹ *Morris v. Hoyt*, 11 Mich. 1; *Pujol v. McKinlay*, 42 Cal. 559.

² *Leonard v. Villars*, 28 Ill. 377; *Smith v. Luse*, 30 Ill. App. 37; *Broughton v. Mitchell*, 64 Ala. 210; *Young v. Hill*, 67 N. Y. 162 (except in mercantile transactions upon a contract implied from the course of dealing or from custom); *Dyar v. Slingerland*, 24 Minn. 267; *Mason v. Callender*, 2 id. 302; *Stokely v. Thompson*, 34 Pa. St. 210; *Ferry v. Ferry*, 2 Cush. 92; *Doe v. Vallejo*, 29 Cal. 285; *Ackerman v. Emott*, 4 Barb. 626.

"Interest upon interest which has accrued upon contracts upon which interest is by their terms payable at stated periods before the principal becomes due is never allowed in making up judgments in suits thereon. This has often been determined, and must now be considered as the settled law in this commonwealth." *Shaw v. Norfolk County R. Co.*, 16

Gray, 407, 416; citing *Hastings v. Wiswall*, 8 Mass. 455; *Wilcox v. Howland*, 23 Pick. 167; *Henry v. Flagg*, 13 Met. 64. To the same effect is *Hodgkins v. Price*, 141 Mass. 162.

In *Pindall's Ex'r v. Bank of Marietta*, 10 Leigh, 481, a debtor owing a debt consisting of principal and interest, it was agreed between him and his creditor that he should, in the first place, pay off the principal, and that the interest might for a time remain unpaid. The creditor received money from the debtor, and applied it in satisfaction of the principal. Many years elapsed without payment of the interest. It was held that the creditor was only entitled to the interest due at the time the principal was paid, and not to interest on the interest, there having been no agreement to pay it. *Tooke v. Bonds*, 29 Tex. 419, is to the same effect.

Interest cannot be compounded without statutory authority. *Hoyle*

several states, however, the rule is otherwise; interest on such arrears is allowed from the time the same became due without rest to the time of computation for payment or judgment. Thus in North Carolina and Arkansas it is held that where a promissory note is given with a stipulation that the interest is to be paid annually or semi-annually, the maker is chargeable with interest at the like rate upon such deferred pay- [681] ments of interest as if he had given a promissory note for the amount thereof.¹ By this mode of computation the court say compound interest is not given, but a middle course is taken between simple and compound interest.² So in Tennessee³ and Kentucky.⁴ Ewing, J., said: "The fact that the amount so promised to be paid is described as interest accruing upon a larger sum which is payable at a future day cannot the less entitle the plaintiff to demand interest upon the amount, in default of payment, as a just remuneration for the detention or non-payment." In Vermont⁵ it is allowed by way of damages for delay of payment; but parties cannot stipulate for interest upon interest before it becomes due. In South Carolina interest overdue bears interest.⁶ So in Rhode

v. Page, 41 Mich. 538. It is provided by statute in Michigan (1 Howell's Stats., § 1599) "that when any instalment of interest upon any note, bond, mortgage or other written contract shall have become due, and the same shall remain unpaid, interest may be computed and collected on any such instalment so due and unpaid from the time at which it became due, at the same rate as specified in any such note, bond, mortgage or other written contract, not exceeding ten per cent.; and if no rate of interest be specified in such instrument, then at the rate of seven per cent." This does not apply to new interest accruing by lapse of time after the maturity of the debt. Voigt v. Beller, 56 Mich. 140; McVicar v. Denison, 81 id. 348; Wallace v. Glaser, 82 id. 190. Where the contract makes interest payable by instalments at fixed periods and sep-

arately from the principal, simple interest will be allowed on each instalment at the contract rate; but where the payment of interest is not stipulated for until the principal becomes due interest is allowable only on the latter. Rix v. Strauts, 59 id. 864.

¹ Bledsoe v. Nixon, 69 N. C. 89; Vaughan v. Kennan, 38 Ark. 114.

² Kennon v. Dickins, Cam. & Norw. Conf. R. by Battle, 857; Bledsoe v. Nixon, *supra*.

³ House v. Tennessee Female College, 7 Heisk. 128.

⁴ Talliaferro v. King's Adm'r, 9 Dana, 331; Hall v. Scott's Adm'r, 13 S. W. Rep. 249.

⁵ Catlin v. Lyman, 16 Vt. 44.

⁶ O'Neill v. Bookman, 9 Rich. L. 80; Gibbes v. Chisolm, 2 N. & McC. 88; Singleton v. Lewis, 2 Hill's L. 408; O'Neill v. Sims, 1 Strob. L. 115; De Bruhl v. Neuffer, id. 426; Doig v.

Island, New Hampshire, Iowa, Wisconsin, Ohio, Texas and Georgia substantially the same doctrine prevails.¹ In Ne-

Barclay, 8 Rich. L. 125; Watkins v. Lang, 17 S. C. 13; Wright v. Eaves, 10 Rich. Eq. 582; Miller v. Hall, 18 S. C. 141.

¹Cramer v. Lepper, 26 Ohio St. 59; Lewis v. Paschal's Adm'r, 37 Tex. 815; Mills v. Jefferson, 20 Wis. 50; Pearce v. Hennessy, 10 R. L. 223; Lanahan v. Ward, id. 299.

In Wheaton v. Pike, 9 R. L. 132, Durfee, J., said: "The reasons assigned for not allowing interest are, first, that interest on interest savors of usury and is liable to bear with oppressive hardship on the debtor; and second, that the creditor from his forbearing to call for the instalments of interest when they become due may be presumed to have waived his claim to interest on the same. These reasons are not entirely consistent; for if the interest is not to be allowed for the first reason, there can be no waiver of interest to be presumed. It is also urged that interest, if so allowable upon annual or semi-annual dues of interest, should, for the same reason, when the debt is payable with interest at a particular time, be allowed from that time upon the interest then due as well as on the principal. Doe v. Warren, 7 Me. 48. See Union Bank v. Williams, 3 Cold. 579. But, on the other hand, it is urged that interest upon such interest, whatever savor of usury it may have, is not usurious; for after such interest is due the debtor may lawfully agree to pay interest thereon; and if he has paid interest thereon he cannot recover it back; that no rule should be adopted which favors the debtor at the expense of the creditor; and that there is no good reason why money due at a particular time for

the use of money should not carry interest from that time in the same manner as money due for anything else. In South Carolina, where the rule accords with this view, it has been held that where a party contracts to pay a sum of money with interest thereon on a given day, when the day arrives the interest becomes principal and bears interest for the future. Doig v. Barclay, 3 Rich. L. 125. There is a reason for not allowing interest upon interest applicable to negotiable securities which we do not find referred to, namely, that it may not be known to the debtor to whom the interest is to be paid; but it may be replied that the same reason would hold in regard to the principal of a negotiable security payable at a particular day, without interest, upon which, nevertheless, interest accrues after its maturity."

Peirce's Ex'r v. Rowe, 1 N. H. 179. Woodbury, J.: "If any interest can be allowed on the annual interest, it must be allowed by virtue of some general principles, and not of any express contract for it contained in the note. But those principles on the subject of interest must be gathered from the reasons on which interest is originally founded, and on which it is in any case permitted without an express contract for its payment. Wherever money is due to an individual, without any stipulation as to interest, some compensation for the use of the money while wrongfully detained seems justly to be due; because the use of the money must be presumed to be beneficial to the one party, and the detention of it injurious to the other. Indeed, the increases of net profit of property

braska interest may be computed upon overdue interest if by so doing the total interest is not made to exceed the maximum legal rate.¹

are an appurtenant to the property itself, and the same broad principle which, without a special contract, would enable the owner to recover the property, would also entitle him to recover its increase. Hence a fair reward for the use of money while negligently or wrongfully withheld from the creditor ought always to be allowed him in the nature of damages for its detention; and the principles of our civil actions justify such an allowance by permitting the damages recovered to be commensurate with the injury sustained. On this theory interest will not commence, when no express contract exists for it, till a wrong is done by the debtor's failure to pay what has become due. Because till that event no breach of duty has happened on his part for which legal damages can accrue. But after money becomes due, every day's neglect to make payment of it, whether principal or interest, is an injury to the creditor; and our civil remedies would prove defective, and would not, as justice requires, approximate those specific ones provided by equity unless the money detained, and a compensation for its use while so detained, could be recovered by the creditor. Were this not the law, a strong temptation, also, would be presented to debtors to violate their duties. They would, in the language of Lord Mansfield, be encouraged 'to make use of all the unjust dilatories of chicanery;' 'and the more the plaintiff is injured the less he will be relieved.' Approved in *Little v. Riley*, 43 N. H. 118; *Townsend v. Riley*, 46 N. H. 300, 313.

But where partial payments have been made during a year, the note bearing annual interest, there should not be rests made for such intermediate payments. If such payments were made on account of accruing interest not due, they should be deducted at the end of the year, but without interest upon them. *Mann v. Cross*, 9 Iowa, 327; *Calhoun v. Marshall*, 61 Ga. 275.

In *Preston v. Walker*, 26 Iowa, 205, and *Burrows v. Stryker*, 47 id. 477, interest was allowed upon delinquent interest upon notes made in New York and payable there.

If the contract rate of interest is higher than the minimum legal rate interest will not be allowed on unpaid interest unless the contract explicitly provides for it. *Wofford v. Wyly*, 72 Ga. 863.

In *The Ship Packet*, 3 Mason, 255, the mode of computing interest on a bottomry bond was discussed by Judge Story. "The rule laid down by Mr. Marshall, in his treatise on Insurance and Bottomry (b. 2, ch. 4, p. 752), is, that 'if when the risk is ended the borrower delay payment the common interest begins to run, *ipso jure*, without any demand. *Discusso periculo, majus legitima usura non debetur*. But this interest runs only on the principal, not on the marine interest, for this would be interest upon interest. *Accessio accessionis non est*.' For this doctrine he cites no English authority, but relies altogether upon the civil law and Pothier and Emerigon. The doctrine of the civil law, denying compound interest, is not of universal application under the com-

¹ *Murtagh v. Thompson*, 28 Neb. 858.

[682] § 376. **Separate agreements for interest.** Contracts for payment of interest, when secured by a separate instrument, will be enforced like all other agreements for the payment of money at a time certain. After maturity interest as [683] damages will be allowed; and proof that the consideration is interest on a debt secured by another instrument will be of no avail to prevent such recovery.¹ Coupons are a familiar example. When so framed that they cannot be separated from the principal obligation, they are only equivalent to a provision therein for the payment of interest, and the question of interest on the amount so agreed to be paid is simply one of interest on arrears of interest.² But if the

mon law. The opinions of Pothier and Emerigon seem certainly opposed to allowance of interest upon the maritime premium (commonly, but somewhat improperly, called interest); but Emerigon admits in explicit terms that the law and practice in France are in favor of it. Upon examining his reasoning on the subject it is by no means satisfactory, being obviously founded upon mere motives of compassion. My opinion is that by the successful termination of the voyage the maritime premium, as well as the sum lent, becomes due; the whole forms one aggregate debt, and that any delay in discharging it ought to be allowed by the allowance of common interest, exactly as in other cases of debt. In making up the decree the sum lent and the bottomry interest are to be considered as the principal, and common interest upon this amount is to be added from the time the bond becomes due to the time of the decree."

The statute of Oregon allows parties to stipulate that delinquent interest may bear interest, but not to compound it oftener than once a year. In *Murray v. Oliver*, 23 Ore. 539, the action was on a note payable in one year, "with interest at the rate of thirty per cent. per annum

until paid, and interest to be paid semi-annually, and if not paid when due to be compounded at the same rate." *Boise, J.*: "We think this contract divisible. There is an agreement to pay the principal and interest at the end of one year from date; then it is stipulated that the interest shall be paid semi-annually," etc. After referring to the statutes he continues: "It would, therefore, result in rendering void the contract to pay interest semi-annually, and would not vitiate the contract to pay the principal sum with interest at thirty per cent."

¹ *Humphreys v. Morton*, 100 Ill. 592; *Graeme v. Cullen*, 23 Gratt. 266; *Koshkonong v. Burton*, 104 U.S. 668; *Genoa v. Woodruff*, 92 id. 502; *Walnut v. Wade*, 103 id. 183; *Mills v. Jefferson*, 20 Wis. 50; *Pruyn v. Milwaukee*, 18 id. 367; *Forstall v. Consolidated Ass'n of Planters*, 34 La. Ann. 770; *Welsh v. First Division St. Paul & P. R. Co.*, 25 Minn. 314; *North Pennsylvania R. Co. v. Adams*, 54 Pa. St. 94; *Gibert v. Washington, etc. R. Co.*, 33 Gratt. 586. *Contra*, *Force v. Elizabeth*, 28 N. J. Eq. 403.

² *Rose v. Bridgeport*, 17 Conn. 243. See *Camp v. Bates*, 11 id. 487; *Crosby v. New London, etc. R. Co.*, 26 id. 121; *Clarke v. Janesville*, 1 Biss. 98.

coupon has in itself all the parts of a complete contract, it may be detached, and if negotiable possesses all the qualities of commercial paper. An action may be maintained on it without production of the bond, though the bond may belong to another party, has never been issued, or has been canceled. And interest after maturity will be given as on notes and bills.¹

§ 377. Periodical interest after maturity of debt. In Rhode Island, where interest is allowed on instalments of interest payable at stated times after they become due, the question recently arose whether after the whole principal matures and remains unpaid interest will become due thereon periodically in instalments, as was stipulated before the principal fell due. It was decided in the negative, for the reason that after maturity of the principal sum both the accruing interest and the principal are not due on any particular day, but every day until they are paid. In that case the interest by the contract was payable semi-annually. The court gave

¹ Rich v. Seneca Falls, 19 Blatch. 558; Philadelphia & R. R. Co. v. Smith, 105 Pa. St. 195; Same v. Knight, 124 id. 58; Whitaker v. Hartford, etc. R. Co., 8 R. L. 47; Thomson v. Lee Co., 8 Wall. 327; Aurora v. West, 7 id. 82; Humphreys v. Morton, 100 Ill. 592; Genoa v. Woodruff, 92 U. S. 502; Connecticut Mutual Ins. Co. v. Cleveland, etc. R. Co., 41 Barb. 9; S. C., 26 How. Pr. 225; City v. Lamson, 9 Wall. 477; Clark v. Iowa City, 20 id. 583; Durant v. Iowa Co., Wool. C. C. 69; Mercer Co. v. Hackett, 1 Wall. 83; Gelpcke v. Dubuque, id. 175; Murray v. Lardner, 2 id. 110; North P. R. Co. v. Adams, 54 Pa. St. 44; Pollard v. Pleasant Hill, 3 Dill. 195; Rogers v. Lee Co., 1 id. 529; Mathias v. Superior Iron Co., 70 Pa. St. 160; Norris v. Philadelphia, id. 832; Hollingsworth v. Detroit, 3 McLean, 472; Jefferson Co. v. Hawkins, 23 Fla. 223 (if no rate of interest is specified in the coupon it bears that fixed by statute, though the

bonds bear a higher rate); Scotland Co. v. Hill, 132 U. S. 107.

If there is a discrepancy as to the rate of interest between a coupon and the bond to which it was originally attached the latter will control when the former is held by one who acquired it after maturity. Goodwin v. Bath, 77 Me. 462. If bonds and coupons are issued by a municipality pursuant to a special statute which does not make provision for the payment of interest upon either after maturity, they do not bear interest. Bates v. Gerber, 82 Cal. 550; Soher v. Calveras Co., 89 id. 134. See Davis v. Yuba Co., 75 id. 452. Coupons given by a guardian for instalments of interest on a mortgage on the ward's lands, if not so worded as to bind either of them personally, do not draw interest after maturity as commercial paper, nor as "written instruments" within the statute of Illinois. United States Mortgage Co. v. Sperry, 26 Fed. Rep. 727.

judgment for the principal with simple interest to the time of rendering judgment, together with interest on the semi-annual dues of interest, including that which accrued when the note became due.¹ In South Carolina interest after maturity may [685] be regulated by agreement; and it has been held that if agreed to be paid periodically, the instalments of interest accruing after maturity will bear interest. The bond was given in February, payable on the first of the following January, and provided for interest annually.² But if the promise is to

¹ *Wheaton v. Pike*, 9 R. L. 132.

² *O'Neill v. Bookman*, 9 Rich. L. 80. Withers, J.: "Within the period of the stipulated credit, when the interest is to be paid annually, no one questions that interest should be computed on the interest from the respective periods fixed for the payment. *Gibbes v. Chisolm*, 2 N. & McC. 38; *Singleton v. Lewis*, 2 Hill (S. C. L.), 408; *O'Neill v. Sims*, 1 Strob. L. 115; *De Bruhl v. Neuffer*, id. 426. Thus much we must regard as settled upon an immovable foundation of authority in the books of reports, reinforced by innumerable instances of conformity in circuit decisions and transactions of daily occurrence. The cases cited, especially *Gibbes v. Chisolm*, will show that the doctrine stated has been fully discussed upon considerations, moral and legal, with a consideration of cases English and American in law and equity, and with dissent in the court at first (see *Gibbes v. Chisolm*) reconciled subsequently. See *Singleton v. Lewis*. But the question now before us presents a variation from some of our cases, but not from all of them. It is a case where the specific credit has expired; and shall the terms, 'with interest payable annually,' be applied to the interest annually accruing at the period of each year following the time set for the payment of the principal? Why should they not so apply when they

were so intended by the parties? Undoubtedly they must if the law do not forbid. There can be no law to forbid unless it can be found in the legislation upon usury. That forbids one 'to take, directly or indirectly, for loan of any moneys, etc., above value of seven pounds for the forbearance of one hundred pounds for one year, and so after that rate for a greater or lesser sum, or for a longer or shorter time.' We have already seen that it is not unlawful — that it is not usurious — to compute interest upon the interest promised to be paid at the expiration of each year within the period of credit expressly stipulated. But this decides the whole question; for it only remains in each case to ascertain what the debtor has promised; whether he intended to promise to pay interest annually beyond the time fixed for the payment of the principal, if forbearance should extend beyond that time; for if he did, there is no more usury in applying the same rule of computation to the year next following than to the next preceding that time. The matter is thus solved: A party promises to pay at a given time \$100, with interest from a given time. At the day of payment, what is due? The principal and interest. From that time, what is forborne? Not the principal only, but all as to which default is made, to wit: the principal and interest; both are

pay at a time fixed beyond twelve months from date, with interest annually, the interest is not payable annually after maturity.¹

equally payable at the time. So it is not the forbearance of \$100 merely, but of more; and where the contract — whether expressly or by legal implication — extends to another succeeding period of time, when the interest is again payable, there is another sum, at such time, in addition to the principal, again forborne. It is at least but seven per cent. per annum, or at that rate, for the forbearance of \$100, or for a greater or less sum. *Singleton v. Lewis* presents a direct authority for the application of this rule of computing interest upon the interest accrued for years succeeding the time fixed for payment of the principal. In that case the credit of the latter expired one year from date, according to the terms used. Yet the promise was: 'with lawful interest, payable annually.' The necessary implication was that the debtor promised to pay interest annually for a period beyond the first year, else the words to that purport would avail nothing whatever, inasmuch as the interest due a year after date would have drawn interest without them. It was said in *O'Neill v. Sims* 'that in all cases in which the compounding of interest, whilst the collection of principal during the whole time is at the discretion of the creditor, seems to savor of usury or may, by abuse, be perverted to the purposes of the usurer.'

"That which touches the question of mutuality in a contract need not affect the question of usury. There can be no illegality for any reason in a promise to pay \$100 with interest

at the end of a year, and if not then paid and so long as the same may remain unpaid the interest thereon shall be paid annually; and if this can be gathered from the contract to be the agreement, it is not obvious how the mere fact that the creditor is at liberty to sue for his money in any case will make that usury which is not so for some other reason. In the case of *Eaton v. Bell*, 7 E. C. L. 18; S. C., 5 B. & Ald. 84, bankers who advanced money made half-yearly rests and carried the interest to the principal, and computed interest on the aggregate, indulging for a considerable space of time, and this mode of computation being acquiesced in was ratified by the king's bench and held free from the taint of usury. That court referred to and recognized the doctrine of Lord Eldon, in *Ex parte Bevan*, 9 Ves. 228, that a prior contract for a loan for twelve months, to settle the balance at the end of six months, and convert the interest then accrued into principal, would be bad for usury; yet that the same thing actually done at the end of six months, and a stipulation to forbear such aggregate, would be legal. Kelly on Usury, p. 48, supposes such *dicta* must be understood as applying to mortgages of real property only. It is finally to be remarked that if at the end of each year a party may give an interest-bearing note for the interest, which notes would be unquestionably valid, there can be no reason why at the inception of the contract he may not provide terms that shall produce the self-same result. Of course an inference that the

¹ *Westfield v. Westfield*, 19 S. C. 85. See *Wilson v. Kelly*, id. 160.

§ 378. Computation ; application and effect of partial payments. The established mode in the court of chancery [686] of computing interest is that whenever a sum in excess of the interest at that time due is to be credited, a balance is to be struck.¹ And the same rule applies at law. Where partial payments are made on a money demand after maturity, the payment is applied in the first place to discharge the interest then due; if the payment exceeds the interest the surplus goes towards discharging the principal; and the subsequent interest is to be computed on the balance of the principal unpaid. If the payment be less than the interest the surplus interest must not be taken to augment the principal; but interest continues on the principal until sufficient payments are made to extinguish the interest to that date. If there be a surplus of such payment it is applied to the principal. A like application is made of all payments.² This rule applies to payments upon judgments,³ demands upon which interest is allowed only in the discretion of the jury, if it is given;⁴ and accounts where [688] credits are payments.⁵ Rests in an account bearing in-

parties agreed for compound interest may be drawn from their dealings in a like manner as the inference may be drawn from the same source as to simple interest. We adjudge that the plaintiff in the present case was entitled to compute interest upon the interest falling due each year as was allowed in *Singleton v. Lewis*, the terms importing and the agreement being at least as clear in the present case as in that."

¹ *Chapline v. Scott*, 4 Har. & McHen. 91.

² *Russell v. Lucas*, Hemp. C. C. 91; *Anonymous*, Martin & Hayw. 169; *Baker v. Baker*, 28 N. J. L. 13; *De Ende v. Wilkison*, 2 Pat. & H. 663; *Baum v. Moon*, 1 Hayw. 323; *Van Benschooten v. Lawson*, 6 Johns. Ch. 313; *Stoughton v. Lynch*, 2 id. 209; *Bettes v. Farewell*, 15 Up. Can. C. P. 450; *Scanland v. Houston*, 5 Yerg. 310; *Dean v. Williams*, 17 Mass. 417; *Story v. Livingston*, 13 Pet. 359;

State v. Jackson, 1 Johns. Ch. 13; *Tracy v. Wikoff*, 1 Dall. 124; *Penrose v. Hart*, id. 378; *Lewis v. Bacon's Legatee*, 3 Hen. & Munf. 89; *Edes v. Goodridge*, 4 Mass. 103; *Meredith v. Banks*, 6 N. J. L. 408; *Houston v. Crutcher*, 31 Miss. 51; *Den's Estate*, 35 Cal. 692; *Backus v. Minor*, 3 id. 231; *Gwinn v. Whitaker*, 1 Har. & J. 754; *Lightfoot v. Price*, 4 Hen. & Munf. 431; *Wallace v. Glaser*, 82 Mich. 190.

³ *Hodgdon v. Hodgdon*, 2 N. H. 169.

⁴ *Peebles v. Gee*, 1 Dev. L. 341.

⁵ *Ross v. Russell*, 31 N. H. 386, was an action on an account stated. During seven years after statement of the account nine payments were made upon it, aggregating more than the principal. *Woods, C. J.* said: "The mode of computing interest upon promissory notes seems to have been perfectly settled by the usages of business and by judicial decisions in many jurisdictions, and

terest and consisting of numerous items, are a proper substitute for computation of interest on each item.¹

we are not aware of any deflections from the rule by any extended usage or any respectable authorities. The authorities in the plaintiff's argument are uniform in support of it, and the unvarying practice of this court is likewise believed to have been in harmony with it. We do not understand the argument of the defendants as drawing the rule into question; but as insisting upon a distinction between the present contract and a promissory note; as well as upon the nature of the contract itself; as, for the reason that the frequency with which the payments were made renders the application of such a rule unreasonably onerous to the party; and therefore not within the general maxim of allowing such interest as shall be just and reasonable. In other words, they claim to have paid the money due on the contract; that the several payments from time to time made in discharge of it should be treated like items of a mutual account, in which the relation of debtor and creditor is not recognized between the parties, except upon final settlement or upon the recurrence of such periodical rests as are allowed by courts sometimes, when the justice of the case seems to require it. If this were a correct view of the case, the question for the court would be as to what interest ought to be allowed, and what rests established for computing it. . . . It was from the beginning a debt for goods sold to the defendants, and by the admission of the party drawing interest; and the sums of money from time to time received by the

plaintiff of the defendants were not of the nature of items of mutual account, but as the auditor finds, and as clearly appears, payments made toward the extinguishment of the debt, and applicable as payments ordinarily are, or should by law be, towards interest or principal, according to the direction that the law gives to such payments in the silence of the parties in respect to them. We find no ground upon which we can exempt this contract to pay money with interest from the general rule shown to govern promissory notes in the particulars in controversy. The principal was payable on demand, and the interest, of course, also. The plaintiffs had a right to insist upon the payment of interest as often as interest accrued, and could have encountered any attempt of the defendants to apply a payment towards the principal by demand of fresh payment on account of interest. The legal presumption, then, was that the payment was made first in reduction of the claim which did not carry interest; that is, the interest itself." *McGregor v. Ganlin*, 4 Up. Can. Q. B. 378.

The court held in *Gwinn v. Whitaker*, 1 Har. & J. 754, that a payment by a debtor *must* be first applied to extinguish the interest of his debt, and then to the principal; and that a different application is not in the discretion of the debtor. But in *Pindall's Ex'r v. Bank of Marietta*, 10 Leigh, 484, it was held that a debtor owing a debt consisting of principal and interest, and making a partial payment, has a

¹ *Harding v. Howdy*, 11 Wheat. 108; *Schieffelin v. Stewart*, 1 Johns. Ch. 620.

[689] Where payment is made on a debt before it is due and begins to bear interest, the party who so pays is not, without some stipulation to that effect, entitled to interest up to the time the debt begins to bear it.¹ If, however, the debt bears interest, and a payment is made and accepted before the money is due, it should be immediately applied to the principal and accrued interest which would next become due.²

right to direct its application to so much of the principal in exclusion of the interest, and the creditor, if he receives it, is bound to apply it accordingly. And this was approved in *Miller v. Trevilian*, 2 Rob. (Va.) 1, which decided also that a case is not taken out of the influence of that principle by the circumstance that the party receiving the payment is a fiduciary.

¹ *Killian v. Herndon*, 4 Rich. L. 609.

² *French v. Kennedy*, 7 Barb. 452; *Miami Exporting Co. v. Bank of U. S.*, 5 Ohio, 260; *Williams v. Houghtaling*, 3 Cow. 86; *Tracy v. Wikoff*, 1 Dall. 133.

In *Miami Co. v. Bank*, *supra*, eight notes were made October 21, 1820. They were severally payable *on or before* the first day of December, 1823, and succeeding years to 1830, and all were on interest from December 1, 1818. Large payments were made on these notes in 1821 and 1822. *Hitchcock, J.*, said: "On the part of the defendants, it is insisted that inasmuch as these notes are payable on or before a particular day, and payments were made before that day, they have a right to compute interest upon the principal sum up to the time of payment, and so on from time to time as payments were made. Had the interest been due when the payments were made, this rule would not have been so objectionable, although we are not prepared to say it would be correct. In support of the principle

contended for, the defendants' counsel cite 8 S. & R. 378; 4 Wash. C. C. 92; 17 Mass. 417; 1 Johns. Ch. 13; 2 id. 209; and a number of other cases. In all these cases, I apprehend, it will be found that none of the payments were made until after the debt was due; at least the contrary does not appear to have been the fact. The cases in *Sargent & Rawle*, and the one in *Washington*, are upon judgments. In the case before the court no interest was demandable until the notes themselves became due. To adopt this rule, then, would be doing injustice to the plaintiffs. It would be charging them with interest before they could be called upon for either principal or interest. To adopt what is called the commercial rule would be equally unjust to the defendants. There would not be the same injustice in this case, it is true, that there would be where the payments had been long delayed and the debt had been even due for a great length of time. In such case it might so happen that the payment of interest alone would discharge both principal and interest. The case cited from 1 Dallas seems to recognize this principle. But it must be remembered that the notes here were payable on or before a certain day. Although the defendants could not compel payment before the day, yet the plaintiffs might pay before that time, and the defendants might be compelled to receive it. They could only be compelled to receive it upon the hypoth-

§ 379. **Same subject.** In the computation for the [690] purpose of applying a partial payment made after the principal sum is due, no notice is taken of the time when such sum fell due. The rests are to be made when the payments are actually made; unless the latter fall short of the interest, in which case, as before stated, the rest is deferred until the amount paid equals or exceeds the interest due; then the money paid is applied first to discharge the interest, and if there is a surplus it is applied to reduce the principal.¹ But in Rhode Island, where, as before remarked, instalments of interests bear interest while in arrear, a rest is to be made at the time the principal should have been paid, though no payment is then made. In a recent case a rule was laid down for computing the amount due at any given time on a bond to pay \$7,500 on or before May 7, 1859, with interest from date at the rate of seven per cent. per annum, payable on the 7th of May, 1859; and, after that time, semi-annually, until the principal sum be paid. It was held that the seven per cent. instalments should be reckoned with interest on them up to the time when the principal was due; and seven per cent. simple interest on the amount then found due; and thence until the time to which the amount is to be computed; inasmuch as by force of the words, "until the principal sum be paid," the contract rate must be held to govern to the time of actual payment although after maturity.² The rule which has been stated as applicable where partial payments have been made is intended to, and does, prevent interest being computed upon

esis that full payment was made; not only principal, but interest. If, then, partial payment only is made, it would seem to be but just that this partial payment should apply as well to interest as principal. We have found but one case reported similar to the one now before the court. This case is reported in 3 Cow. 86. The court say: 'Payment made on an instalment not due and payable should be applied to the extinguishment of principal, and such proportion of interest as has accrued on the principal thus extinguished.

For instance, a note or bond is given for the payment of \$100 on or before the termination of one year. At the end of six months a payment of \$51.50 is made. This is not applied to sink the principal to \$48.50; but the \$1.50 is applied to the interest of \$50 for six months, and \$50 to sink so much of the principal. At the end of the year there will be due \$50 of principal and the interest on that \$50 for one year.'

¹ French v. Kennedy, 7 Barb. 452.

² Lanahan v. Ward, 10 R. L. 299.

interest; and of course must be modified where interest payable at particular times and remaining unpaid is allowed to bear interest. In North Carolina the rule for computing interest on a bond on which it is payable annually is to calculate the interest on the bond for the first year, setting the interest aside, and then for the second, third, and so on until the time for the first payment; then calculate the interest on each year's interest to the same time, and apply the payment first to the extinguishment of this interest, and the surplus, if any, to the reduction of the principal. If the payment is not sufficient to pay this interest, it is applied first to extinguish the interest calculated on each year's interest, and the surplus to the principal interest as far as it will go. If the payment is not enough to satisfy the interest on the interest, it is set aside, and neither stops nor bears interest.¹ Where only the interest on the principal becomes principal and the deferred interest is a separate demand payments are applied to the delayed annual interest and the secondary interest accrued thereon, and the balance, if any, to the interest accrued on the principal since the last annual period, and then to the principal itself.² If an erroneous rule of computing interest is adopted with the knowledge and consent of the parties, although ignorantly, it is a mistake of law; but if there is a mistake in the calculation it is one of fact.³

SECTION 9.

SUSPENSION OF INTEREST.

§ 380. Miscellaneous cases. Interest given as damages results from the debtor's default. When he owes money, and knows the amount, he is chargeable with interest from the time when he ought to pay it; but if he is prevented from paying by the act or neglect of the creditor,⁴ or by law, he is not in default; and no interest is allowable during the period

¹ Bratton v. Allison, 70 N. C. 498.

² Vaughan v. Kennan, 88 Ark. 114.

³ Baker v. Baker, 28 N. J. L. 18.

⁴ Thompson v. Fullenwider, 5 Ill. App. 551.

The maker of a note is bound to

know the amount due upon it, and cannot claim a reduction of the interest because the payee refused to inform him on that point. *Lamprey v. Mason*, 148 Mass. 231.

he is so prevented. The fact that when an instalment of interest became due the mortgagor was unable to find the mortgagee until after the period required for the payment of interest, in order to prevent the principal from coming due, is not, in the absence of any fraud on the part of the mortgagee, a defense to a foreclosure of the mortgage for the non-payment of the principal.¹ Nor is interest suspended on a bond or note which is lost or mislaid unless a tender is made.² The interest on a note payable by an administrator to the estate he represents is not suspended by his appointment as such.³ Neither is that result produced by the death of the payee of a note, although no administration is granted upon his estate and no guardian appointed for the minor heirs, and it is uncertain whether there are any claims against it, if the maker of the obligation can cause letters of administration to be issued.⁴ But where a person entitled to an annuity removed to parts unknown, and made no demand of the administrator for many years till suit was instituted, the court refused to allow interest except from the commencement of suit, on the ground that its allowance in such case is not matter of positive law, but dependent on the circumstances.⁵

§ 381. Where payments prevented by legal process. In case of garnishment, trustee process, or restraint by other judicial proceeding, where the indebtedness is of such a character that interest can only be recovered for wrongful detention of the principal sum, the question whether the debtor who is subjected to such process shall pay interest during the pendency of the suit has been much discussed and variously decided. In the New England states, and some others, perhaps, the trustee is not generally held chargeable with interest during the time he is under such restraint,⁶ unless the funds have been retained under such circumstances that the court can infer that they have earned interest⁷ or the trustee prac-

¹ *Dwight v. Webster*, 10 Abb. 128.
See *Cheney v. Libby*, 134 U. S. 68.

² *Payne v. Clark*, 28 Mo. 259. See
Heywood v. Hartshorn, 55 N. H. 476.

³ *Rodenbach's Appeal*, 102 Pa. St.
572.

⁴ *Gale v. Corey*, 112 Ind. 39.

⁵ *Laura Jane v. Hagan*, 10 Humph.
332.

⁶ *Rennell v. Kimball*, 5 Allen, 356;
Prescott v. Parker, 4 Mass. 170; *Adams v. Cordis*, 8 Pick. 260; *Smith v. Flanders*, 129 Mass. 322; *Huntress v. Burbank*, 111 Mass. 218; *Greenish v. Standard Sugar Refinery*, 2 Low. 553.

⁷ *Norris v. Massachusetts Mut. L. Ins. Co.*, 131 Mass. 294; *Brown v. Silsby*, 10 N. H. 521; *Swanscot Ma-*

tices unreasonable delay in making his answer for the purpose of obtaining a longer use of the money.¹

Where a corporation whose object was not to employ its funds in trade and business was the trustee, the court held that it had done its duty if it had the money ready upon the determination of the case to pay such judgment as should be rendered.² So it has been held by the national supreme court that if money be enjoined in the hands of a party, who is thereby prevented from making any use of it, interest is not allowed.³ In an action in New York upon a note, it was said that a person who is prohibited by injunction from paying the principal will not be compelled to pay interest; and one who [693] causes such injunction is not entitled to it. The debtor in that case supposed he was enjoined, but was not; and not being compelled to retain the money was held liable to pay interest.⁴

In New Jersey the obligee of a bond, for the purpose of having it collected, made an unconditional assignment. Afterwards fearing that the assignee would appropriate the money to his own use, the assignor filed a bill in equity to restrain the obligor from paying the money to the assignee, and the latter from receiving it. It was held that during the continuance of the injunction the obligor was not chargeable with interest.⁵

In Pennsylvania where the debt is the subject of a foreign attachment the interest ceases on the service of the writ if the debtor is ready and willing to pay the debt and interest; but he is not entitled to the benefit of this rule where the delay

chine Co. v. Partridge, 25 id. 369; Pierce v. Rowe, 1 id. 179; Abbott v. Stinchfield, 71 Me. 214; Woodruff v. Bacon, 35 Conn. 98. See Condee v. Skinner, 40 id. 463.

The intervention of trustee process will not relieve the defendant from interest, where judgment was entered on the debt after a defense on the merits, during the continuance of the attachment, no application having been made to continue the action for judgment until such process was disposed of. Albion Lead Works v. Citizens' Ins. Co., 3 Fed. Rep. 197.

¹ Oriental Bank v. Fremont Ins. Co., 4 Met. 1; Rushton v. Rowe, 64 Pa. St. 63.

² Swanscot Machine Co. v. Partridge, 25 N. H. 391. See Norris v. Hall, 18 Me. 332; Chase v. Manhardt, 1 Bland, 333.

³ Osborn v. Bank of U. S., 9 Wheat. 738; Wade v. Wade's Adm'r, 1 Wash. C. C. 477; Bowman v. Wilson, 2 McCrary, 394.

⁴ Stevens v. Barringer, 13 Wend. 639.

⁵ Branthwait v. Halsey, 9 N. J. L. 3

is caused by his litigiousness and unreasonable conduct. The court suggest that a sure way for the garnishee to avoid liability for interest is to pay the money into court.¹

In an Ohio case the court said the exemption, by reason of an injunction or garnishment, seems to rest entirely upon the idea of the party having the money actually in readiness to be disposed of as directed by the court; and so being in the custody of the law it is to be regarded as a *quasi* payment, as if placed on deposit subject to the order of the court; and referring to the case in hand said: "Nothing short of such a state of facts, we think, should have exempted the defendant in this case from the payment of interest during the pendency of the attachment proceedings. The record shows no proof of such a state of facts in this case. It is not pretended that the defendant, either before or during the attachment proceedings, expressed a wish or even willingness to pay his indebtedness. Nor does it appear that he was ready to pay. If, then, he is in law exempt from the payment of interest during the time of his garnishment, for the reason that he was actually holding the money, ready and willing to pay, but was prevented [694] by the attachment proceedings, such state of facts must be presumed. But a presumption is the supposition of a truth grounded on circumstantial or *probable* evidence. It should always be a natural and reasonable deduction from pertinent circumstances and relative existing facts to constitute a legal presumption."²

In Alabama where a bill was filed for the purpose of subjecting a sum of money in the hands of a third person to the payment of a debt due the complainant, it was held that if such person is enjoined from using it, and does not offer to bring it into court, but insists upon his right to retain it both against the complainant and his debtor, he should be charged with interest.³ In a later case a debtor was enjoined from paying money over to his creditor, but was not restrained

¹ Jones v. Manufacturers' Nat. Bank, 99 Pa. St. 317; Rushton v. Spring, 11 S. & R. 188; also Stevens Rowe, 64 id. 63. See Fitzgerald v. Caldwell, 2 Dall. 218; Jackson v. Lloyd, 44 Pa. St. 82; Irwin v. Pittsburgh, etc. R. Co., 48 id. 488; Mackey v. Hodgson, 9 id. 468; Updegraff v. Gwathmey, 19 Mo. 628; Goodwin v. McGehee, 19 Ala. 468.

² Candee v. Webster, 9 Ohio St. 452.

³ Kirkman v. Vanlier, 7 Ala. 217.

from using it in any other manner; it was held that he could only discharge himself from liability for interest by paying the money into court.¹

In Kentucky a debtor is not excused from paying interest because the fund is attached in his hands by a bill in chancery, unless he brings the money into court, or shows that he was prevented from using it.²

In Maryland in a suit upon an injunction bond given upon the granting of an injunction to restrain the payment of a sum of money, interest on this sum is recoverable as a matter of right up to the time it was paid into court upon the dissolution of the injunction. This right of action and recovery proceeded on the assumption that the debtor enjoined was exempt from paying interest during the continuance of the injunction.³

In Virginia it is held that although a debtor is restrained from paying money by attachment he ought nevertheless to pay interest during the time he was so restrained if he continued to hold the funds.⁴

¹ Bullock v. Ferguson, 30 Ala. 227.

² Shackleford v. Helm, 1 Dana, 338.

³ Wallis v. Dilley, 7 Md. 237.

⁴ Templeman v. Fountleroy, 3 Rand. 434. Carr, J., said: "The last objection to the decree is that it gives interest while the money was stayed in the party's hands, and it would have been a contempt to have paid it out. I have examined the case of Tazewell v. Barrett, 4 Hen. & Munf. 159, and think the principle decided there directly applicable to the present question. Tazewell owed money to Bland by bond. He was served with a *subpœna* on behalf of Bland's executors, attaching this money in his hands. After this service he received notice that the bond had been assigned. An order of court was subsequently served on him to restrain him from paying the money until further order. It was five or six years before this order was discharged; and in a suit by the assignees of the bond the question

was whether during this time Tazewell should pay interest. The court decided that he should. Judge Roane considered the principle as settled by Hunter v. Spotswood, 1 Wash. 145, where a sheriff sold attached effects under an order of court directing him to pay the money to Hunter on his giving security, which he failed to do; the money remained; and it was said died in the sheriff's hands by depreciation. Yet he was decreed to pay interest. In all such cases I think the safe and sound doctrine is that if the party, though restrained from paying, holds and uses the money (and we must presume he uses if he continues to hold it) he ought to pay interest; and if the holder does not think so he has always the privilege of bringing the money into court; and because if the debtor could under the restraining process hold the debt for years without interest it would offer a strong temptation to him to stir

In Mississippi a garnishee who admits his indebtedness is liable for interest thereon *pendente lite* unless he deposits the money in court.¹ There is practical good sense in this rule as applied to debtors generally in all judicial proceedings. A debtor who is in default, and therefore liable to in- [695] terest when the restraining process is served, has no cause to complain that that liability continues; for the process, in restraining him for the time being, operates in harmony with his own choice. When the course of the proceedings admonishes him that the money may be required so soon that he can make no further beneficial use of it the option to pay it into court is equivalent to the option to pay it to his creditor; and having this election from the first it cannot be said that the law compels him to keep the money at all; he is not prevented for any time whatever from making payment.²

§ 382. Where war prevents payment. War suspends all commercial intercourse between belligerent nations, and the citizens or subjects of each are enemies of the citizens or subjects of the other. Their contracts are prevented by law from being performed while this hostile relation subsists. Interest cannot be allowed on money becoming due [696] during a war between enemies, the payment of which could not be made by reason of such suspension of commercial intercourse, because the debtor is not in fault for the delay.³ On a bond given in one of the American states to a British creditor before the war of the revolution, and confiscated, it was held that the creditor was not entitled to interest except from the time the debt was demanded after the treaty of peace; but that it ought to be disclosed by plea that the creditor was beyond sea, and that the debtor had always been ready since the treaty to pay, and is now ready; in verification of which he should pay the money into court.⁴

up claims of this kind, and to throw all possible obstacles in the way of a decision of the question raised." See *Ross v. Austin*, 4 Hen. & Munf. 502.

¹ *Work v. Glaskins*, 33 Miss. 539; *Smith v. German Bank*, 60 id. 69.

² See *Greenish v. Standard Sugar Refinery*, 2 Low. 553; *McKnight v. Chauncey*, *Selden's Notes* (N. Y.), 97.

³ *Bean v. Chapman*, 62 Ala. 58;

Brewer v. Hartie, 8 Call, 21; *Duniston v. Imbrie*, 8 Wash. C. C. 396; *Birdley v. Eden*, 8 Har. & McHen. 167. See *Dulany v. Wells*, id. 20; *Court v. Vanbibber*, id. 140.

⁴ *Anonymous*, *Martin & Hayw. L. & Eq.* 363. See *Sheppard v. Taylor*, 5 Pet. 675; *Selden v. Preston*, 11 Bush, 191.

Interest on loans made previous to, and maturing after, the commencement of a war ceases to run during the subsequent continuance of it, although it was stipulated for in the contract.¹ But interest which accrued during the war of the revolution on a bond to a citizen of Maryland by a principal and surety, the former a British subject and the latter a citizen of that state, was held to be recoverable in an action against the surety.² The rule that interest is not recoverable between alien enemies during a war between their respective countries was held to be applicable to debts between citizens of states in rebellion and citizens of states adhering to the national government in the late civil war; but it only applied when the money was to be paid to the belligerent directly.³ It cannot apply when there is a known agent, resident within the same jurisdiction with the debtor, appointed to receive the money; in such a case the debt will draw interest.⁴

§ 383. **Tender stops interest.** Tender has been considered in a broader sense in another connection.⁵ It is only needful [697] here to explain when admissible, in what it consists, and its effect to stop interest. The theory of charging interest after a debt is due and ought to be paid is that the debtor is in default; that he might voluntarily pay, and should be charged with interest because he does not, but withholds the money without the creditor's consent; hence a tender, being an offer of payment, has the effect of preventing all the consequences of the default; it stops interest and protects the party against costs; for, if the tender is refused, it is not his but the creditor's fault that the debt remains unpaid.⁶ The

¹ *Brown v. Hiatts*, 15 Wall. 177; *Lush v. Lambert*, 15 Minn. 416.

² *Paul v. Christie*, 4 Har. & McH. 161; *Bean v. Chapman*, 62 Ala. 58.

³ *Pillow v. Brown*, 26 Ark. 240; *Ward v. Smith*, 7 Wall. 447; *Lush v. Lambert*, 15 Minn. 416; *Bigler v. Waller*, Chase's Dec. 316; *Brown v. Hiatts*, 15 Wall. 177.

⁴ *Ward v. Smith*, 7 Wall. 447; *Williams v. State*, 37 Ark. 463; *Roberts v. Cocke*, 28 Gratt. 207.

For circumstances under which

trustees have been relieved from paying interest during the civil war though residing in the southern states where their creditors or *cestuis que trust* also resided, see *Lacy v. Stemper*, 27 Gratt. 42; *Brent's Adm'r v. Clevinger*, 78 Va. 12.

⁵ §§ 260-278, *ante*.

⁶ *Paterson v. Sharp*, 41 Cal. 138; *Raymond v. Bearnard*, 12 Johns. 274; *Jackson v. Law*, 5 Cow. 248; *Woodruff v. Trapnall*, 12 Ark. 640; *Wheeler v. Woodward*, 66 Pa. St. 158; *Dixon*

tender and refusal only cause a suspension of interest and exempt the debtor from costs. Where the maker of a promissory note paid money into the hands of an agent to secure it, and the latter tendered the money to the holder of the note on condition of having it delivered up, the note being mislaid, this condition was not complied with; and the agent afterwards became bankrupt with the money in his hands. Held, that the maker was still responsible on the note, but interest was not recoverable after the time of the tender.¹

§ 384. **Tender not allowed for unliquidated damages.** A tender can only be made of a debt which is certain in amount; it is not available at common law where the demand consists of unliquidated damages.² The debt must also be certain to justify interest by reason of the debtor's default. The theory of the law is that the debtor is able by his own voluntary act to prevent such interest. His act can never be more than a tender, without the concurring act of the creditor in accepting the money. A tender, however, being all the debtor can do towards performance of the promise to pay, has the [698] effect of preventing damages for non-performance. On principle, a party should have a right by tender to prevent default wherever in the absence of such tender interest would be chargeable on the ground of default.³ In New Hampshire the plaintiff in a tort action will not generally be allowed interest if he recovers less on the trial than the defendant offered him, although the offer was not strictly a tender.⁴ The interest is allowed in such a case as damages, following the

v. Clark, 5 C. B. 365; Waistell v. Atkinson, 8 Bing. 289; Carley v. Vance, 17 Mass. 389; Cornell v. Green, 10 S. & R. 14; Johnson v. Triggs, 4 G. Greene, 97; Freeman v. Fleming, 5 Iowa, 460; Shant v. Southern, 10 id. 415; Mohn v. Stoner, 11 id. 80; Hayward v. Munger, 14 id. 516; Dooley v. Smith, 18 Wall. 604.

A tender of the amount due does not suspend interest if the debtor subsequently assails the validity of the demand and seeks to have it canceled. Tishmingo Savings Bank v. Buchanan, 60 Miss. 496.

¹ Dent v. Dunn, 8 Camp. 290.

² Cilley v. Hawkins, 48 Ill. 308; Gregory v. Wells, 62 id. 232; Dearle v. Barrett, 2 Ad. & E. 82; Green v. Shurtliff, 19 Vt. 592; Dunning v. Humphrey, 24 Wend. 81. See McDowell v. Keller, 4 Cold. 258; Hopson v. Fountain, 5 Humph. 140.

³ In Dearle v. Barrett, 2 Ad. & E. 82, it is assumed, or referred to as true, that a tender is pleadable to a *quantum meruit*. See note b to this case.

⁴ Thompson v. Boston & M. R. Co., 58 N. H. 524.

delay in obtaining redress, and if the wrong-doer is not responsible for the delay he certainly ought not to be called upon to compensate the other party for a loss he has brought upon himself.

§ 385. When tender may be made. A tender is the offer of performance by a party who is under a contract obligation to pay money. It should to prevent interest altogether be made on the day the money becomes due; the offer is then of the very thing promised, and, if accepted, there is a specific performance of the contract. In Massachusetts a tender afterwards could not be pleaded, and was unavailing as a defense, until the rule was changed by statute.¹ And this is the doctrine of the English courts. There it is said a plea of tender is in truth a plea of performance of the contract as far as the party contracting can perform; and where money is to be paid, the debtor cannot pay it unless the creditor will receive it. A tender, therefore, at the time it is due is sufficient because it is payment so far as the debtor can pay, but a tender afterwards is too late.² Nothing can discharge a covenant to pay on a certain day but actual payment; acceptance afterwards may have the effect of discharge as accord and satisfaction.³ But neither in England nor Massachusetts is a tender of the debt after it is due without effect. The denial of the right to [699] plead such a tender is technical, and the benefit of it is afforded in another way. The tender, or even an offer to pay without going far enough to constitute a tender, may so negative default as to take away the right to damages, or any

¹ *City Bank v. Cutter*, 8 Pick. 414; *Suffolk Bank v. Worcester Bank*, 5 id. 106; *Dewey v. Humphrey*, id. 187; *Maynard v. Hunt*, id. 240; *Frazier v. Cushman*, 12 Mass. 277.

² *Dobie v. Larkan*, 10 Exch. 776.

³ *Poole v. Tumbidge*, 2 M. & W. 228. In this case *Johnson v. Clay*, 7 Taunt. 486, is doubted.

In *Hume v. Peploe*, 8 East, 168, Lord Ellenborough, C. J., said: "In strictness, a plea of tender is applicable only to cases where the party pleading it has never been guilty of any breach of his contract; and we

cannot now suffer a new form of pleading to be introduced different from that which has always prevailed in this case. The damages, indeed, have sometimes varied, as the rate of interest has been changed. And though the courts have adopted the practice of referring it to their officers to compute principal and interest on bills of exchange, instead of sending it to a jury to make the same computation, yet it is a matter always in the discretion of the court, and not to be obtained without motion."

penalty for detention of the money. A bank was by statute subjected to additional damages at the rate of twenty-four per cent. per annum for the time it should refuse or delay payment; and demand for payment of a large sum of its bills was made, which was partially complied with; but the amount required, exceeding the specie in the vaults of the bank, there was a deficiency in the payment which was tendered after suit brought, on the day after the demand, and an additional sum for interest and costs. This tender was refused; after which the money was deposited in another bank subject to the order of the creditor, and notice thereof given to such creditor. Under a rule of the trial court the money was brought into court and taken by the plaintiffs. The court, by Parker, C. J., said:¹ "The tender, though not technically good as a defense,

¹Suffolk Bank v. Worcester Bank, 5 Pick. 106. The learned chief justice cites the practice in England in support of the exemption of the debtor from liability to pay interest in such cases. Referring to *Dent v. Dunn*, 3 Camp. 296, he says: "The action was brought by Dent against the executrix of Dunn on two promissory notes given by the testator in his life-time. It appeared that after his death his executrix had given her agent a sum sufficient to take up the notes. The agent offered to pay the principal and interest on having the notes delivered up to him, but they were mislaid, and so the money was not paid. The agent failed with the money in his hands. Afterwards the notes were found and the action brought. These facts were relied upon in defense of the action, but not admitted as such. A question then arose, to what time the interest should be made up. Lord Ellenborough said he thought interest ought to be stopped from the time of the offer to pay. Interest, he said, is a compensation agreed to be paid for the use of money forborne by the lender at the borrower's

request. It is more frequently recovered in the shape of damages for money improperly retained by the debtor contrary to the request of the creditor. But in neither of these ways can interest run after an offer to pay the principal upon a reasonable condition, which the party to receive refuses, or is not in a situation to fulfill. And a verdict was taken for the principal and interest down to the tender. Here, it will be observed, was no legal tender. The offer to pay was after the notes had become due, and a condition was insisted on, which, however reasonable, would have rendered the offer nugatory as a tender; but yet it had its effect, because the money was not unlawfully detained, but it was the negligence of the plaintiff in regard to the notes which prevented the payment.

"So in the case before us there was no legal tender but an offer to pay the money on the same day that the action was commenced, together with a surplus sufficient to cover the interest or penalty which had accrued, and upon the refusal to receive, the money was deposited in a bank for

is a legal and equitable shield against the just but severe penalty for neglecting and refusing to redeem their bills from the time when they would have redeemed them but for the re-

their use with a notice that they might at any time draw it out. The case is more favorable for the defendants than the one cited, and it differs also in this, that there was no contract for interest; so that it could be recovered only as damages for improper detention; whereas in the case cited the promissory notes themselves were without doubt upon interest, it being stated that the offer by the agent was to pay the principal and interest. There, too, the money was lost so that the payment of the principal itself was disputed. Here the principal and interest due at the time of the offer and the costs which had accrued were at all times after the offer at the disposal of the plaintiffs. The court of common pleas in England have adopted the same just principle, and applied it more extensively as appears by the case of *Zeevin v. Cowell*, 2 Taunt. 203. The case was that after the action was commenced, and before the declaration was made out, the defendant offered to pay the debt and costs which the plaintiff refused to take, and proceeded to make out his declaration. The motion was that the defendant should be permitted to pay into court the debt and costs up to the time of the offer to pay; which was allowed and the plaintiff was made to pay the costs of the application and all subsequent costs. And in the case of *Roberts v. Lambert*, 2 Taunt. 283, the same order was made. This rule is exceedingly just, as it goes to repress the spirit of litigation, and punishes the party for his vexatious proceedings. These cases fully justify us in the conclusion we have come to in the present case, that the

money brought in under the rule was sufficient; which having been taken out by the plaintiffs, judgment must be for the defendants for costs after that time." *Goff v. Rehoboth*, 2 Cush. 475. See *Jeter v. Littlejohn*, 3 Murph. 186; *Cornell v. Green*, 10 S. & R. 14; *Heywood v. Hartshorn*, 55 N. H. 476.

In *Donohue v. Chase*, 139 Mass. 407, the rates of interest stipulated for in mortgage notes varied from seven to twelve per cent. The mortgagor made an offer to pay the sum due which was refused unless compliance was made with an illegal demand of the mortgagee. The court observe that the debtor did all that was necessary to be done before receiving the creditor's account. He was in fault, and it would be inequitable to allow him to avail himself of his own wrongful act to secure the payment of an excessive rate of interest. The offer to pay did not amount to a legal tender, but the court reduced the subsequent interest to the legal rate.

The statute of 3 and 4 W. 4, c. 42, § 21, enacts: "That it shall be lawful for the defendant in all personal actions (with certain exceptions) by leave of any of the said superior courts where such action is pending, or a judge of any of said superior courts, to pay into court a sum of money by way of compensation or amends, in such action and under such regulations as to the payment of costs and the form of pleading as the said judges or such eight or more of them as aforesaid shall, by any rule or orders by them to be from time to time made, order and direct."

fusal of the other party to receive. We think, too, that the plaintiffs ought not to recover even simple interest after they might have received their money and refused, under the circumstances of this case. The bank bills or notes sued were promises to pay money on demand, without any engagement to pay interest. Interest was no part of the contract; but after demand and non-payment interest would be recovered in the form of damages for detention. This claim of damages might be answered before a jury by proving that it was the fault of the plaintiffs themselves that they had not received their debt, and that the money had been placed subject to their order so that the debtor could not put it to profitable use. If there were any question about the amount due the case might be different; but where the sum is certain, and the creditor refuses to receive the debt, which is not by the terms of the contract on interest, and the debtor deprives himself of the use of the money, putting it under the control of the creditor without any condition, we can see no [700] principle of law or justice which will oblige the debtor to pay interest subsequently." It has also been held in [701] Kentucky that a tender after the day fixed for payment is not good.¹

¹ *Huston v. Noble*, 4 J. J. Marsh. 130. See *Gould v. Banks*, 8 Wend. 562; *Day v. Lafferty*, 4 Ark. 450.

In *Dixon v. Clark*, 5 C. B. 365, Wilde, C. J., said: "In actions of debt and *assumpsit*, the principle of the plea of tender, in our apprehension, is that the defendant has been always ready (*toujours prist*) to perform entirely the contract on which the action is founded; and that he did perform it as far as he was able by tendering the requisite money; the plaintiff himself precluding a complete performance by refusing to receive it. And as, in ordinary cases, the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (*uncore prist*), but must be accompanied by a *profert in curiam* of the money tendered. If

the defendant can maintain this plea, although he will not thereby bar the debt (for that would be inconsistent with the *uncore prist* and *profert in curiam*), yet he will answer the action, in the sense that he will recover judgment for his costs of defense against the plaintiff,—in which respect the plea of tender is essentially different from that of payment of money into court. And, as the plea is thus to constitute an answer to the action, it must, we conceive, be deficient in none of the requisite qualities of a good plea in bar. With respect to the averment of *toujours prist*, if the plaintiff can falsify it he avoids the plea altogether. Therefore, if he can show that an entire performance of the contract was demanded and refused at any time when, by the terms of it, he had a

[702] § 386. **Same subject.** After a debt has become due an action accrues for the recovery of damages; the whole demand is one for their recovery given by law for failure to perform

right to make such a demand, he will avoid the plea. Hence, if a demand of the whole sum originally due is made and refused a subsequent tender of part of it is bad, notwithstanding that, by part payment, or other means, the debt may have been reduced, in the *interim*, to the sum tendered. And this is the principle of the decision of *Cotton v. Godwin*, 7 M. & W. 147. If, however, the demand were of a larger sum than that originally due under the contract, a refusal to pay it would not falsify the *toujours prist*, even though the amount demanded were made up of the sum due under the contract, and some other debt due from the defendant to the plaintiff. And this is the principle of the decisions of *Brandon v. Newington*, 3 Q. B. 915, and *Hesketh v. Fawcett*, 11 M. & W. 356, which appear to overrule *Tyler v. Bland*, 9 M. & W. 338.

"This principle, however, we think, is only applicable where the larger sum is demanded *generally*, and can hardly be enforced where it is explained to the defendant at the time how the amount demanded is made up; for, in such case, the transaction appears to be nothing less than a simultaneous demand of the several debts so as to falsify the averment of *toujours prist* as to each. But, besides the averment of *readiness* to perform, the plea must aver an actual *performance* of the entire contract on the part of the defendant as far as the plaintiff would allow. And it is plain that where, by the terms of it, the money is to be paid on a future day certain, this branch of the plea can only be satisfied by alleging a tender *on the very*

day. And this is the principle of the decisions of *Hume v. Peploe*, 8 East, 168, and *Poole v. Tumbridge*, 2 M. & W. 223. It is also obvious that the defect in the plea in this respect cannot be remedied by resorting to the previous averment of *toujours prist*. Consequently, a plea by the acceptor of a bill or the maker of a note of a tender *post diem* is bad, notwithstanding the tender is of the amount of the bill or note, with interest from the day it became due up to the day of the tender, and notwithstanding the plea alleges that the defendant was always *ready* to pay, not only from the time of the tender (as the plea was in *Hume v. Peploe*), but also from the time when the bill or note became payable. On the same reasoning it appears to us that this branch of the plea can only be satisfied by alleging a tender of the whole sum due under the contract, for that a tender of a part of it only is no averment that the defendant performed the whole contract as far as the plaintiff would allow. If it be said that the plea of tender is, in effect, only in preclusion of damages subsequent to the tender, and that it would be unjust to give the plaintiff those damages which have been incurred merely in consequence of his refusal to receive the money tendered, the answer is that the same argument might be applied to the instance of the tender *post diem* of the amount of a bill or note with the interest then due; but that, in each case, the defendant is unable to allege that he has performed the terms of his contract as far as the plaintiff would allow him, and is, therefore, disabled from pleading a tender."

the contract. A tender then is not an offer of strict [703] performance, but of damages; a tender of the full amount to which the creditor is entitled, if received, is accord and satisfaction; but since the damages are certain in amount, consisting of the debt and interest, the general American doctrine is that a tender may be made after the debt is due, and may be pleaded as such. To be sufficient, however, it must include the interest up to the date it is made.¹ In cases of promises to pay in chattels or in paper money of fluctuating value a tender in kind of the thing stipulated to be paid, to be effectual, can only be made on the day appointed for payment.² It is only upon debts due that a tender will stop interest; a tender to pay a debt bearing interest before it is due will not have that effect.³ The creditor has a right to keep his money at interest according to the contract.⁴ In a Wisconsin case the question arose whether a tender can be made before an interest-bearing debt becomes due by tendering interest also to the maturity of the debt. The court remarked that the question was somewhat novel in its character, and upon which authorities are not numerous, owing doubtless to the rarity of the occurrence as matter of fact. It is seldom, at least in modern times, that the debtor offers to pay before the debt is due, including interest up to the time it is due; still more seldom, such offer being made, that the creditor refuses it. The two Massachusetts cases seem to rest the decision upon the right of the creditor to keep his money at interest according to the contract. But where the debtor tenders the whole amount of the interest which could accrue up to the time of payment fixed by the contract, this reason would seem to fail. But can it not be said that the creditor may have an interest in keeping his money invested upon security, rather than to have it in his own hands? Can it not be said that he may insist on it, even arbitrarily or obstinately, and without advantage to [704]

¹ Tracy v. Strong, 2 Conn. 659; Stadwell v. Cooke, 38 id. 549; Ashburn v. Poulter, 35 id. 553; Patterson v. Sharp, 41 Cal. 133; Haman v. Dimmick, 14 Ind. 105; Livingston v. Harrison, 2 E. D. Smith, 197; Rudolph v. Wagner, 36 Ala. 698. See 2 Pars. on Cont. 642, note e.

² Powe v. Powe, 42 Ala. 118; Toulmin v. Sager, id. 127.

³ Ellis v. Craig, 7 Johns. Ch. 7; Mitchell v. Cook, 29 Barb. 248.

⁴ Id.; Saunders v. Frost, 5 Pick. 259, 266; Kingman v. Pierce, 17 Mass. 247.

himself, so long as the contract provides for? It would seem so, unless the rule of the civil law is to prevail, which was that the day of payment was fixed for the convenience of the debtor only; that he might not be compelled to pay before that time, leaving him at liberty, however, to do so if he chose.¹ A tender should be made before suit brought, though it may be made after the creditor has directed it to be brought,² and even taken the initiatory steps.³ But under a rule of court the defendant may pay into court the amount he acknowledges to be due.⁴

The law of tender has been more or less regulated by statute in nearly all the states, and a tender is generally allowed after suit commenced; but when so made, the costs that have accrued up to that time must also be tendered.⁵ The tender may be made generally for the debt, interest and costs; and will be sufficient if the amount is large enough; but a tender for the debt, not mentioning costs, will not be good, though the plaintiff recover no more than is paid into court; for tenders are *stricti juris*.⁶ If at the time of the tender the debtor has no knowledge of the commencement of a suit, and the creditor does not inform him thereof, nor make any claim of costs, but refuses to accept the amount tendered solely on account of its insufficiency to pay the *debt*, it may be regarded as a waiver of all claims for costs.⁷ After judgment the only way to make a tender effectual is to bring the money into court, and move for and obtain a rule to enter satisfaction upon the record.⁸ But where a defendant, on being taken on execution under a *ca. sa.*, tendered the debt and costs to the plaintiff's attorney, and required him to sign his discharge, [705] which such attorney refused to do until the debtor paid

¹ Moore v. Cord, 14 Wis. 218. See McHard v. Whetcroft, 3 Har. & McH. 85; 2 Par. on Cont. 642; Tillon v. Britton, 9 N. J. L. 120.

² Hubbard v. Chenango Bank, 8 Cow. 88; Fishburne v. Sanders, 1 N. & McC. 242; Winningham v. Redding, 6 Jones' L. 125.

³ Knight v. Beach, 7 Abb. (N. S.) 241; Retan v. Drew, 19 Wend. 804; Bennett v. Bayes, 5 H. & N. 891.

⁴ Murray v. Windley, 7 Ired. 201.

⁵ Freeman v. Fleming, 5 Iowa. 460; Emerson v. White, 10 Gray, 851.

⁶ Shotwell v. Denman, Coxe (N. J. L.), 174; State Bank v. Holcomb, 7 N. J. L. 198. See Gammon v. Stone, 1 Ves. Sr. 839.

⁷ Haskell v. Brewer, 11 Me. 258; Hull v. Peters 7 Barb. 831.

⁸ Jackson v. Law, 5 Cow. 248.

an independent collateral demand for costs, it was held that the plaintiff and his attorney were liable to an action on the case for such refusal.¹

SECTION 10.

PLEADING.

§ 387. How interest claimed in pleading. It is a rule of pleading that those damages which are implied by law, or necessarily result from the facts stated as the cause of action, need not be specially declared for.² Under this rule, interest at the legal rate, which may be claimed as damages for non-payment of money when due, may be recovered without being specially claimed in pleading.³ If the action is brought upon

¹ Crozer v. Pilling, 6 D. & R. 129.

² See ch. 10.

³ Ansley v. Jordan, 61 Ga. 482; Tucker v. Page, 69 Ill. 179; McConnell v. Thomas, 3 Ill. 313; Washington v. Planters' Bank, 1 How. (Miss.), 230. But when interest is included in the agreement it is part of the debt agreed to be paid, and the interest promise and its breach must be alleged.

In Chinn v. Hamilton, Hemp. C. C. 438, debt was brought on a promissory note for \$3,919.53, to be paid one day after date, with interest at ten per cent. from date until final payment. In the declaration the plaintiff demanded the sum of \$3,919.53, and assigned as a breach the non-payment of that sum, made no averment in relation to the interest, and concluded the breach in these words: "to the damage of the plaintiff, \$2,000." And the court say: "In actions upon obligations, or promissory notes for the payment of money, containing no stipulation in regard to interest, it has not been deemed necessary to demand in the declaration the interest that may be due, nor to negative its payment in

the assignment of breaches. The uniform and settled practice is to declare for the debt alone, and interest is recovered as damages for its detention. Upon the failure to pay money at the time it is due the creditor is justly and legally entitled to be remunerated by the debtor for the damages he has sustained by the fault of the debtor. The law has declared the amount of these damages, and fixed them at the rate of six per cent. per annum, and allowed the parties to the contract to vary this rate; so that in no case shall it exceed the rate of ten per cent. per annum upon the amount loaned or withheld. In lieu of the damages that the creditor would be entitled to recover for the unjust detention of the debt the law has given interest; and although the law denominates it interest, it is in fact the damages which the creditor has sustained. He is therefore always allowed to recover the interest due at the rendition of the judgment as damages for the detention of the debt. But in cases where the parties stipulate in the contract for the payment of interest before the debt falls due, the

[706] an express promise to pay money, and the contract set out includes a promise to pay interest at a given rate which it is lawful to stipulate for until the debt is paid, a general breach with an *ad damnum* large enough to cover the princi-

interest cannot be regarded in the light of damages, but constitutes a part of the contract itself. The interest in this case accrues by the stipulations of the contract, and not as a legal consequence of a breach. It cannot be in the nature of damages, for it arises before any infraction of the contract or failure to perform it.

. . . The promise to pay the debt, and the promise to pay interest from the date of the contract, are two separate, distinct promises or undertakings; one may be performed without performing the other. In declaring upon a covenant or a parol contract in writing containing various undertakings, the plaintiff has his election to complain of the breach of one or of all of the covenants or promises. If he complains of the breach or the non-performance of one only of the covenants or promises, he thereby admits that the others have been performed. The intendment is to be made most strongly against the pleader, and as he complains of the breach of only one of the covenants or obligations, the presumption arises that the others have been performed. It, at all events, waives any right of action upon them; for, having sued upon the contract once, he is forever barred from suing again. It will not be allowed to split up the various covenants or promises contained in one contract and sue upon each of them—he can have but one recovery upon one contract, which then becomes merged in the judgment of the court.

“If the foregoing remarks are well founded the declaration is not de-

fective. Can the plaintiff in this case recover interest after the debt becomes due; and if he can, at what rate? He is entitled to recover interest as damages for the detention of the money after it became due, and where the contract is silent the law fixes the rate at six per cent. per annum; but when the contract fixes the rate of interest at ten per cent., the law declares that to be the rate. In this case the contract is set out in the declaration, and fixes the rate of interest at ten per cent. per annum; consequently the plaintiff is entitled to recover interest at the rate of ten per cent. per annum. The fact that the parties have agreed upon the rate of interest does not change the nature of interest after the debt becomes due; but it is still justly regarded in the nature of damages for the failure to pay at the time stipulated by the parties.”

But in *De Groot v. Darby*, 7 Rich. L. 120, Whitner, J., said: “The plaintiff claims interest in this case. The action was for goods sold and delivered. The declaration contained no count for interest, and although it did contain the usual count for money had and received, the bill of particulars, we are informed in the course of the argument, was for goods alone, and without any item for interest. It cannot be said, in the ordinary transaction of the sale of goods, that interest is an incident of the contract itself. The first inquiry is whether there was a special agreement to pay interest, *eo nomine*, or to do something towards the payment of an admitted sum. That would imply a promise; for in no

pal and interest will entitle the plaintiff to recover interest to the date of the judgment at the contract rate.¹ It has [707] been held in Alabama, however, that, in general, a court of equity will not decree interest on a balance unless it is spe-

just sense can it be maintained that the interest constitutes a part of the price of the goods. I do not understand this principle to be drawn into controversy. Cases in our own state are numerous in reference to such contracts as carry interest with them. Harp. 83; 1 Hill, 393; 8 McCord, 505; 2 Bailey, 394. The mere statement of such a proposition, it would seem, discloses the necessity of its appearance in pleading in some form. The very object of all pleading is to advertise the party sought to be charged of the matter or thing claimed. Hence the necessity of a declaration; and when, according to our forms and the nature of the demand, it might otherwise be too general, hence the propriety of a bill of particulars. The law abhors surprise and undue advantage, and therefore requires all reasonable certainty. In this particular case the party would be wholly at sea if he may be made liable for that which is outside of the contract set forth, which in no way springs from it as an incident, which, though susceptible of allegation, is neither set out by special count nor notified in the bill of particulars. Such a rule would be obnoxious to the double implication of surprising the defendant and of giving to the plaintiff what he has not asked for. On the contrary, that is but a reasonable rule which requires such an advertisement at least as may enable the parties to prepare to meet proof by proof, that the truth may be known."

This decision is not adverse to that in the preceding case, if interest by agreement was sought to be recov-

ered, before the account was due, or put upon interest by demand or unreasonable delay. But if it is deemed necessary to specifically claim interest on an account after it is due, and after interest would accrue by reason of default in payment, then it would seem to be in conflict with the principle universally recognized that those damages which are implied by law need not be specially claimed.

The true distinction is pointed out in *Adams v. Palmer*, 30 Pa. St. 346, where it was held that where a usage of trade has fixed a period at which book-accounts bear interest, this becomes a law of the contract, and it is not necessary to demand it in the copy of the claim filed. *Hummel v. Brown*, 24 Pa. St. 310; *Watt v. Hoch*, 25 id. 411. If a bargain, however, exists for interest at an earlier period than the usage would allow, or if a special contract be relied on as giving it, then it must be set forth in or added to the copy of the claim; otherwise the plaintiff cannot include it in his judgment.

¹ *Chinn v. Hamilton*, Hemp. C. C. 438; *McConnell v. Thomas*, 3 Ill. 318. In this case suit was upon a note payable in a year, with interest at the rate of thirty per cent. per annum from date until paid. Breach assigned: "yet the debt remains unpaid; wherefore the plaintiff prays judgment for his debt and damages for the detention of the same." A verdict was given for debt and interest, and it was held right. The "debt" in that case included the principal and interest to the time of the action.

In *Nunnelle v. Morton*, Cooke

[708] cially asked for in the bill; but this rule only applies to interest due at the filing of the bill. When interest accrues subsequently it is the practice of the court, upon further directions, to order that it be computed although there is no prayer to that effect.¹

But as interest before the maturity of the principal is the creature of contract, no case can be made for the recovery of such interest without alleging the contract and a breach of it.² A demand for principal and interest on a covenant to pay a specific sum with interest is divisible.³

Under the code, an office judgment in case of a failure to answer is authorized to be taken for the amount specified in the summons; if an answer is filed judgment may be rendered for the principal, and interest added thereto, though the complaint only prays for judgment for the principal.⁴ Interest may be allowed from the time action was begun in a default judgment, although the damages were unliquidated and there was no specific prayer therefor in the complaint.⁵ If the right to interest depends upon a demand, the time of making it must be alleged, or interest will be computed only from the commencement of the action.⁶

(Tenn.), 21, an action of debt on a judgment in which interest was specifically asked for, it was at first a question whether the claim of interest did not render the demand uncertain. But, with some hesitation, the court held that the amount of the judgment could be claimed as a debt, and the interest from its rendition as damages.

¹ Godwin v. McGehee, 19 Ala. 468. See Mills v. Heeney, 35 Ill. 173; Carter v. Lewis, 29 Ill. 500; Prescott v. Maxwell, 48 id. 82; Heiman v. Schroeder, 74 id. 158.

Under a demand for a specified

sum with interest and costs, judgment cannot be recovered on the interest due on the judgment sued upon anterior to the time suit was begun. Haven v. Baldwin, 5 Iowa, 403.

² Chinn v. Hamilton, Hemp. C. C. 438, quoted from *supra*; McConnell v. Thomas, 3 Ill. 313.

³ McClure v. Cole, 6 Blackf. 290; Verney v. Iddings, 2 Chitty, 234.

⁴ Cassacia v. Phoenix Ins. Co., 28 Cal. 628; Corcoran v. Doll, 32 Cal. 82.

⁵ Whereatt v. Ellis, 68 Wis. 61.

⁶ Hall v. Farmers' & Citizens' Bank, 55 Iowa, 612.

SECTION 11.

INTEREST DURING PROCEEDINGS TO COLLECT A DEBT.

§ 388. **Interest on verdict before judgment.** When the cause of action is such as to carry interest, and judgment is delayed after verdict by the act of the defendant, by an unsuccessful motion for new trial or writ of error, in New York the plaintiff was held entitled to interest on the entire amount of the verdict for the time of the delay, to be taxed as [709] part of the general costs in the cause.¹ Interest is so allowed in cases where the contract sued on carries it,² but only for the period during which the plaintiff has been delayed in obtaining judgment by the act of the defendant.³ In other jurisdictions interest during this interval has been computed and added to the judgment.⁴

If the demand sued for is of such a nature that it carries interest before verdict the plaintiff's right thereto between verdict and judgment for him, when there is delay by the act of the defendant, rests upon sound principles. The fact that

¹ Lord v. Mayor, 3 Hill, 426; People v. Gaines, 1 Johns. 843; Vredenberg v. Hallett, 1 Johns. Cas. 27; Henning v. Van Tyne, 19 Wend. 101; Williams v. Smith, 2 Cai. 253; Bull v. Ketchum, 2 Denio, 188; Bissell v. Hopkins, 4 Cow. 53.

² Vredenberg v. Hallett, *supra*.

³ Bull v. Ketchum, 2 Denio, 188; Vail v. Nickerson, 6 Mass. 261. See Buckman v. Davis, 28 Pa. St. 211.

⁴ Interest may be computed from the day the verdict was rendered, whether the action be tort or contract. Gibson v. Cincinnati Enquirer, 2 Flip. 88; Sproat's Ex'r v. Cutler, Wright (Ohio), 157; Winthrop v. Curtis, 4 Me. 297; Johnston v. Atlantic, etc. R. Co., 43 N. H. 410; Weed v. Weed, 25 Conn. 494; Renther v. State, 8 Ind. 86; Carson v. Germania Ins. Co., 62 Iowa, 433. But not from the first day of the term in which it was

rendered. Gibson v. Cincinnati Enquirer, *supra*.

In Irvin v. Hazleton, 37 Pa. St. 465, a verdict was taken in 1853; no further proceeding was had until 1860, when judgment was entered for the amount of the verdict, with interest from its date. The allowance of interest was held, on error brought, to be proper. Strong, J., said: "It was, in substance, an exercise of the ordinary and well recognized power of entering a judgment *nunc pro tunc*; and if they had the power, we must presume, in the absence of reasons to the contrary, that it was rightfully exerted." Referring to Kelsey v. Murphy, 30 Pa. St. 340, he said the learned judge in that case "denied that interest was a necessary incident to a verdict." The case called for nothing more, and nothing more ought to be considered as decided by it.

he disputes his liability, or the amount of it, does not suspend interest before verdict; nor should the pendency of a defendant's motion for a new trial, or in arrest of judgment on untenable grounds, suspend it between verdict and judgment.¹

¹Swails v. Cissna, 61 Iowa, 693; Dowell v. Griswold, 5 Sawyer, 23. The reasoning in Kelsey v. Murphy, which seems to be disapproved in the later case of Irvin v. Hazleton, *supra*, is plausible; but interest, in general, is not refused upon such grounds. Thompson, J., says: "Interest has been defined 'to be a compensation for delay of payment by the debtor,' and is said to be impliedly due 'whenever a liquidated sum of money is unjustly withheld.' 10 Wheat. 440. And again — but rather by way of amplification — it is said 'to be a legal and uniform rate of damages allowed in the absence of any express contract when payment is withheld after it has become the duty of the debtor to discharge the debt.' From these definitions, differing but little in essentials, two things must necessarily pre-exist to raise this duty on the part of the debtor; namely, the ascertainment of the amount to be paid, and its maturity. If these essentials are wanting, the debt, although existing, cannot be said to be due and withheld, and the duty to pay has not become imperative upon the debtor. Unliquidated demands, past due, will, if otherwise entitled, bear interest, upon the maxim of *id certum*, etc. They can be rendered certain. But while the question of indebtedness, under all the ascertained facts in the case, is in abeyance, as is the case on a motion for a new trial, the contract of the debtor is suspended. The case is *gremio legis*, and is presumed to be held under consideration by the ministers of the law. The debtor can neither pay nor tender so as to avail

anything, even if disposed to abandon the contest. It is emphatically, and in truth, the 'law's delay.' It is an incident, inseparable from the civil machinery that the law puts in operation to ascertain the truth between man and man, and until the process is gone through with it presumes that errors may exist, and hence not only indulges such delays, occasionally, but sometimes brings out of them the finest achievements of its mission." See Hoopes v. Brinton, 8 Watts, 73.

In Johnson v. Atlantic, etc. R., 48 N. H. 410, it was held that interest between verdict and judgment upon the amount of the verdict should be added in rendering judgment. Such a motion was made and denied by the trial court. Bellows, J., said: "Upon the facts reported we are of opinion that the allowance of interest upon the amount of the verdict would have accorded with the general course of practice in this state, and is sustained both by principle and authority. Up to the time of the decision of Robinson v. Bland, 2 Burr. 1085, the general principle appears to have been the other way in England, and even to allow no interest after the commencement of the action. But the question was much discussed in that case by Lord Mansfield, and the allowance of such interest in general put upon very solid ground; holding that 'nothing can be more agreeable to justice than that the interest should be carried down quite to the actual payment; but as that cannot be, it should be carried on as far as the time when the demand is completely liqui-

As interest, regulated by law or the agreement of the [710] parties, is a definite measure of damages not requiring testimony to prove or a jury to decide, there is no difficulty in the matter of practice in allowing it to run until judgment. The

dated;’ and he says he ‘don’t know of any court in any country which does not carry interest down to the time of the last act by which the sum is liquidated.’ The recovery in this case was for money loaned, which was found by a special verdict to be £300, and to that interest was added by the court to the rendition of the judgment; and there are remarks which seem to point to a distinction, in this respect, between actions of *assumpsit* and actions of trespass and the like; but the general course of the reasoning applies to both kinds of actions. The decision accords also with the course of practice of courts of equity, where interest, after the master’s report, is usually added in making up the decree. 2 Dan. Ch. Pr. 1442, and notes; *Brown v. Barkham*, 1 P. Wms. 652, and *Perkyns v. Baynton*, 1 Bro. Ch. 574. The general doctrine of these cases is recognized in *Vredenbergh v. Hallett*, 1 Johns. Cas. 27; *People v. Gaine*, 1 Johns. 348; *Williams v. Smith*, 2 Cai. 253; *Lord v. Mayor*, 8 Hill, 426; *Bull v. Ketchum*, 2 Denio, 188; *Vail v. Nickerson*, 6 Mass. 262; *Winthrop v. Curtis*, 4 Me. 297. In many or most of these cases, the allowance of interest upon the amount of the verdict is confined to cases where the delay was caused by the act of the defendant; and now, by statute in New York, this distinction is disregarded. By our statute interest is now payable on all executions in civil actions from the time judgment is rendered. Comp. St. 296, sec. 6. And it will be perceived that no distinction is made as to the nature of the action in which the

judgment is rendered; and it will also be observed that this law carries out the suggestion of Lord Mansfield, that justice requires that interest should be carried down to the time of payment. The verdict of the jury, if judgment is rendered upon it, must be regarded as showing the amount justly due at the time it is rendered, and, in most cases, whether *ex contractu* or *ex delicto*, interest, *eo nomine*, is included in the verdict, at least from the commencement of the suit; and in the other cases it may reasonably be supposed that it is in some form taken into account. No solid reason, we think, can be given for withholding the interest between the finding of the jury and the rendering of judgment, as it is quite clear that, under our law and practice, interest should be allowed at all other times from the commencement of the suit at least until payment and satisfaction of the judgment.

“In *Bull v. Ketchum*, 2 Denio, 188, the defendant delayed judgment for a time by proceedings designed to set aside the verdict, but abandoned them; and the plaintiff afterwards took steps attended with delay for a new trial, the motion for which was denied. Interest was allowed on the verdict and taxed with the costs for the time judgment was delayed by the defendant, and then ceased; and no interest was given while the plaintiff’s motion for new trial was pending.”

A verdict of a stated sum “with interest” in an action on a contract which provided for payment in instalments, the amount of principal

[711] right and the convenience of practice concur to favor the allowance. Interest during this period, however, is not universally allowed. In Maryland, West Virginia, Colorado and Louisiana it is denied.¹

§ 389. **On judgments pending review.** On general principles, a judgment or money decree bears interest from the time of being pronounced unless a different time is fixed for payment; because the moneys so adjudged or decreed are liquidated and due. But interest on such debts being allowed only as damages for detention of money which ought to be paid, it can only be recovered by action or judicially awarded in a pending proceeding. A ministerial officer with the usual process for carrying into execution the judgment or decree [712] cannot assess and collect such interest as part of the debt he is authorized and required to levy unless he is empowered to do so by statute or by the execution.²

A defendant in an execution, is not chargeable with interest upon the debt due by him beyond the return day of the writ, although the plaintiff does not receive his money, unless the delay is occasioned by the former.³

Unless a new judgment is rendered by the appellate court, or by its direction, all damages pending the review must be awarded in its judgment of affirmance; the adjudication below remains; if affirmed, it is available from the time it was made; and interest is not suspended by appeal, writ of error or *certiorari*. It may be collected by suit or by execution, legally including accruing interest, as though no proceedings had been had in an appellate court.⁴

found due being less than the last instalment, was construed to mean with interest from the maturity of such instalment. *Winkle v. Wilkins*, 81 Ga. 93.

¹ *Baltimore City Ry. Co. v. Sewell*, 37 Md. 443; *Fowler v. B. & O. R. Co.*, 18 W. Va. 579; *Hawley v. Barker*, 5 Colo. 118 (under statute); *Bonner v. Copley*, 15 La. Ann. 504.

² *Klock v. Robinson*, 22 Wend. 157.

³ *Strohecker v. Farmers' Bank*, 6 Watts, 96.

⁴ In *Lord v. Mayor*, 3 Hill, 426, a

judgment of affirmance was rendered on *certiorari*, and this judgment affirmed on writ of error in the court of last resort. The final judgment of affirmance expressly awarded to the successful party interest from the date of the judgment of affirmance below, and a question arose whether the right to interest from the rendition of the original judgment to the first affirmance was thereby taken away. It was held that the adjudication below being affirmed remained available from

Under a system of practice by which, on appeal or writ of error, a final judgment is entered in the appellate court, the new judgment will of course embrace the former, in case of affirmance, as well as the costs and damages incident to the appeal or writ of error. But where the appeal is from a judgment of a single judge to the general term, as in New York, both judgments being in the same court, the general term does not enter a new judgment on affirmance for the original claim; but it declares that it is satisfied to let the former judgment stand, and therefore merely affirms it. The judgment of affirmance is added to the original judgment roll, and in case of appeal to the court of last resort the whole case is carried up; but the former judgment is not thereby vacated.¹ Under this practice the judgment of affirmance should not include interest on the judgment which is affirmed. It has become the established practice in that state to exclude [713] from the judgment of affirmance all sums secured by the judgment in the court below.²

In an equity case the mandate of the supreme court directed the court of chancery to make a decree that the plaintiff should pay the defendant a certain sum as damages for an injunction; but directed nothing in respect to the interest on the same; and the court of chancery made the decree granting interest only from the date thereof; it was held that the decree was in this respect in accordance with the mandate, the plaintiff not being in default for not paying the damages until it was made; and therefore not liable for interest prior thereto. The defendants having appealed from the decision refusing interest, the plaintiff was also held not liable to pay interest while the cause was in the supreme court on appeal, but only from the time it was remanded to the court of chancery.³

In Pennsylvania on affirmance of a judgment in the appellate court on error interest is to be charged on the judgment below till affirmance, and then the aggregate is to bear interest; and this results from the statute giving interest on

the time it was made, and such interest was allowed. *McLimans v. Lancaster*, 65 Wis. 240.

¹ *Eno v. Crooke*, 6 How. Pr. 462.

² *Beardsley Scythe Co. v. Foster*,

36 N. Y. 561; *Halsey v. Flink*, 15 Abb. 367. See *Dougherty v. Miller*, 38 Cal. 548.

³ *Sturges v. Knapp*, 36 Vt. 489. See

Vanvalkenbergh v. Fuller, 6 Paige, 10.

every judgment. Whenever a judgment is given it is understood that interest on any former judgment in the same action is to be charged.¹

Where the damages for delay during an unsuccessful appeal or other mode of review by an appellate court are subject to the determination of that court, its judgment controls the question of interest between the rendition of the judgment below and its affirmance in the superior court.² If a new trial upon the facts takes place on appeal, interest is to be computed in the appellate court on such trial as though no previous trial had been had; and not on the judgment appealed from.³

If the successful party in the trial court withdraws funds in litigation after an adjudication adverse to intervenors, and such judgment is reversed and on a second trial they are successful, the party who has the funds will be liable for interest from the time they came to his possession.⁴ Intervenor who secure the payment of money into court to abide the further order thereof are not liable for interest while it is detained there under an erroneous order, though they fail to establish their right to it.⁵

By section twenty-three of the judiciary act of 1789⁶ it was [714] provided that when the supreme or circuit court should affirm a judgment or decree they should adjudge or decree to the respondent in error just damages for his delay, and single or double costs; at their discretion. Under this law there was no distinction made between cases in equity and at law. In either the allowance of damages in addition to the amount found to be due by the judgment or decree of the court below was confided to the judicial discretion of the appellate court. If, upon affirmance, no allowance of interest or damages was

¹ McCausland v. Bell, 9 S. & R. 388. See Brigham v. Van Buskirk, 6 B. Mon. 197; Young v. Pate, 3 J. J. Marsh. 100; Smith's Adm'r v. Todd's Ex'r, id. 306.

² Butcher v. Norwood, 1 H. & J. 485; Contee v. Findley, id. 331. See Kelsey v. Murphy, 30 Pa. St. 340.

³ Tindall v. Meeker, 2 Ill. 137. See Eno v. Crooke, 6 How. Pr. 462.

⁴ Heidenheimer v. Johnson, 76 Texas, 200.

⁵ Van Gordon v. Ormsby, 60 Iowa, 510.

Money paid into court in satisfaction of a decree and for distribution does not bear interest in favor of the party who is entitled thereto pending an appeal, though the order of distribution is changed; but money to which the party was not entitled bore interest against him. Whitall v. Cressman, 18 Neb. 508.

⁶ See § 1010, R. S. of U. S.

made, it was equivalent to a denial of either, and the court below, in carrying into effect the judgment or decree of affirmance, could not enlarge the amount thereby allowed, but was limited to the mere execution of the mandate in the terms in which it was expressed. That court, in 1803 and 1807, made rules by which its discretion was guided. By the seventeenth rule, when a case appeared to be brought merely for delay, damages were awarded at the rate of ten per cent. on the amount of the judgment; and by the eighteenth rule, the damages were to be at the rate of six per cent., when it appeared that there was a real controversy.¹

¹ Perkins v. Fourniquet, 14 How. 828. In this case Taney, C. J., referring to Mitchell v. Harmony, 18 How. 115, said: "The judgment brought up by the writ of error was rendered in the circuit court of New York, and was affirmed by this court. The sum recovered was large, and interest, even for a short time, was, therefore, important. And counsel for Harmony, the defendant in error, moved the court to allow him the New York interest of seven per cent. upon the amount of the judgment, and that the interest should run until the judgment was paid." But, as the rules [mentioned in the text] were still in force, the court held that he was entitled only to six per cent., to be calculated from the date of the judgment in the circuit court to the day of affirmance here. The case now before us was decided in the early part of the last term, before the case of Mitchell v. Harmony, and consequently falls within the operation of the same rules, and damages upon the affirmance of the decree must be calculated in a like manner. Indeed, in the New York case, the claim for interest stood on stronger ground than the present one, for that was an action at law. The act of 1842, therefore, applied to the judgment in the circuit court, and it

would have carried the state interest until paid, if it had not been brought here by writ of error. But this is a decree in equity, and not embraced in the act of 1842, and, according to the settled chancery practice, no interest or damages could have been levied under process of execution upon the amount ascertained to be due and decreed to be paid if there had been no appeal. 2 Ves. 157, 168, n. 1, Sumn. ed.; 2 Dan. Chan. Pl. & Pr. 1442, 1487, 1488. Nor could any damages or interest have been given on its affirmance here but for the discretionary power vested by the act of 1789." Boyce v. Grundy, 9 Pet. 275.

In Hoyt v. Gelston, 15 Johns. 221, the court say: "This court cannot pronounce any new judgment in this case. It can only carry into effect the judgment of the supreme court of the United States. In the computation of interest, therefore, the taxing officer must not go beyond the time of the judgment of affirmance, that being the last act of the court above. The practice in this respect in our state courts is regulated by statute, which cannot apply to this case." See same case, 3 Wheat. 246, 836. See, also, Himely v. Rose, 5 Cranch, 818; Kilbourne v. State Savings Inst., 22 How. 503; Hennessy v.

[715] Now, by the twenty-third rule, interest and damages are thus regulated:

“1. In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment is rendered.¹

“2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the amount of the judgment.²

“3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.³

“4. In cases in admiralty, interest shall not be allowed unless specially directed by the court.”⁴

Sheldon, 12 Wall. 440; Insurance Co.
v. Huchbergers, id. 166.

¹ Adopted 1808, 1851.

² Adopted 1808, 1871.

³ See Schell v. Cochran, 107 U. S.
625; Whitney v. Cook, 99 id. 607.

⁴ Adopted 1884.

CHAPTER IX.

EXEMPLARY DAMAGES.

- § 390. Compensation for wrongs done with bad motive.
- 391-393. Exemplary damages; difference of views; when allowed.
- 394. Malice in law and malice in fact.
- 395. Restriction and denial of exemplary damages.
- 396. Same subject; New Hampshire rule.
- 397. Same subject; Massachusetts rule.
- 398. Same subject; Nebraska rule.
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- 400. Same subject; other states.
- 401. Exemplary damages as compensation and punishment.
- 402. Exemplary damages for penal offenses.
- 403. Exemplary damages as matter of right.
- 404, 405. Enhancement and mitigation of exemplary damages.
- 406. Exemplary damages based on actual damages.
- 407. Motive of one wrong-doer not imputable to others.
- 408-411. Parties liable; master for servant.
- 412. Liability of officers, municipalities and estates.

§ 390. Compensation for wrongs done with bad motive.

A party who breaks his contract is liable for the result- [716]
ing damage, without regard to the motive by which he was
actuated. And in theory, the damages recoverable in actions
upon contract are not affected by the motive which induced
the breach;¹ actions for breach of marriage contracts are an

¹ Gordon v. Brewster, 7 Wis. 355;
Duche v. Wilson, 37 Hun, 519; N.
& W. R. Co. v. Wysor, 82 Va. 250.

There are cases in which exem-
plary damages have been allowed
against sureties on statutory bonds
where the principal therein had sub-
jected himself to such damages. In
Alabama sureties have been held to
that liability on an attachment bond,
the writ having been wrongfully
sued out. Floyd v. Hamilton, 33
Ala. 235. In a later case the signers
of a bond of indemnity given to in-
duce a sheriff to levy on goods in
the possession of one not a party to

the process were held not liable for
exemplary damages unless they au-
thorized him to execute the process
wantonly, recklessly or with circum-
stances of aggravation, or his acts
were probably consequent on mak-
ing the levy or were ratified by
them. Lienkauf v. Morris, 66 Ala.
406. In Iowa the sureties upon a
liquor seller's bond, the terms of
which bound them to "pay any dam-
age any person may sustain, or
which may result from the drinking
of any wine or beer, or any liquor
got or procured at his saloon or place
of business," have been held for ex-

exception; and there are some other exceptions to which attention has been called;¹ but such is the general rule. In actions of tort full compensation may be recovered though the injury was the result of mistake, or the acts were done in good faith.² In other words, the right to compensation for tortious injuries does not depend at all upon their being inflicted purposely or with any culpable intention.

There is, however, a marked difference legally, as there is practically, between a tort committed with and without malice; between a wrong done in the assertion of a supposed right, and one wantonly committed; one unattended with any incidents of insult, and one with such concomitants. Such vicious accompaniments increase the injury, and render additional damages necessary to adequate compensation.

§ 391. Exemplary damages; difference of views; when allowed. There is much authority for allowing damages for [717] torts beyond compensation whenever a case shows a wanton invasion of the plaintiff's rights, or any circumstances of outrage or insult;³ whenever there has been oppression or vindictiveness on the part of the wrong-doer;⁴ whenever there is a wilful, malicious or reckless tort to person or property.⁵ In a Kentucky case the court say: "In actions of trespass juries are authorized to give what is denominated smart money. If trespassers were bound to pay in damages no more than the exact value of the property forcibly taken and

emplary damages. *Richmond v. Shickler*, 57 Iowa, 486. These cases are not in harmony with the weight of authority, nor consistent with the theory upon which such damages are imposed. It is otherwise as to attachment bonds in South Carolina and Illinois (*McClendon v. Wells*, 20 S. C. 514; *Spants v. Barrett*, 57 Ill. 290); and as to dram-shop bonds in the latter state (*Cobb v. People*, 84 Ill, 511); and replevin bonds. *Dalby v. Campbell*, 26 Ill. App. 502. In Texas a suit may be brought for a breach of contract and for a tort when both grow out of the same transaction and can be properly litigated together. But to recover ex-

emplary damages the pleading must show that the manner in which the breach of contract was committed amounted to a tort for which an action would lie for exemplary damages, independently of the right to recover actual damages by reason of the breach of contract alone. *Hooks v. Fitzenrieter*, 76 Texas, 277. .

¹ *Ante*, §§ 98, 99.

² *Id.*

³ *Amer v. Longstreth*, 10 Pa. St. 148.

⁴ *Nagle v. Mattison*, 34 Pa. St. 48.

⁵ *Illinois, etc. R. Co. v. Cobb*, 68 Ill. 58; *Cutler v. Smith*, 57 id. 252; *Connors v. Walsh*, 131 N. Y. 590.

converted by them, there would be no motive created by the operation of the law to induce them to desist and abstain from invading the rights of others. To furnish such a motive smart money is allowed.”¹ In an Illinois case the court say: “The experience of past ages demonstrates a tendency on the part of many in every community to take the law into their own hands, and to oppress, insult and abuse others, even in pursuing their rights. And inasmuch as such conduct is not indictable, the law has, for the repose of society, authorized the jury to give exemplary damages where a trespass is wanton, wilful or malicious; or where it is accompanied with such acts of indignity as to show a reckless disregard of the rights of others, as a punishment for the wrong, and to deter others from the perpetration of such acts.”² In New Hampshire there has been considerable fluctuation of decision; and that state may now be classed with those in which exemplary damages, *ultra* compensation, are denied.³ But in several

¹ *Tyson v. Ewing*, 8 J. J. Marsh. 186.

² *Cutler v. Smith*, 57 Ill. 252.

³ In *Fay v. Parker*, 53 N. H. 342, a very able, elaborate and exhaustive opinion was delivered by Foster, J., in which the court seemed to be unanimous, against exemplary damages, especially where the act complained of is a criminal offense. While admitting that there are many cases sanctioning the recovery of such damages, he contends, with great force of reasoning, not easy to resist on principle:

1. That many of the cases cited in support of exemplary damages, and many loose expressions which are to be found in judicial opinions, when closely scrutinized only favor a liberal allowance of compensation in consideration of aggravations.

2. That where there are such facts as have generally been deemed to warrant the recovery of vindictive damages, they should be considered only as they enhance the damages which the injured party is entitled

to receive; that nothing should be allowed for punishment as a substantive element or purpose.

3. That to permit a plaintiff to recover for his actual damages, including, as they should, his pecuniary loss, and in cases of personal injury, or other torts aggravated by personal abuse or insult, for pain, bodily and mental; and, in addition, a sum by way of punishment, is to subject the defendant to the injustice of a double recovery; for he is thus compelled to pay more than the plaintiff is entitled to receive.

4. If the defendant is subject to be punished criminally for the same act, then the recovery in a civil action of vindictive or punitive damages exposes the wrong-doer to double punishment, besides making full compensation for every element of injury to the injured party.

5. That such double recovery of damages, and such double punishment, are an infraction of the maxims of the common law against being twice vexed for the same cause

[718] cases their allowance had been affirmed. The court say in one: "It is extremely well settled that exemplary or vindictive damages may, in certain cases, be recovered; and this is, perhaps, in accordance with the legislative policy which has given pecuniary penalties in numerous instances to private prosecutors of certain offenses. Where the wrong done to [719] the party partakes of a criminal character, though not punishable as an offense against the state, the public may be said to have an interest that the wrong-doer should be prosecuted and brought to justice in a civil suit; and exemplary damages may, in such cases, encourage prosecutions where mere compensation for the private injury would not repay

or twice punished for the same offense; and an infraction of the guaranties found in nearly all American constitutions on the same subject.

He concluded his opinion by saying: "The true rule, simple and just, is to keep the civil and criminal process and practice distinct and separate. Let the criminal law deal with the criminal, and administer punishment for the legitimate purpose and end of punishment,—namely, the reformation of the offender and the safety of the people. Let the individual whose rights are infringed, and who has suffered injury, go to the civil courts, and there obtain full and ample reparation and compensation; but let him not thus obtain the 'fruits' to which he is not entitled, and which belong to others. Why longer tolerate a false doctrine, which, in its practical exemplification, deprives a defendant of his constitutional right of indictment or complaint on oath before being called into court? deprives him of the right of meeting the witnesses against him face to face? deprives him of the right of not being compelled to testify against himself? deprives him of the right of being acquitted, unless the proof of his offense is established beyond a reasonable doubt? deprives

him of the right of not being punished twice for the same offense? Punitive damages destroy every constitutional safeguard within their reach. And what is to be gained by this annihilation and obliteration of fundamental law? The sole object, in its practical results, seems to be to give a plaintiff something which he does not claim in his declaration. If justice to the plaintiff requires the destruction of the constitution, there would be some pretext for wishing the constitution were destroyed. But why demolish the plainest guaranties of that instrument, and explode the very foundation upon which constitutional guaranties are based, for no other purpose than to perpetuate false theories and develop unwholesome fruits? Undoubtedly this pernicious doctrine 'has become so fixed in the law,' to repeat the language of Mr. Justice Campbell, of Michigan, 'that it may be *difficult* to get rid of it.' But it is the business of courts to deal with difficulties; and this heresy should be taken in hand without favor, firmly and fearlessly. It was once said: 'If thy right eye offend thee, pluck it out; . . . and if thy right hand offend thee, cut it off.' Wherefore, not reluctantly, should

the trouble and expense of the proceeding.”¹ In a subsequent case² this doctrine was approved, and the court add that it “furnishes the most efficient, if not the only, means of correcting many very serious social abuses; and among those that of gross negligence which puts at unnecessary hazard the life and limbs of large numbers of passengers must take high rank. It is not, therefore, to be regretted that the law has established an exception to the ordinary rule in respect to damages, and armed the sufferer in such cases with the power to administer a corrective which cannot or will not otherwise be efficiently applied at all.”

§ 392. **Same subject.** These views have been sanctioned by the supreme court of the United States. Mr. Justice Grier said:³ “It is a well established principle of the common law that in actions of trespass, and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offense, rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by stat- [720] ute law, men are often punished for aggravated misconduct or lawless acts by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured. In many civil actions, such as libel, slander, seduction, etc., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant’s conduct, and may properly be termed exemplary or vindictive rather than compensatory. In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff,

we apply the knife to this deformity, concerning which every true member of the sound and healthy body of the law may well exclaim: ‘I have no need of thee.’” 2 Greenlf.

Ev., §§ 258, 273; Boyer v. Barr, 8 Neb. 68.

¹ Hopkins v. Railroad, 36 N. H. 9.

² Taylor v. Railway, 48 N. H. 820.

³ Day v. Woodworth, 13 How. 871.

which he would have been entitled to recover had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called 'smart money.' This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case. It must be evident, also, that as it depends upon the degree of malice, wantonness, oppression or outrage of the defendant's conduct, the punishment of his delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit. It is true that damages, assessed by way of example, may thus indirectly compensate the plaintiff for money expended in counsel fees; but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction."¹

In the actions here spoken of the conduct and motives of the defendant are open to inquiry with a view to the amount of damages. If, in committing the wrong complained of, he acted recklessly, oppressively, insultingly or wilfully and maliciously, with a design to oppress and injure, the jury in fixing the damages may disregard the rule of compensation; and beyond that, may, as a punishment of the defendant, and as protection to society against the violation of personal rights and social order, award such additional damages as in their discretion they may deem proper. This rule has been held to [721] apply in all actions for torts—in actions for personal injuries, in cases of a wilful injury to property, in slander, libel, seduction, false imprisonment, malicious prosecution, and in actions for tort founded upon negligence amounting to misconduct and recklessness.² On grounds of public policy

¹ *Stimpson v. Railroad*, 2 Wall. Jr. 164; *Milwaukee, etc. R. Co. v. Arms*, 91 U. S. 489; *Denver, etc. Ry. v. Harris*, 122 U. S. 597; *Minneapolis, etc. Ry. Co. v. Beckwith*, 129 id. 26.

It is held in the case last cited and also in *Missouri P. Ry. Co. v. Humes*, 115 U. S. 512, that statutes which authorize the recovery of double the value of stock killed or damage caused thereto by the neglect of rail-

road companies to comply with the law concerning the fencing of their roads do not infringe the fourteenth amendment to the federal constitution, either as depriving such companies of property without due process of law or denying them the equal protection of the laws.

² *Borland v. Barrett*, 76 Va. 128; *Eviston v. Cramer*, 57 Wis. 570; *Templeton v. Graves*, 59 id. 95; *Brown v.*

exemplary damages have been denied for a tortious injury to property which was employed in an unlawful business.¹ It has been ruled that such damages cannot be recovered in an

Evans, 17 Fed. Rep. 912; Sowers v. Sowers, 87 N. C. 303; Johnson v. Allen, 100 id. 181; Webb v. Gilman, 80 Me. 177; Bergman v. Jones, 94 N. Y. 51; Spear v. Hiles, 67 Wis. 177; Pittsburgh, etc. Ry. Co. v. Lyon, 128 Pa. St. 140; Alabama, etc. R. Co. v. Hill, 90 Ala. 71; Kemmitt v. Adamson, 44 Minn. 121; Barlow v. Lowder, 85 Ark. 492; Holt v. Van Eps, 1 Dak. 198; Bates v. Callender, 3 id. 256; Smith v. Bagwell, 19 Fla. 117; Harrison v. Ely, 120 Ill. 83; Wales v. Miner, 89 Ind. 118; State v. Stevens, 103 id. 55; Farman v. Lauman, 73 id. 568; Parkhurst v. Mastellar, 57 Iowa, 474; Root v. Sturdivant, 70 id. 55; Wilkinson v. Drew, 75 Me. 360; Boetcher v. Staples, 27 Minn. 308; MacGowan v. Duff, 14 Daly, 315; Day v. Holland, 15 Ore. 464; Lake Shore, etc. Ry. Co. v. Rosenzweig, 113 Pa. St. 519; Holmes v. Carolina C. R. Co., 94 N. C. 318; Knowles v. Norfolk S. R. Co., 102 id. 59; Louisville & N. R. Co. v. Ballard, 85 Ky. 387; S. C., 88 id. 159; Sloan v. Edwards, 61 Md. 89; Voltz v. Blackmar, 64 N. Y. 440; Tift v. Culver, 3 Hill, 180; Tillotson v. Cheetham, 3 Johns. 56; Wort v. Jenkins, 14 id. 352; Taylor v. Railway, 48 N. H. 320; Goodspeed v. Bank, 22 Conn. 53; Fleet v. Hollenkemp, 13 B. Mon. 219; Jennings v. Maddox, 8 id. 432; Illinois, etc. R. Co. v. Cobb, 68 Ill. 53; Becker v. Dupree, 75 id. 167; Robinson v. Burton, 5 Harr. (Del.) 835 (but see McCoy v. Philadelphia, etc. R. Co., 5 Houst. 599); Fox v. Stevens, 18 Minn. 272; Dibble v. Morris, 26 Conn. 416; Young v. Mertens, 27 Md. 114; Elbin v. Wilson, 83 id. 185; Wade v. Thayer, 40 Cal. 578; McWilliams v. Bragg, 8 Wis. 524; Hoadley v. Watson, 45 Vt. 289; Gilreath v. Allen, 10 Ired. L. 67; Bradley v. Morris, Busbee (N. C.), 395; Stevenson v. Belknap, 6 Iowa, 97; Reeder v. Purdy, 48 Ill. 261; Chicago, etc. R. Co. v. Williams, 55 id. 185; McNamara v. King, 7 id. 43; Kalb v. O'Brien, 86 id. 210; Stillwell v. Barnett, 60 id. 210; Bauer v. Gottmanhauser, 65 id. 499; Lawrence v. Hagerman, 56 id. 68; Clevenger v. Dunaway, 84 id. 367; Sherman v. Dutch, 16 id. 283; Drohn v. Brewer, 77 id. 280; Miller v. Kirby, 74 id. 242; Scott v. Bryson, id. 420; Farwell v. Warren, 70 id. 28; Grable v. Margrave, 4 id. 373; Johnson v. Weedman, 5 id. 495; Smalley v. Smalley, 81 id. 70; McBride v. McLaughlin, 5 Watts, 375; Allaback v. Utt, 51 N. Y. 654; Von Fragstein v. Windler, 2 Mo. App. 598; Newman v. St. Louis, etc. R. Co., id. 402; Kennedy v. North R. Co., 36 Mo. 351; Green v. Craig, 47 id. 90; Molecek v. Tower Grove R. Co., 57 id. 17; Klingman v. Holmes, 54 id. 304; Graham v. Pacific R. Co., 66 id. 536; Kansas, etc. R. Co. v. Little, 19 Kan. 267; Edelman v. St. Louis T. Co., 8 Mo. App. 503; Vicksburg, etc. R. Co. v. Patton, 81 Miss. 155; Storm v. Green, 51 id. 108; Memphis, etc. R. Co. v. Whitfield, 44 id. 466; Burray v. Milson, 18 id. 287; Kalb v. Bankhead, 18 Tex. 228; Smith v. Sherwood, 2 Tex. 460; Bowler v. Lane, 3 Met. (Ky.) 311; Cochran v. Miller, 13 Iowa, 128; Champion v. Vincent, 20 Tex. 311; Greenville, etc. R. Co. v. Partlow, 14 Rich. 237; Magee v. Holland, 27 N. J. L. 86; Mobile, etc. R. Co. v. Ashcroft, 48 Ala.

¹ Kauffman v. Babcock, 67 Texas, 241.

action on the case for fraud in the sale of personal property;¹ but it may be doubted whether all the elements which enter into the right to exemplary damages are not present when a fraud is perpetrated.² A corporation has the same right to recover punitive damages as an individual for a malicious and oppressive trespass committed upon its property.³ Under a statute which provided that injuries to the person, whether the same do or do not result in death, shall survive to the executor or administrator, such damages have been allowed where there was an interval between the act which caused the death and that event;⁴ and also where the death was instantaneous.⁵ Statutes of this character usually confine the damages to the pecuniary injury sustained by the next of kin or the persons who may recover, and are construed to exclude punitive damages.⁶ A court of equity will not award such damages,⁷ but courts of admiralty will.⁸ They cannot be recovered in an action for a statutory penalty.⁹

The doctrine that exemplary damages may be allowed for

15; *Hefley v. Baker*, 19 Kan. 9; *Sawyer v. Lauer*, 10 id. 466; *Raynor v. Nims*, 87 Mich. 34; *Emblen v. Myers*, 6 H. & N. 54; *Baltimore, etc. T. Co. v. Boone*, 45 Md. 344; *McWilliams v. Holan*, 42 id. 56; *Philadelphia, etc. R. Co. v. Larkin*, 47 id. 155; *Bradshaw v. Buchanan*, 50 Tex. 492; *Titus v. Corkins*, 21 Kan. 722; *Meidel v. Anthis*, 71 Ill. 241; *Dutton v. Beers*, 88 Conn. 529; *Munter v. Bande*, 1 Mo. App. 484; *Parker v. Shackelford*, 61 Mo. 68; *Shaw v. Brown*, 41 Tex. 446; *Welch v. Durand*, 36 Vt. 182; *Ellsworth v. Potter*, 41 id. 685; *Slater v. Sherman*, 5 Bush, 206; *Huckle v. Money*, 2 Wils. 205; *Tullidge v. Wade*, 3 id. 18; *Merest v. Harvey*, 5 Taunt. 442; *Brewer v. Dew*, 11 M. & W. 625; *Sears v. Lyons*, 2 Stark. 317; *Williams v. Currie*, 1 Man., G. & S. 841; *Bell v. Midland Ry. Co.*, 10 C. B. (N. S.) 287; *Clissold v. Machell*, 26 Up. Can. Q. B. 422; *Silver v. Dominion Tel. Co.*, 2 Russ. & G. (Nova Scotia), 17.

The malice necessary to authorize the infliction of exemplary damages need not be proved beyond a reasonable doubt. *St. Ores v. McGlashen*, 74 Cal. 148.

¹ *Singleton's Adm'r v. Kennedy*, 9 B. Mon. 222.

² *State v. Stevens*, 103 Ind. 55; *Holmes v. Carolina C. R. Co.*, 94 N. C. 818.

³ *International, etc. R. Co. v. Telephone & T. Co.*, 69 Texas, 277.

⁴ *Murphy v. New York, etc. R. Co.*, 29 Conn. 496.

⁵ *Halsey v. Mobile & O. R. Co.*, 7 Baxter (Tenn.), 239; *Railway Co. v. Doughtry*, 88 Tenn. 721.

⁶ See ch. 87, vol. 8.

⁷ *Bird v. W. & M. R. Co.*, 8 Rich. Eq. 46, 57.

⁸ *Boston Manuf. Co. v. Fiske*, 2 Mason, 119, 121.

⁹ *Stovall v. Smith*, 4 B. Mon. 378; *Giffen v. Barr*, 60 Vt. 599.

the purpose of example and punishment in addition to [722] compensation in certain cases is held in a majority of the states of the Union,¹ in Canada and in England. In some states it is followed with reluctance and deprecating acquiescence; in others, with emphatic indorsement; while in a few it is not, or but partially, accepted. There is a substantial and practical difference, and not a mere verbal conflict, on two aspects of the subject. First, as to what is intrinsically meant by exemplary, vindictive, punitive or punitory damages; those words in general being used indifferently as importing the same thing.² Second, in respect to the consequence to [723] the civil remedy of the tortious act complained of being an offense punishable under the criminal law.

¹ Indiana has been considered by some courts and writers to be one of the states in which exemplary damages are not recoverable. This misapprehension has probably arisen from *obiter* remarks by individual judges and from the rule long established and consistently adhered to that they cannot be allowed where the act which gives rise to the claim is punishable criminally. It was observed in *State v. Stevens*, 103 Ind. 55, that in all that class of torts not rising to the degree of criminality the injured party might, where the elements of fraud, malice, gross negligence or oppression mingled in the controversy, in addition to full compensation for all other damages, recover exemplary or punitive damages as a punishment, or by way of example, to deter others from the like offenses. *Lytton v. Baird*, 95 Ind. 349.

The code of Georgia permits the recovery of exemplary damages "either to deter the wrong-doer from repeating the trespass or as compensation for the wounded feelings of the plaintiff." The public good and the desire to deter others cannot justify their imposition. *Ratcree v. Chapman*, 79 Ga. 574.

² *Chiles v. Drake*, 2 Met. (Ky.) 146; *Louisville, etc. R. Co. v. Smith*, 2 Duvall, 556; *Kennedy v. North Mo. R. Co.*, 36 Mo. 851.

In *Meidel v. Anthia*, 71 Ill. 241, the court gave a construction to the remedy of a wife for damages under the liquor law of that state. That act subjects the seller of intoxicating liquors sold contrary to its provisions to punishment by indictment; it also gives a civil remedy in damages to a wife, among others, who is injured in person, property or means of support by the intoxication of her husband, caused by such unauthorized and prohibited sales. *Breese, C. J.*, referred to *Freese v. Tripp*, 70 Ill. 496, and said: "It was held in that case that the statute, being highly penal in its character, and introducing remedies unknown to the common law in which the person prosecuting had decided advantages over the party defending, should receive a strict construction. It was held that anguish or mental pain of the wife was not an element of damage to be considered. The statute contemplates only injury in person or property or means of support. It was also held the jury could not

§ 393. **Same subject.** Formerly the imposition of damages as punishment and for example was exclusively in the discretion of the jury, subject to review as to the amount allowed. There is a tendency in the more recent adjudications to con-

give exemplary damages unless actual damages were proved and found. In support of this, *Schneider v. Hosier*, 21 Ohio St. 98, was cited. It was also held that exemplary damages could not be awarded as punishment for the reason the statute itself provides the public shall avail of its preventive provisions by indictment (§§ 6, 8); that putting money in the pocket of the plaintiff would be no satisfaction to the public for violation of a penal statute. Appellee in this case insists such damages can be awarded; that the statute allows exemplary damages. This is true, but not damages by way of punishment, but exemplary damages, such as will operate as an example, or a warning to deter the party or others from similar transactions, and aggravating circumstances must be shown. Appellee says such damages are allowed in actions of *tort* at common law. Granted; but this is not an action of *tort* at common law; and the idea of the statute does not seem to be, as it has provided a punishment for the public wrong, that a complaining party in a civil suit should pocket money by way of punishment for the offender. We concede this court is committed to the doctrine that in certain actions of *tort* at the common law the jury can go beyond the question of mere compensation for the injury, and give damages by way of punishment, though eminent law writers protest, and insist that this was not a principle of the ancient and genuine common law. It is insisted, by that law, the civil remedy for a wrong done should not be punitive to the wrongdoer, as well as compensative to the sufferer. 3 Parsons on Cont. 170. Greenleaf, in his treatise on Evidence, in most emphatic language affirms that the position that damages may be given by way of punishment has not the countenance of any express decision upon the point, though it has the support of several *obiter dicta*; and inquires, if this be a rule of law, how is the party to be protected from double punishment. 2 Greenleaf on Evidence, § 242, in an elaborate note. Although this court is committed to the other doctrine, still the question remains under this statute, can the jury give exemplary damages by way of punishment of the offender? They may give exemplary damages. We understand by this they may, in a proper case, give besides actual damages to the party injured such damages as may operate as a warning to others—they may make an example of the seller by the *quantum* of damages they shall award against him. We cannot believe that it was the design of the legislature to give to the jury in such an action the power to punish the violator of the law in the shape of damages which go to the party injured, the more especially as, by the very act authorizing exemplary damages, the seller, as punishment for his wrong-doing, is subject to fine and imprisonment in the county jail. Exemplary damages must not be given as punishment—not as vindictive but as exemplary damages. This is a penal statute, and to the words used in it the proper significance must be given. It was enough to comply with the statute for the

sider such damages more in the nature of a right, or following as a legal consequence from the doing of an unlawful act with reprehensible motives. Whether the allowance is discretionary with the jury or may be directed by the court, in making it the idea of compensation to the injured party for any immediate or remote loss or injury to him is put out of view. In determining the amount which the defendant shall pay on this account the turpitude of his conduct and his financial ability are only considered; and such consideration is not in view of the injury or distress of the plaintiff, but in behalf of the public: the wrongful act is regarded as an indication of the actor's vicious mind — as an overt deed of vindictive or wanton wrong, offensive and dangerous to the public good. This is the view of those damages which generally prevails. They are allowed when a wrongful act is done with a bad motive; or so recklessly as to imply a disregard of social obligations; or where there is negligence so gross as to amount to misconduct and recklessness.¹ In answer to the contention that punitive damages cannot be awarded in an action for negligence, Appleton, C. J., said: The law seems well settled that punitive damages may be given in case equally as in trespass. Whatever reasons exist for punitive damages in trespass are equally applicable in case. The objection is that this is merely negligence and not the wilful act of the defendant. But the omission of duty, negligence, may be as injurious and criminal in its consequences as the direct and wrongful application of force. The omission to act when action is obligatory is equally criminal with wrongful action when action is forbidden. Action and inaction alike imply volition. Care and want of care are evidentiary of mental

court to tell the jury that, in addition to actual damages, they might find exemplary damages."

¹ *Voltz v. Blackmar*, 64 N. Y. 440; *Milwaukee, etc. R. Co. v. Arms*, 91 U. S. 489; *Prickett v. Crook*, 20 Wis. 358; *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282; *Hoadley v. Watson*, 45 Vt. 289; *Meibus v. Dodge*, 83 Wis. 300; *Baltimore, etc. T. Co. v. Boone*, 45 Md. 344; *Sherman v. Dutch*, 16 Ill. 293; *Clevenger v. Dun-*

away, 84 Ill. 367; *Philadelphia, etc. R. Co. v. Hoefflich*, 62 Md. 300; *Hoffman v. Northern P. R. Co.*, 45 Minn. 53; *Trauerman v. Lippincott*, 39 Mo. App. 478; *Powers v. Manhattan Ry. Co.*, 120 N. Y. 178; *Brooks v. New York, etc. R. Co.*, 80 Hun, 47; *Day v. Holland*, 15 Ore. 464; *Boyle v. Case*, 18 Fed. Rep. 880; *Berry v. Fletcher*, 1 Dill. 67; *United States v. Taylor*, 85 Fed. Rep. 484; *Alabama, etc. R. Co. v. Sellers*, 93 Ala. 9.

conditions.¹ It is no objection to the allowance of such damages that the declaration does not allege that the negligence was wilful and wanton.²

If a wrong is done wilfully; that is, if a tort is committed deliberately, recklessly,³ or by wilful negligence,⁴ with a present consciousness of invading another's right, or of exposing him to injury, an undoubted case is presented for exemplary damages. To enable a jury to exercise their discretion wisely for the purposes for which such damages are allowable, all the

¹ *Wilkinson v. Drew*, 75 Me. 360; *Hopkins v. Atlantic, etc. R. Co.*, 86 N. H. 9.

² *Wilkinson v. Drew*, 75 Me. 360.

³ In *Lake Shore, etc. Ry. Co. v. Rosenzweig*, 113 Pa. St. 519, 543, a passenger was wrongfully put off a train. The court said: "In determining whether the conductor acted in reckless disregard of the plaintiff's rights, the jury ought to have kept in view the fact that he violated an express rule calculated to promote the safety of passengers and those having contractual relation with the defendant. This conductor committed no battery; he made no threats; he acted quickly. A glance at the ticket, a pull at the bell rope, the stopping of the train, a deaf ear to the plaintiff's entreaties to be carried to a place of safety, a few significant words, and the plaintiff followed him to the ground, there to be pointed to a light toward the depot; but not to a bridge or any safe way out of his peril. If there was no wilful misconduct by the conductor, how can it be said that he was not recklessly indifferent to the consequences likely to befall the plaintiff? If the suit were against him, there could be little question that the jury would be permitted to give exemplary damages." Compare *Philad. Traction Co. v. Orbann*, 119 Pa. St. 37; *Philadelphia, etc. R. Co. v. Hoeflich*, 62 Md. 300.

⁴ The negligence must be gross,

within the strictest signification of the phrase, which means such entire want of care as to raise a presumption that the person in fault is conscious of the probable consequences of his carelessness, and is indifferent or worse to the danger of injury to the persons or property of others. *Lienkauf v. Morris*, 66 Ala. 406; *Wilkinson v. Searcy*, 76 id. 176.

It is said in *Brooke v. Clark*, 57 Tex. 105, 114: "If the conduct of the defendant in the discharge of his duty as accoucher was so grossly negligent as to raise the presumption of his criminal indifference to results, we very greatly doubt whether it should avail to exempt him from exemplary damages for him to show that he had no bad motive, and that he acted otherwise in a manner tending to show that he was not, at heart, indifferent. Where the act is so grossly negligent as to raise the presumption of indifference, evidence that in other matters connected therewith he had shown due care, and that actual indifference would have been in fact indifference to his own interest, should, we think, not be allowed for any other purpose than to be considered by the jury in fixing the amount of exemplary damages."

Gross carelessness is not ground for such damages under the code of California, in the absence of oppression, fraud or malice. *Yerian v. Linkletter*, 80 Cal. 135.

facts and circumstances which belong to the principal transaction and tend to develop its character should be submitted to them.¹

These damages are allowable only when there is misconduct and malice, or what is equivalent thereto. A tort committed by mistake, in the assertion of a supposed right, or without any actual wrong intention, and without such recklessness or negligence as evinces malice or conscious disregard of the rights of others, will not warrant the giving of damages for punishment, where the doctrine of such damages prevails.² An excessive battery is an answer to a plea of *son assault demesne*, and if wantonly or maliciously inflicted subjects the party making it to the same liability to exemplary damages as if he had been the original wrong-doer.³ So the fact that a person who has acted oppressively and [725] cruelly in dispossessing another in inclement weather believed he had a right to eject him will not be a protection from exemplary damages, if it be found that he had not such legal right.⁴

¹ The cases cited in the five last preceding notes recognize the rule. *Alabama, etc. R. Co. v. Frazier*, 98 Ala. 45.

² *Alabama, etc. R. Co. v. Arnold*, 84 Ala. 159; *Patterson v. South & N. A. R. Co.*, 89 id. 318; *Sullivan v. Dee*, 8 Ill. App. 268; *Holmes v. Carolina C. R. Co.*, 94 N. C. 318; *Jackson v. Crum*, 62 Texas, 401; *Nordhaus v. Peterson*, 54 Iowa, 68; *Inman v. Ball*, 65 id. 543 (it is not enough to authorize the imposition of exemplary damages that the defendant acted with good reason to believe that he was doing wrong); *Powers v. Manhattan Ry. Co.*, 120 N. Y. 178 (a delay of two years to initiate condemnation proceedings will not subject a railroad company to punitive damages if it has legislative and judicial authority to support its acts); *O'Brien v. Loomis*, 43 Mo. App. 29; *Richmond & D. R. Co. v. Vance*, 98 Ala. 144 (see *Alabama, etc. R. Co. v. Hill*, id.

514, 525); *Kolb v. O'Brien*, 86 Ill. 210; *Floyd v. Hamilton*, 38 Ala. 235; *Devauhn v. Heath*, 87 id. 595; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25; *Wallace v. Mayor*, 9 Abb. 40; *Moody v. McDonald*, 4 Cal. 297; *St. Peter's Church v. Beach*, 26 Conn. 355; *Phelps v. Owen*, 11 Cal. 22; *Goetz v. Amba*, 27 Mo. 28; *Biggs v. D'Aquin*, 13 La. Ann. 21; *Jones v. Rahilly*, 16 Minn. 321; *Beveridge v. Welch*, 7 Wis. 465; *Blodgett v. Brattleboro*, 80 Vt. 579; *Smith v. Wunderlich*, 70 Ill. 426; *Stillwell v. Barnett*, 60 id. 210; *Tripp v. Grouner*, id. 474; *Elliott v. Herz*, 29 Mich. 202; *Walker v. Fuller*, 29 Ark. 448; *Brown v. Allen*, 85 Iowa, 806; *Scripps v. Reilly*, 88 Mich. 10; *Hyatt v. Adams*, 16 id. 180; *Allison v. Chandler*, 11 id. 542.

³ *Philadelphia, etc. R. Co. v. Larkin*, 47 Md. 155.

⁴ *Raynor v. Nima*, 87 Mich. 84.

There is a very instructive and reasonable *résumé* of the discussions on

§ 394. Malice in law and malice in fact. As has been shown, the liability to exemplary damages does not rest solely on the fact that the defendant has done wrong by infringing on the

the general subject in *Hendrickson v. Kingsbury*, 21 Iowa, 379, an action for assault and battery. In the instructions to the jury the trial court thus defined and stated the law of exemplary damages: "Exemplary damages are given whenever elements of oppression or fraud or malice enter into the commission of the offense; and in such cases the jury are not limited to actual compensation, nor are they required to scrutinize very closely the amount of their verdict; but blending together the rights of the injured party and the interests of the community, they may give such a verdict as will compensate for the injury, and at the same time inflict some punishment upon the defendant for his wrongful act, protect society and manifest the detestation in which the act is held by them." On appeal Mr. Justice Cole said: "As to the right of the jury to increase the amount of the verdict so as 'to manifest the detestation in which the act is held by them,' we think that such language, or its equivalent, cannot be found in any authoritative report of any adjudicated case in England or this country. Mr. Sedgwick, in his article in reply to Professor Greenleaf's review of his text, both of which may be found in the appendix to *Sedgwick on the Measure of Damages* (2d and 3d ed.), quotes that language, and cites *Lives of the Lord Chancellors*, vol. 5, p. 249. We have the second American from the third London edition of that most excellent work, and on pages 213 and 214 the learned author and justly distinguished jurist, Lord Campbell, after stating the circumstances of the dis-

charge under *habeas corpus* of Mr. Wilkes from arrest for libel under a 'general warrant,' issued by Lord Halifax, says: 'The immense popularity which Lord Chief Justice Pratt (afterward Lord Camden) now acquired *led him into some intemperance of language*, although his decisions might be sound. Many actions were brought in his court and tried before him for arrests under general warrants: and, the juries giving enormous damages, applications were made to set aside the verdicts and to grant new trials. It might be right to refuse to interfere, but not in terms such as these: . . . The defendants claim a right, under a general warrant and bad precedents, to force houses, break open escritoirs, seize papers, where no inventory is made of things taken, and no persons' names specified in the warrant, so that messengers are to be vested with a discretionary power to search wherever their suspicions or their malice may lead them. As to the damages, I continue of the opinion that the jury are not limited to the injury received. Damages are designed, not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, and as proof of the detestation in which the wrongful act is held by the jury.' Lord Campbell himself italicises the last lines in his quotation, and thereby points to that as the 'intemperate language' into which Lord Camden had been led by the 'immense popularity' acquired by the discharge of Mr. Wilkes, a member of parliament, from his arrest under a general warrant for publishing a seditious libel.

legal rights of the plaintiff. The wrong must be aggravated by the manner in which or the purpose for which it was done. The spirit which actuated the wrong-doer may doubtless be

The discharge was based upon his privilege as a member of parliament to be free from arrest in all cases except treason, felony and actual breach of the peace. Upon the reassembling of parliament after Mr. Wilkes' discharge, both houses declared (as if in condemnation of Lord Camden's decision) 'that privilege of parliament does not extend to the case of writing or publishing seditious libels.' It was after this resolution of parliament, and in Mr. Wilkes' own action for that particular arrest, that Lord Chief Justice Pratt is said, by Lord Campbell, to have used the language quoted; but in a note to page 14 of the *Lives of the Lord Chancellors*, the case of *Boardman v. Carrington*, 2 Wils. 244, is cited. Now, if Lord Campbell, who writes of Lord Camden as 'one of the brightest ornaments of my profession, and of *my party*,' can so unequivocally condemn this particular language as intemperate and unsound; and when the circumstances under which it was uttered are so clearly indicative of a controversy between the king and parliament on the one hand, and the court and people on the other, as would naturally (if not properly) stimulate to the use of strong and partisan language, is it reasonable to hold upon this authority alone that such language is the law of the land, and ought to be given as such by way of instruction to the jury? It should also be borne in mind that even Lord Camden himself did not give this language in instructions to the jury, but only used it in argument to sustain his judgment and refusal to set aside

the verdict on the ground of excessive damages. Without passing just here upon the correctness of other portions of the instruction, we think that after telling the jury that they may compensate the plaintiff, punish the defendant and protect society, and not scrutinize these amounts very closely, that they may also add such further sum as will manifest the detestation in which the act is held by them, is, to speak mythologically, 'piling Pelion and Ossa on Olympus,' and is without good foundation as we think in principle or precedent."

As to the right of the jury to give damages by way of punishment he continued: "He would be a bold jurist who, in view of these authorities [over one hundred different cases which the learned judge said he had carefully examined, and a majority of which decide that vindictive or punitive damages may be given in cases where the element of fraud or oppression is shown], should hold that the doctrine of exemplary, vindictive or punitive damages had no foundation in law. Since the time of the controversy between Professor Greenleaf and Mr. Sedgwick (1847) on this subject, a large majority of the appellate courts in this country have followed the doctrine advocated by Mr. Sedgwick in that controversy; and our own supreme court has expressly denied, on the authorities, the correctness of Professor Greenleaf's views (*Funk & Co. v. Coe*, 4 G. Greene, 555); and in the same case expressed the opinion that, under certain circumstances, exemplary damages should be entertained. . . . *Cochrane v. Miller*,

inferred from the circumstances surrounding the parties and the transaction. If it appears that he is a lunatic, he is not

18 Iowa, 128; *Thomas v. Isett*, 1 G. Greene, 470; *Denslow v. Van Horn*, 16 Iowa, 476; *King v. Palmer*, 18 Iowa, 377; R. S. 1860, §§ 2112, 3113, 3183. It seems that the terms *exemplary*, *vindictive*, *punitive*, *imaginary*, *presumptive*, *speculative*, and *smart money* are used in the law as synonymous; and the first three were expressly held in *Chiles v. Drake*, 2 Met. (Ky.) 146, to be synonymous terms. While these words certainly have a literal or technical difference of signification as defined by lexicographers, yet they have been too long used as synonymous by legal writers to now justify the making of any distinction of meaning in construing the decisions or opinions of judges, or other law writings in which they are used. The controversy on this subject between Professor Greenleaf and Mr. Sedgwick may, perhaps, after all the attention and discussion it has excited, be found to be a controversy as to the terminology of the law, rather than as to the extent of the right of recovery or real measure of damages. Professor Greenleaf holds that, while the plaintiff can only recover compensation, he is not confined to the proof of actual pecuniary loss, but that the jury may take into consideration every circumstance of the act which injuriously affected the plaintiff, not only in his property, but in his person, his peace of mind, his quiet and sense of security, in the enjoyment of his rights; in short, his happiness. But it must affect his happiness, not his neighbors'; and, therefore, to this question alone the jury should be restricted. Sedg. on Meas. of Dam. 609. While Mr. Sedgwick holds that whenever the ele-

ments of fraud, malice, gross negligence or oppression mingle in the controversy, the law, instead of adhering to the system, or even the language, of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitive, vindictive or exemplary damages; in other words, it blends together the interests of society and the aggrieved individual, and gives damages not only to recompense the sufferer but to punish the offender. Sedg. on Meas. of Dam. 623.

"The difference arises, not in the statement of the respective propositions, but in the restatement or construction which each puts upon the rule stated; 'in short,' says Professor Greenleaf, '*his happiness*;' while Mr. Sedgwick says, 'in other words, blends together the interest of society and the aggrieved individual,' etc. But some of the courts, which follow the rule as stated by Mr. Sedgwick, place a construction upon it not at all in antagonism to the rule as stated by Mr. Greenleaf. In *Chiles v. Drake*, 2 Met. (Ky.) 146, the court say, 'every recovery for personal injury, with or without vindictive damages, operates in some degree as a punishment, but it is the punishment which results from the redress of a private wrong, and does not, therefore, violate the meaning or spirit of the constitution,' prohibiting more than one punishment for the same offense. . . . The damages are allowed as compensation for the loss sustained, but the jury are permitted to give exemplary damages on account of the nature of the injury. It is, therefore, the increase of the damages resulting from the character of the defendant's con-

liable for anything beyond compensatory damages because he is incapable of exercising the volition upon which depends his

duct that is denominated punitive or vindictive. Under the rule as stated by Mr. Greenleaf this increase of damages resulting from the nature of the defendant's conduct showing fraud, malice or oppression is given to the plaintiff as a compensation for the invasions of his 'peace of mind, his quiet and sense of security in the enjoyment of his rights;' while under the rule as stated by Mr. Sedgwick, this increase is given as 'punitive, vindictive or exemplary damages.' In either case, and under either rule, the amount given by the jury is 'imaginary,' 'presumptive' or 'speculative' with them; that is, the jury have not, and, in the nature of things, cannot have, in either case, any pecuniary standard by which to measure the amount of compensation or damages to which the plaintiff is entitled.

"It is, perhaps, true that the broad and general language of the rule, as stated by Mr. Sedgwick, tends more to convey to a jury the idea of their unlimited and unrestrained power, jurisdiction or control over the amount of their verdict than the rule as stated by Mr. Greenleaf; and that under that rule jurors would more frequently return verdicts based more or less upon their passions and prejudices than under the other rule. For instance, the instruction as given in this case, omitting the objectionable clause heretofore considered, would tend very strongly to convey to the jury the idea of complete control over the amount of their verdict, unrestrained by any legal rule whatever. But suppose they had been instructed that in estimating the amount of plaintiff's damages they would ascertain and give: First, the

actual pecuniary loss directly sustained, as the value of the clothing destroyed. Second, the consequential pecuniary loss, as the value of the time lost by the plaintiff, the expenses, if any, incurred for medicine, physician's bills, compensation to the attendant, and board while sick, or the like. Third, the physical suffering consequent upon the injury, including any temporary, protracted or permanent deformity, disability or disfiguring, as by scars, or the like. Fourth, the mental anguish, loss of honor and sense of shame, caused by the act of the defendant, as by the exposure of his naked person to the public, the sense of wrong inflicted, insult effected, the degradation felt, and the like. Fifth, the injury to the business, reputation, social standing, and the like. Is it not unreasonable to suppose that such an instruction would more certainly exclude passion and prejudice, and that a jury would feel themselves more constrained to limit their verdict to compensation to the plaintiff for the injuries inflicted by the defendant, and, at the same time, would render a verdict which would amply compensate for the injury in every phase and manner wherein it could operate? And, indeed, it seems to us that under such an instruction the verdict would be more likely to approximate to justice and to exclude passion and prejudice than under the loose and general instruction as given by the court in this case, and justified by the rule laid down by Mr. Sedgwick, and sustained by the general current of the authorities. And yet it is doubtless true that such an instruction might mislead and confound a jury; and they would not,

liability therefor.¹ There is some difference of opinion concerning the effect to be given an act which is done without other malice than is implied from the doing of an unlawful act. It is said that every act done wilfully or purposely to the injury of another without or upon slight provocation is as against such person malicious, and the law so presumes; and whenever a grievous or wanton assault is committed, actual malice need not be shown to entitle the aggrieved party to exemplary damages.² Malice in law is not personal hate or ill-will of one person towards another; it refers to that state of mind which is reckless of law and of the legal rights of the citizen in a person's conduct toward that citizen.³ It is implied from the doing of an unlawful and injurious act with a wrong motive.⁴ The right of the jury to assess punitive damages in cases of false imprisonment, says Thayer, J., does not necessarily depend upon the existence of malice, using that term in its ordinary sense. They may be awarded when a wrongful act is done wilfully, in a wanton or oppressive manner, or even when it is done recklessly, in open disregard of the rights of others. The cases on the subject show that in the matter of assessing damages for a false imprisonment, or for an assault or trespass, it is the duty of the jury to consider not only all the circumstances of aggravation attending the wrongful act, but in some measure, at least, the nature of the right that has been invaded, and the effect upon social order of permitting a wrong-doer to escape without substantial punishment, in case of a flagrant violation of the law and the rights of others.⁵ A statute which imposes liability to exemplary damages for wilful neglect contemplates an intentional failure to perform a manifest duty in which the public has an interest, or which is important to the person injured,

in any event, have any pecuniary standard by which to measure the damages under the third, fourth and fifth subdivisions of the instructions as specified."

¹ McIntire v. Sholty, 121 Ill. 660.

² Borland v. Barrett, 76 Va. 128.

They are not recoverable for an assault if, in making due allowance for the infirmities of human temper,

the defendant has a reasonable excuse arising from the provocation or fault of the plaintiff, though they were not sufficient to justify the act done. Ward v. Blackwood, 41 Ark. 295.

³ Willis v. Miller, 29 Fed. Rep. 288.

⁴ White v. Spangler, 68 Iowa, 222.

⁵ Fotheringham v. Adams Exp. Co., 86 Fed. Rep. 252.

either in preventing or avoiding the injury.¹ It has generally been held that civil damage laws which authorize the recovery of such damages do not go so far as to allow them to be imposed unless the violation of the law was wilful, wanton or reckless, or otherwise merited punishment beyond that which followed the recovery of compensatory damages.² In Iowa, however, the wilful violation of the statute supports the recovery of punitive damages.³ These cases and the adjudications generally do not proceed on the theory that the wrongdoer must act with a spirit of ill-will toward the individual who is injured by his act or omission. Indeed, so far as punitive damages are based on the principle that the public good requires, or is subserved by, their allowance, the consequences of the wrong-doer's conduct are more important than the motive which prompted it; or are the sure *indicia* of the motive, so far at least as to throw upon him the duty of establishing the facts which exempt him from punitive liability for doing an act in itself wrongful to another. In suits for libel the general rule is that if the publication is libelous *per se* exemplary damages may be awarded without proof of express malice;⁴ if it is not so libelous the falsity of it is sufficient proof of malice to sustain such damages if the jury award them.⁵ If the words published were qualifiedly privileged actual malice must be shown in order to authorize the imposition of damages beyond those which are compensatory.⁶ In Wisconsin exemplary damages cannot be recovered for a libel unless it was published with special ill-will or bad intent, which may be inferred from all the circumstances, but not alone from the falsity of the charge and its evil consequences.⁷

¹ Kentucky C. R. Co. v. Gastineau's Rep. 724; S. C., 20 W. N. C. 97 Adm'r, 83 Ky. 119. (Penn.).

² Kreiter v. Nichols, 28 Mich. 496; ³ Malloy v. Bennett, 15 Fed. Rep. Rosecrantz v. Shoemaker, 60 id. 4; 871; Buckley v. Knapp, 48 Mo. 152; Kadym v. Miller, 18 Ill. App. 474; Bergman v. Jones, 94 N. Y. 51; Samuels v. Evening Mail Ass'n, 75 id. 604; Holmes v. Jones, 121 id. 461. Jockers v. Borgman, 29 Kan. 109; ⁴ Fresh v. Cutter, 78 Md. 87; 10 Neu v. Kechnie, 95 N. Y. 682; Franklin v. Schermerhorn, 8 Hun, 112; Reid v. Terwilliger, 116 N. Y. 580; L. R. A. 67. Meidel v. Anthis, 71 Ill. 241. ⁵ Eviston v. Cramer, 57 Wis. 570;

⁶ Fox v. Wunderlich, 64 Iowa, 187. Templeton v. Graves, 59 id. 95. See

⁷ Wood v. Hilbish, 23 Mo. App. 389; Regensperger v. Kiefer, 7 Atl. Neeb v. Hope, 111 Pa. St. 145; Hamilton v. Eno, 81 N. Y. 116.

§ 395. Restriction and denial of exemplary damages.

[726] In some jurisdictions the term exemplary damages is in use, but signifies only a liberal extension of compensation to the injured party in view of the bad motive which induced or characterized the wrong, the mental distress resulting therefrom, and the remoter pecuniary consequences. The [727] courts here accept, in the main, the views of Prof. Greenleaf. He says: "Damages are given as a compensation, recompense or satisfaction to the plaintiff for an injury actually received by him from the defendant. They should be precisely commensurate with the injury; neither more nor less; and this, whether it be to his person or estate. All [728] damages must be the result of the injury complained of. It is frequently said that in actions *ex delicto* evidence is admissible in aggravation or in mitigation of damages. But this, it is conceived, means nothing more than that evidence is admissible of facts and circumstances which go in aggravation or in mitigation of the injury itself. The circum- [729] stances thus proved ought to be those only which belong to the act complained of. The plaintiff is not justly entitled to receive compensation beyond the extent of his injury, nor ought the defendant to pay to the plaintiff more than the plaintiff is entitled to receive. Injuries to the person or to the reputation consist in the pain inflicted, whether bodily or mental, and in the expenses and loss of property which they occasion. The jury, therefore, in the estimation of damages, are to consider not only the direct expenses incurred by the plaintiff, but the loss of his time, his bodily sufferings, and, if the injury was wilful, his mental agony also; the injury to his reputation, the circumstances of indignity and contumely under which the wrong was done, and the consequent public disgrace to the plaintiff, together with any other circumstances belonging to the wrongful act and tending to the plaintiff's discomfort."¹

§ 396. Same subject; New Hampshire rule. In the late New Hampshire case already referred to, Foster, J., said his review of the cases compelled the conclusion that the modern erroneous idea of exemplary damages "originated in, and is in fact the same thing as, damages for wounded feelings, as

¹ 2 Greenlf. Ev., § 207.

distinguished from damages for an injury to the person [730] or property. Damages for lacerated sensibilities, insulted honor, tyrannical oppression, and so forth, being much emphasized, and often being the principal damage suffered by the plaintiff, and language being loosely used, and not preserving the true distinction carefully, . . . it finally came to be understood that damages might be given in a civil suit as a punishment for an offense against the public; an idea that is certainly not plainly declared in the early cases. . . . I venture to say that no case will be found in which a judge explicitly told a jury that they might in an action for assault and battery give the plaintiff four damages, viz.: 1. For loss of property, or for injury to his apparel, loss of labor and time, expenses of surgical assistance, nursing, etc. 2. For bodily pain. 3. For mental suffering; and 4. For punishment of the defendant's crime. But a critical examination of the cases will show, as I believe, that this fourth is, in fact, comprehended in the third, but has grown into and become a separate and additional item by inconsiderate, if not intemperate and angry, instructions given to juries when the court was too much incensed by the exhibition of wanton malice, revenge, insult and oppression to weigh with coolness and deliberation the meaning of language previously used by other judges; and instructions prompted by impulses of righteous indignation, swift to administer supposed justice to a guilty defendant, but expressed with too little caution and without pausing to reflect that the court was thus encouraging the jury to give the plaintiff more than he was entitled to; to give him, in fact, as damages, the avails of a fine imposed for the vindication of the criminal law and for the sake of public example."¹

In a subsequent case in the same state² the court approve the foregoing, and say, by Cushing, J.: "Ordinarily, in actions for torts, the rule of damages is compensation in money for the damage sustained by reason of the natural and obvious consequences of the wrongful act. . . . When, however, the element of malice enters into the wrong the rule of damages is different and more liberal. It is equally well set-

¹ Fay v. Parker, 53 N. H. 342.

² Bixby v. Dunlap, 56 N. H. 456.

tled that in such cases there enters into the question of damages considerations which cannot be made the subject of exact pecuniary compensation,—such as were described in the charge of the court as mental distress and vexation, what in common language might be spoken of as offenses to the feelings, insult, degradation, offenses against honest pride, and all matters which cannot arise except in those wrongs which are attended with malice. . . . In the endeavor to bring such considerations within the grasp of the law, and as far as possible to compensate such wrongs by damages, courts have used the terms punitive, vindictive, exemplary. I do not think the cases show, in so far as I have examined them, that this has ever been considered as punishing an offense against the criminal law of the state, but simply as a mode of stating the matter so as to bring this almost intangible subject within the grasp of the law. Whenever the law is so held that the jury are instructed that they may leave the domains of actual pecuniary value, and go into speculations in regard to compensation for the wounded feelings, the offended pride, the outraged sense of decency and delicacy, they have come into the domain of what the law has been accustomed to call punitive, vindictive, or exemplary damages. It is of little consequence under what name it goes. The substance of the thing must be retained, unless a very large class of cases are to be stricken from the list of actionable wrongs. . . . According to these views, it is incorrect to separate what is called actual damage from what is called exemplary damage. The rule is not, as I understand it, to instruct the jury in the first place to determine the actual money damage which the plaintiff has sustained, and then further instruct the jury that, if they find that the defendant has been malicious, they may give another separate sum in damages by way of example, or for the sake of punishment. The true rule, as I understand it, is to instruct the jury that if they find the defendant has been malicious the rule of damages will be more liberal; that, instead of awarding damages only for those matters which are capable of exact pecuniary valuation, they may take into consideration all the circumstances of aggravation,—the insults, offended feelings, degradation and so on,—and endeavor, according to their best judgment, to award such damages by

way of compensation or indemnity as the plaintiff, on [732] the whole, ought to receive, and the defendant ought to pay."

§ 397. **Same subject; Massachusetts rule.** In Massachusetts the same doctrine appears to be held; compensation is allowed to be fixed by considering all those circumstances which are generally the basis of exemplary damages; but there seems to be no countenance given to the infliction of additional damages for the punishment of the offender.¹ In an action by a father for harboring and secreting his minor daughter, and persuading her to remain absent from his family and service without his consent, it was held that he was entitled to recover for mental suffering caused by the injury, though it was erroneous to admit evidence thereof distinct from and in addition to that which showed the nature and extent of the injury.² If there is a wantonness or mischief, causing additional bodily or mental damage, in the injurious act of a servant within the scope of his employment, that wantonness or mischief will enhance the damages against the master.³ When the gist of the action is the breaking and entering the plaintiff's close, the circumstances which accompany and give character to the trespass may always be shown either in aggravation or mitigation.⁴ He who is guilty of a wilful trespass, or one characterized by gross carelessness and want of ordinary attention to the rights of another, is bound to make full compensation. Under such circumstances the natural injury to the feelings of the plaintiff may be taken into consideration in trespasses to real estate as well as in other actions of tort. Acts of gross carelessness, as well as those of wilful mischief, often inflict a serious wound upon the feelings when the injury done to property is comparatively trifling. No rule of law requires the mental suffering of the plaintiff or the misconduct of the defendant to be disregarded. The damages in such cases are enhanced, not because vindictive or exemplary damages are allowable, but because the actual injury is made greater by its wantonness.⁵ In one case Chief Justice Shaw said: "It is

¹ *Smith v. Holcomb*, 99 Mass. 552; *Bracegirdle v. Orford*, 2 M. & S. 77;
Austin v. Wilson, 4 Cush. 278. *Merest v. Harvey*, 5 Taunt. 442;

² *Stowe v. Heywood*, 7 Allen, 118; *Brewer v. Dew*, 11 M. & W. 625.
Phillips v. Hoyle, 4 Gray, 568.

³ *Hawes v. Knowles*, 114 Mass. 518. *Meagher v. Driscoll*, *supra*; *Fille-*
brown v. Hoar, 124 Mass. 580.

⁴ *Meagher v. Driscoll*, 99 Mass. 281;

[733] immaterial," speaking of the particular case, "whether the proof establishes gross negligence, or only a want of ordinary care on the part of the defendant. In either case the plaintiff would be entitled to recover in damages the actual amount of loss sustained, and no more, in the form of vindictive damages or otherwise."¹

§ 398. Same subject; Nebraska rule. In Nebraska the court say:² "To this court the question of punitive, vindictive or exemplary damages is *tabula rasa*, it now being presented for the first time. And being thus called upon to lay the foundation for future adjudications on this subject in this state, we are warned to avoid a line of construction which seems to have been the fruitful source of so much difficulty elsewhere, and to follow those precedents and authorities which are most satisfactory to our judgment, and which do not seem to have led to any embarrassing complications in their administration." And the court disapproved an instruction to a jury that, in addition to compensating the plaintiff for injury actually committed, they might assess other damages of a punitive or exemplary character.³

[734] § 399. Same subject; Michigan rule. In Michigan, also, the element of punishment is rejected. Mr. Justice Campbell stated the question and defined the accepted doctrine with great clearness and force in a libel case. He said: "It is in connection with the various degrees of blameworthiness chargeable on wrong-doers that the discussions have arisen upon the subject of vindictive damages, which, inasmuch as they rest upon actual fault, are by some authorities said to be designed to punish the wrong intent; while according to others the damages usually so called are only meant to recompense the sense of injury which is, in human experience, always aggravated or lessened in proportion to the degree of perversity exhibited by the offender. While the term exemplary or vindictive damages has become so fixed in the law that it may be difficult to get rid of it, yet it should not be allowed to be used so as to mislead; and we think the only

¹ Barnard v. Poor, 21 Pick. 380.

early one. Boldt v. Budwig, 19 Neb.

² Boyer v. Barr, 8 Neb. 68. The later cases are in harmony with the

739; Winkler v. Roeder, 23 id. 706.

³ See Quigley v. Central P. R. Co., 11 Nev. 850, 876.

proper application of damages, beyond those to the person, property or reputation, is to make reparation for the injury to the feelings of the person injured. This is often the greatest wrong which can be inflicted; and injured pride or affection may, under some circumstances, justify very heavy damages. . . . The injury to the feelings is only allowed to be considered in those torts which consist of some voluntary act or very gross neglect, and practically depends very closely on the degree of fault evinced by all the circumstances. It has been very wisely left to the jury to determine each case upon its own surroundings, because the only safe rule of damages in matters of feeling is to give what, to the ordinary apprehension of impartial men, would seem proportionate to an injury which must be measured by the instincts of our common humanity.”¹ A recent case adheres to the rule announced

¹ *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447.

Some years later the same learned judge again discussed this subject. In *Welch v. Ware*, 32 Mich. 84, he said: “The common sense of mankind has never failed to see that the injury done by a wilful wrong to person or reputation, and in some cases to property, cannot be measured by the consequent loss in money. A person assaulted may not be disabled, or even disturbed in his business, and may not be put to any outlay in repairs or medical services. He may not be made poorer in money, directly or consequentially. He may incur no pecuniary damage whatever. And it is very clear that the shame and mental anxiety and suffering or indignation consequent on such a wrong are not capable of a money measurement. No one would avow in advance that he would be willing for a given sum to meet that experience; and no one who should seek it as a means of putting money into his pocket would be likely to receive compensation at the hands of a jury. So a person

who is struck down by a blow from the arms of a wind-mill may be much more seriously hurt than by a blow from a fist or a whip. But no one would dream of comparing these injuries by their physical effect. When the law gives an action for wilful wrongs it does it on the ground that the injured person ought to receive pecuniary amends from the wrongdoer. It assumes that every such wrong brings damages upon the sufferer, and that the principal damage is mental and not physical. And it assumes further, that this is actual and not metaphysical damage, and deserves compensation. When this is once recognized, it is just as clear that the wilfulness and wickedness of the act must constitute an important element in the computation, for the plain reason that we all feel our indignation excited in direct proportion with the malice of the offender, and that the wrong is aggravated by it.

“If actual damage is not confined to pecuniary consequences and cannot be measured by a money standard, all redress in damages must par-

in the earlier cases, viz.: "that where the damages are capable of pecuniary estimation, vindictive damages can never be allowed; that for any wrongful injuries where the grievance created is purely pecuniary in its nature, and is susceptible of

take of a punitory character to some extent; and the line between actual and what are called exemplary damages cannot be drawn with much nicety. In every such case the jury are compelled to determine from their own sense of justice and their knowledge of human nature what the amount of damages should be. When the amount to be recovered must in all cases rest in their fair and deliberate discretion, the law can give them no precise instructions. It aims to do justice by directing them to distinguish between provoked grievances and those which are unprovoked, or for which the provocation is in great disproportion to the wrong, making adequate compensation in all cases, but giving heavier damages in all cases where the wrong is aggravated by bad motives or malice. It would be of very little use to present the law to a jury upon any theoretical basis. The rule is intelligible and has not been found to work badly in practice. But whether this rule involves merely compensation or whether it is based on a theory of punishment is not very important in practice, and does not come within the domain of law so long as the jury are obliged to estimate by their own good judgment. It is not an open question in this state that damages are to be given not only for grievances beyond pecuniary losses, but also in accordance with the malice of the offender." Previous cases in that state illustrating the general doctrine concerning aggravation of damages by wilful and wanton misconduct, and the powers and duties of jurors in actions of tort, are cited.

Tefft v. Windsor, 17 Mich. 486; *Warren v. Cole*, 15 Mich. 265; *Brushaber v. Stegemann*, 22 Mich. 266; *Swift v. Applebone*, 23 Mich. 252, *Leonard v. Pope*, 27 Mich. 145; *Sheahan v. Barry*, 27 Mich. 217.

In the later case of *Elliott v. Van Buren*, 33 Mich. 49, Judge Campbell had to deal with this subject again in an action by a female for assault and battery aggravated by an alleged attempt to ravish. He said: "This is nothing more than trespass for an assault and battery. There is no such thing as a private action for a crime as such. The civil grievance here charged was an assault described as was proper with its attendant circumstances of enormity including an attempt to ravish. This, however, does not make it differ from an action for a lighter grievance except as showing a heavier ground of complaint, for which if made out the damages would be likely to be larger." Further on he says: "There was no dispute but that the plaintiff below received some blow or blows, or, what was equivalent, was pushed with more or less force by the defendant. If this was done by him as the first assailant, he was unquestionably guilty of an assault. And as an assault cannot very well be purely accidental, and is not pretended to have been anything but intentional, if committed at all, it was such an act as must be regarded as wilful, whether serious or trivial. Being so, it authorized the jury to give such damages as would, in their sound judgment, be required by the character and extent of its atrocity. If the jury believed that there was any

a full and definite money compensation, it is not permissible to abandon a certain rule, which will do complete justice, for an uncertain one that can hardly fail to do injustice.¹ And in *Wilson v. Bowen*² it is said that it is not the province of the jury, after full damages have been found for the plaintiff, so that he is fully compensated for the wrong committed by the defendant, to mulct the defendant in an additional sum to be handed over to the plaintiff as a punishment for the wrong he has done to such plaintiff.”³

assault at all, they could not help believing it was an indecent one, if not felonious, because there was no proof of any other. We need not, therefore, consider anything except the instructions given concerning what are called exemplary damages, as the case was fit for them if they were allowed at all. The question of the propriety of their allowance is not an open one in this state. The argument that a person is thereby punished twice within the constitutional and common-law rule is, in our opinion, entirely fallacious. The maxim at common law that no one shall be twice vexed for the same cause, where it applied at all, prevented a second prosecution as well as a second punishment; and if it applied to civil damages would cover the whole and not merely what is assumed to be a part of them. But there is no analogy between the civil and criminal remedies. The punishment by criminal prosecution is to redress the grievance of the public, while the civil remedy is for private redress. In the eye of the law, where both actions lie, there is a double injury, and one has never, therefore, been allowed to be pleaded in abatement or bar of the other, simply because they are contentions between different parties. But when we look at the rules which have been provided for enforcing the redress of either the public or the private com-

plainant, we are not so much concerned with any supposable theories on which such rules may be based as with the rules themselves. Civil actions never lie, except for the vindication of broken laws, any more than criminal. It is a matter of arbitrary regulation, and not of principle, whether a given violation of law shall be redressed by a civil or criminal prosecution, or by both; and where new crimes are created out of what were before civil wrongs, the civil remedy has seldom been lessened or narrowed by reason of the new criminal prosecution. Whether we call the process punitory or exemplary or remedial, we get no nearer a conclusion if the law has given the rule of procedure.” *Scripps v. Reilly*, 88 Mich. 10; *Stilson v. Gibbs*, 53 id. 283; *Wilson v. Bowen*, 64 id. 133. See *Ross v. Leggett*, 61 id. 445; *Durfee v. Newkirk*, 83 id. 522.

¹ *Warren v. Cole*, 15 Mich. 273.

² 64 Mich. 133.

³ *Durfee v. Newkirk*, 83 Mich. 522.

The opinion continues: “There is a class of cases, such as seduction (see *Watson v. Watson*, 53 Mich. 168), where the damages are not capable of accurate measurement by a money standard, and where they must necessarily be left to the proper discretion of the jury. In such cases increased damages are permitted for circumstances of aggravation in the

§ 400. **Same subject; other states.** The early cases in Colorado supported, at least by strong inference, the doctrine of exemplary damages. In 1884 they were reviewed and the conclusion was reached that the question was not *res judicata*. It was then held that such damages are not recoverable for an act which is punishable under the criminal laws.¹ Four years later it was ruled that nothing beyond liberal compensation is recoverable.² In the following year the legislature provided for the recovery of exemplary damages.³ In West Virginia⁴ and the new state of Washington such damages are not allowed.⁵

§ 401. **Exemplary damages as compensation and punishment.** The difference between allowing all the circumstances belonging to a tort, tending to show that it was induced or aggravated by malice, to be shown and considered [737] merely for more ample compensation to the party injured, and permitting it to be done with that view, and also that the amount shall operate as a punishment and a warning, is that to the extent that the latter object influences the jury the verdict will be increased; and the cases are very numerous in the books which show that very large additions must have been made for punitive effect to the amount which would otherwise have been found. Nor is this result surprising to those who have frequently participated in or witnessed the trial of tort actions, and observed the effect of the indignant denunciations of counsel, seconded by the apparently dispassionate instructions of the court, submitting the very same considerations to the jury as warranting them, in their discretion, for the good of the public, in awarding a larger sum.

wrong-doing, but they are not given by the law, as interpreted by this court, in punishment of the wrong-doer, but as extra compensation to the person wronged, for the reason that the injury is considered greater because of such circumstances of aggravation, and therefore the compensation ought to be greater. Wilful trespasses, assaults and batteries, libels and slanders, false imprisonment and, perhaps, other actions, where the injury is in part to the

feelings of the plaintiff, to his shame and humiliation, are cases where 'increased' damages may be given."

¹ *Murphy v. Hobbs*, 7 Colo. 541.

² *Greeley, etc. Ry. Co. v. Yeager*, 11 Colo. 845.

³ *Laws 1889*, p. 64.

⁴ *Pegram v. Stortz*, 81 W. Va. 220; *Beck v. Thompson*, id. 459.

⁵ *Spokane Truck & D. Co. v. Hoefer*, 25 Pac. Rep. 1072; 11 L. R. A. 689; 2 Wash. St. 45.

In a New York case¹ the court say: "In vindictive actions — and this [for assault and battery] is agreed to come within that class — jurors are always authorized to give exemplary damages, where the injury is attended with circumstances of aggravation; and the rule is laid down without qualification that we are not to regard either the possible or the actual punishment of the defendant by indictment and conviction at the suit of the people. . . . We concede that smart money, allowed by a jury, and a fine imposed at the suit [738] of the people, depend on the same principle. Both are penal, and intended to deter others from the commission of the like crime. The former, however, becomes *incidentally* compensatory for damages, and at the same time answers the purposes of punishment. The recovery of such damages ought not to be made dependent on what has been done by way of criminal prosecution any more than on what may be done. Nor are we prepared to concede that either a fine, an imprisonment, or both, should be received in evidence to mitigate the damages. True, if excluded, a double punishment may sometimes ensue, but the preventive lies with the criminal rather than the civil courts." It obviously should be assumed that such double punishment occurs in every instance where the same act is the subject of a civil and a criminal suit, and in each the malicious act is submitted to the jury, with the usual instructions, in the former, in respect to exemplary damages for punishment.

If the idea of punishment is excluded, and the aggravations are permitted to be considered only as elements of the injury to the wronged party, the civil action is merely a means of private redress for the particular injury such party suffers from an act which, in a general way, affects the whole community. He is entitled to that redress without prejudice from the existence of a liability to respond to the public.

§ 402. Exemplary damages for penal offense. The courts of some states only allow exemplary damages, including the punitive element, for such tortious acts, accompanied with malice or wanton misconduct, as are not criminal offenses.²

¹ Cook v. Ellis, 6 Hill, 466.

Koerner v. Oberly, 56 id. 284; State

² Murphy v. Hobbs, 7 Colo. 541; v. Stevens, 103 id. 55; Freese v. Tripp, Farman v. Lauman, 73 Ind. 568; 70 Ill. 496; Meidel v. Anthis, 71

But more generally liability to punishment in a prosecution for the same act as an offense against the state is held not to affect the civil remedy; the jury have, notwithstanding, the same discretion to allow damages beyond compensation for [739] punishment.¹ The reasoning upon which this double liability to punishment is maintained is not very satisfactory. It is not a cogent answer to the objection that the additional damages imposed for punishment in the civil action go to the injured party. He is not entitled to them if he is otherwise compensated; nor does the fact that this mulct goes to him instead of the state render its imposition any less a punishment, which is repeated and duplicated when, upon the same principle and for the same public purpose, he is fined again in a prosecution in the name of the state.²

Ill. 241; *Stowe v. Heywood*, 7 Allen, 118; *Fay v. Parker*, 53 N. H. 342; *Bixby v. Dunlap*, 56 id. 456; *Cherry v. McCall*, 23 Ga. 193; *Butler v. Mercer*, 14 Ind. 479.

Bundy v. Maginess, 76 Cal. 532; *Smith v. Bagwell*, 19 Fla. 117; *Boetcher v. Staples*, 27 Minn. 308; *Brown v. Evans*, 17 Fed. Rep. 912; *Chiles v. Drake*, 2 Met. (Ky.) 146; *Sowers v. Sowers*, 87 N. C. 303; *Barr v. Moore*, 87 Pa. St. 385; *Wiley v. Keoukuk*, 6 Kan. 94; *Jockers v. Borgman*, 29 id. 109, 121; *Cook v. Ellis*, 6 Hill, 466; *Corwin v. Walter*, 18 Mo. 71; *Jefferson v. Adams*, 4 Harr. 321; *Wilson v. Middleton*, 2 Cal. 54; *Edwards v. Leavitt*, 46 Vt. 126; *Hoadley v. Watson*, 45 id. 289; *Phillips v. Kelly*, 29 Ala. 628; *Roberts v. Mason*, 10 Ohio St. 277; *Garland v. Wholeham*, 26 Iowa, 185; *Lucas v. Flinn*, 35 id. 9; *Hendrickson v. Kingsbury*, 21 id. 379; *Wheatley v. Thorn*, 23 Miss. 62; *Fry v. Bennett*, 4 Duer, 247; *Pike v. Dilling*, 48 Me. 539; *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202; *Johnson v. Smith*, 64 Me. 553; *Wolff v. Cohen*, 8 Rich. 144.

² In *Ward v. Ward*, 41 Iowa, 687, Beck, J., said: "It is the settled rule

in this state, that, in cases of this kind, where the proper facts are shown, and it appears that the act complained of is punishable under the criminal statutes, punitive and exemplary damages may be allowed. *Guengerich v. Smith*, 36 Iowa, 587; *Garland v. Wholeham*, 26 id. 185; *Hendrickson v. Kingsbury*, 21 id. 379. Among the objects attained by the allowance of exemplary damages are the punishment of the wrongdoer, and the example whereby others are deterred from the commission of like wrong—and it is often said such damages are allowed for these purposes. *Sedgw. on Measure of Damages*, p. 587, note; 1 *Hilliard on Torts*, p. 251, note a; *Anthony v. Gilbert*, 4 Blackf. 348; *Taylor v. Church*, 8 N. Y. 452, 460; *Bailey v. Dean*, 5 Barb. 297, 303; *Roberts v. Mason*, 10 Ohio St. 277, 280. Indeed, it appears that one of the objects of punishment in all cases is to prevent the repetition of the crime by the culprit and others. The example of punishment, it is presumed, will deter others from the commission of the offense in the future. Counsel for defendant insists

When punitive damages are allowed the law uses the [740] suit of a private party as an instrument of public protection, not for the sake of the suitor, but for that of the public. It

that while in proper cases exemplary damages may be allowed for the purpose of punishing the defendant, they ought not to be carried to the extent that they may serve as an example to others; that is, the defendant ought not to suffer for the purpose of public good. It is true that vindictive damages are never allowed alone for the purpose of public good, through the example given in their assessment. The effect upon the public is but an incident, just as the effect of punishment in criminal cases incidentally operates to deter others from the commission of crime."

In *Brown v. Swineford*, 44 Wis. 285, Ryan, C. J., said: "A very able and solemn appeal was made to the court to exclude the rule of exemplary damages in actions of tort, when the tort is punishable as a crime. The position was founded upon the clause in section 8, article II, of the constitution, that no person, for the same offense, shall be twice put in jeopardy of punishment. It was argued, with very great force, that punitive damages given in the right of the public, in addition to full compensation to the sufferer by an act which is at once a tort and a crime, as in this case, and in *McWilliams v. Bragg*, 3 Wis. 424, and *Birchard v. Booth*, 4 id. 67, subjects the tort-feasor to punishment twice for the same offense. And it might have been added, that while the statute limits the pecuniary fine upon criminal prosecution for such an act, there is but vague limit to the punitive damages which a jury may find in a civil action. It certainly appears to be an incongruity

that one may be punished by the public for the crime, upon criminal prosecution, by fine limited by statute, and again punished in favor of the sufferer, but in right of the public, for the same act, by punitive damages, with little limit but the discretion of the jury. This is but another illustration of what appears to be the incongruity of the entire rule of exemplary damages. On this subject the writer adheres to what he said in *Bass v. Railway Co.*, 42 Wis. 672, confirmed by comments which he has seen about it in legal periodicals. And he believes that his views of punitive damages, as an original question, are sanctioned by every present member of the court.

"The particular view now insisted on was overlooked in *McWilliams v. Bragg*, *Birchard v. Booth*, and all the cases in this court in which the action was against the actual tort-feasor, subject to criminal conviction for the act. In *Railroad Co. v. Finney*, 10 Wis. 388; *Bass v. Railway Co.*, 36 id. 450; S. C., 42 id. 654; *Craker v. Railway Co.*, 36 id. 657, and other cases where the action was against the master for the tort of the servant, it could not well arise. So far, therefore, it is a question of first impression here. It would have been no subject of regret to the court if the obligation of the constitution called upon it to abridge the application of the rule. But the court is unable to hold that the constitutional provision has any controlling bearing on the question. The constitution only re-enacts what was the general, if not literally universal, rule at common law. See

is not the form of the action that gives the right to the jury [741] to give such damages, but the moral culpability of the

authorities collected in 1 Bish. Crim. Law, §§ 980-987. The word *jeopardy* is therefore used in the constitution in its defined technical sense at the common law. And in this use it is applied only to strictly criminal prosecutions by indictment, information, or otherwise. Commonwealth v. Cook, 6 Ser. & R. 577; State v. McKee, 1 Bailey, 651; People v. Goodwin, 18 Johns. 187; United States v. Gibert, 2 Sumn. 19; United States v. Haskell, 4 Wash. 402. See, also, State v. Crane, 4 Wis. 400. The cases generally hold that the rule in criminal cases, that one shall not twice be put in jeopardy, implies no more than the bar of a judgment to an action for the same cause. But no case is known where a conviction upon an indictment has been held a bar to a civil action for damages growing out of the same act; *a fortiori*, none in which a recovery in a civil action has been held a bar to an indictment for the same act. And the whole purview of section 8 plainly shows that the putting in jeopardy prohibited is confined to criminal prosecutions. Indeed, this is manifest, in the clause itself, which is confined to the same *offense*, used in the same sense as *criminal offense*, in the first clause of the section. Of course the same act may be an offense (in the sense of crime) against the state, and an offense (in the sense of tort) against a private person. It is manifest that a judgment for one is not a bar to the other. And it might be difficult on principle to hold a criminal conviction as a bar to the recovery of punitive damages in a civil action, and not a bar to the recovery of compensatory damages; not a bar to

any civil action. See *Jacks v. Bell*, 3 C. & P. 316.

"The radical difficulty in the position of counsel appears to be that judgment for the criminal offense is for the offense against the public; judgment for the tort is for the offense against the private sufferer; that though punitive damages go in the right of the public for example, they do not go by way of public punishment, but by way of private damages; for the act as a tort, and not as a crime; to the private sufferer, and not to the state. Though they are allowed beyond compensation of the private sufferer, they still go to him for himself, as damages allowed to him by law in addition to his actual damages; like the double and treble damages sometimes allowed by statute. Considered as strictly punitive, the damages are for the punishment of the private tort, not of the public crime. It is unfortunate that damages should ever have been suffered to go beyond actual compensation, under a liberal rule like that given in *Craker v. Railway Co.*, 36 Wis. 657. But the rule so given and so generally established is a sin against sound judicial principle, not against the constitution. . . . The argument and consideration of this case have gone to confirm the present members of this court in their disapprobation of the rule of exemplary damages which they have inherited. But they fear to complicate the difficulties and incongruities of the rule by the exception urged; and do not feel at liberty to change or modify the rule at so late a day, against the general current of authority elsewhere." See *Malone v. Murphy*, 2 Kan. 250; *Whit-*

defendant.¹ After there has been one trial in which his culpability has been tried with a view to punishment in the interest of the public, any other trial for the same purpose, whatever may be the form of the proceeding, is in substance and effect putting the accused again in jeopardy of punishment for the same offense, and vexing him again for the same cause. Nor is the objection removed though the first [742] verdict and the judgment thereon be provable on the second trial in mitigation, though this would, to the extent of the mitigation, lessen the injury resulting from double punishment. And in some jurisdictions it is provable in mitigation.²

§ 403. Exemplary damages as matter of right. It is for the court to determine whether the evidence tends to show facts which warrant exemplary damages; the sufficiency of the facts is for the jury.³ There is a difference of opinion as to whether damages for punitive effect can be claimed as a matter of right. The affirmative is well maintained in a Wisconsin case, where the jury were told that they ought to give exemplary damages if the facts justified their allowance. In answer to an exception to this instruction it was said: "It cannot be assumed that the law, in giving this power of punishment to juries, designed that it should be exercised arbitrarily, wantonly or capriciously. It was not designed that it should be withheld or applied from any personal motive of favoritism or animosity existing in the breast of the jury. On the contrary, it must have been designed that it should be exercised in a uniform and equal manner, without respect to persons and with the single purpose of accomplishing the object of granting the power at all, that of protecting the community from such injuries. This can only be accomplished by giving juries to understand that where the facts are such as authorize them to exercise the power it ought to be exer-

ney v. Hitchcock, 4 Denio, 461; Wheeler v. Randall, 48 Ill. 182.

¹ Hamilton v. Third Ave. R. Co., 53 N. Y. 25.

² Taylor v. Carpenter, 2 Woodb. & M. 1, 22; State v. Autery, 1 Stew. 399; Johnston v. Crawford, Phillips' L. (N. C.) 842; Porter v. Seiler, 23 Pa.

St. 424; Southwick v. Ward, 7 Jones' L. (N. C.) 64.

³ Chicago, etc. R. Co. v. Scurr, 59 Miss. 456; Chicago v. Martin, 49 Ill. 241; Heil v. Glanding, 42 Pa. St. 493; Kennedy v. North M. R. Co., 36 Mo. 351; Milwaukee R. Co. v. Arms, 91 U. S. 489; Hawk v. Ridgway, 33 Ill. 478.

cised; regard being had, in fixing the amount of the punishment to be inflicted in each instance, to all the circumstances of the case bearing upon the degree of malice, insult and aggravation.”¹ In Vermont, Mississippi, Kentucky, Illinois and Maine punitive damages cannot be claimed as matter of right.² The amount which may be recovered as punishment is for the jury in the first instance,³ but subject to the power of the court to set aside the verdict if it is so excessive that it is convinced that the jury have been influenced by passion or prejudice.⁴

§ 404. Enhancement and mitigation of exemplary damages. The expenses of the particular action to redress a wrong, except as they may be taxed as costs, are not allowed for the purpose of compensation. But in some states where the wrong is accompanied by such aggravations or induced by such motives as to justify exemplary damages, a less strict rule governs in determining the extent of compensation; in other words, damages are given with a more liberal hand,⁵ and may be made to embrace losses and injuries which would otherwise

¹ *Hooker v. Newton*, 24 Wis. 292; *McCarthy v. Niskern*, 22 Minn. 90; *Hodgson v. Milward*, 3 Grant's Cas. 406; *Platt v. Brown*, 30 Conn. 336; *McConnell v. Hampton*, 12 Johns. 234.

Goodall v. Thurman, 1 Head (Tenn.), 209; *Coryell v. Colbaugh*, 1 N. J. L. 77; *Mayer v. Duke*, 72 Texas, 445; *Fox v. Wunderlich*, 64 Iowa, 187; *Thill v. Pohlman*, 76 id. 638.

² *Snow v. Carpenter*, 49 Vt. 426; *Boardman v. Goldsmith*, 48 Vt. 403; *New Orleans, etc. R. Co. v. Burke*, 53 Miss. 200; *Kentucky C. R. Co. v. Gastineau's Adm'r*, 83 Ky. 119; *Louisville & N. R. Co. v. Brooks' Adm'r*, id. 129; *Wabash, etc. Ry. Co. v. Rec-tor*, 104 Ill. 296; *McNay v. Stratton*, 9 Ill. App. 215; *Webb v. Gilman*, 80 Me. 177.

³ *Graham v. Pacific R. Co.*, 66 Mo. 536; *New Orleans, etc. R. Co. v. Burke*, 53 Miss. 200; *Southern R. Co. v. Kendrick*, 40 Miss. 374; *Johnson v. Smith*, 64 Me. 553.

⁴ *Rogers v. Henry*, 32 Wis. 327; *Belknap v. Railroad*, 49 N. H. 358;

It is said in some cases that the punitive damages should be in reasonable proportion to the actual damages. *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 15. Where the former have been in the proportion of eight or more to the latter the judgments have been reversed. *Willis v. McNeill*, 57 Texas, 465; *Railroad Co. v. Nichols*, cited in the last case; *International, etc. R. Co. v. Telephone & T. Co.*, 69 Texas, 277. It is, probably, the signification of these cases, not that the compensatory damages shall bear any exact or approximate ratio to the exemplary, but that the imposition of the latter in a large sum, if the former are small, may be considered for the purpose of determining whether the jury was influenced by improper motives.

⁵ *Emblen v. Myers*, 6 H. & N. 54.

be excluded; and among these the counsel fees and other expenses not included in the costs taxed.¹ But these are per-

¹ Welch v. Durand, 86 Conn. 182.

In *St. Peter's Church v. Beach*, 26 id. 864, Ellsworth, J., said: "It is part of the case that the actual damage suffered by the plaintiffs in the destruction of their property does not exceed \$10, and that defendant's conduct was not wanton or malicious. Of course, the plaintiffs were entitled, as the court stated, to recover their actual damage; but the court further instructed the jury that if the plaintiffs had been compelled to come into court to vindicate their rights, the jury might take into consideration the expenses attending such vindication beyond the taxable costs as actual damage. If this be a just interpretation of the rule of actual damages, such damages will become just and legal in every case, whether of tort or contract; for the plaintiff may always say that he is compelled to come into court to vindicate his rights. But not to criticise the form or language of the charge, we think there is in it a radical error, viz: that in cases where a penal sum or smart money are not to be allowed the expenses of the litigation may be allowed as damages; for the judge stated that none but actual damages were to be assessed, and proceeded to say that the expenses might be allowed; and, although the actual loss or injury did not exceed \$10, the jury rendered a verdict for \$197.91. Now, the expenses of litigation are never damages sued for in any case, when the action is brought for the wrong itself, not even if the tort be wanton or malicious. They are not 'the natural and proximate consequence of the wrongful act,' which is the universal rule, but are remote, future and contingent. They may follow

the wrong, and are very likely to, but not of course, or necessarily. Besides, damages sued for must be such as exist, and can be, and are, in some form satisfactory to the law, stated in the declaration and made matter of proof; but these expenses accrue subsequently to the bringing of the suit, and cannot be stated in the declaration, nor can they become matter of proof.

"In actions of tort founded on the misconduct or culpable neglect of the defendant, it is usually and entirely proper for the judge to say to the jury that they are not necessarily confined in assessing damages to the actual loss of property to the plaintiff, but may allow smart money, measured by the circumstances of aggravation; and may, from their general knowledge of the course of the courts, if the case warrants it in their judgment, take into account the expenses of the trial beyond the taxable costs."

In *Welch v. Durand*, 86 Conn. 182, and several earlier cases the court sustained instructions in accordance with the above views, as damages appropriate only to actions in which smart money may be given. *Linsley v. Bushnell*, 15 Conn. 225; *Beecher v. Derby Bridge Co.*, 24 id. 132; *Ives v. Carter*, id. 392; *Mason v. Hawes*, 52 id. 12; *Wynne v. Parsons*, 57 id. 73.

In Kansas the same doctrine is held. *Titus v. Corkins*, 21 Kan. 722. And in Ohio, that in such cases these expenses may be taken into account in estimating compensatory damages. *Roberts v. Mason*, 10 Ohio St. 277. See *Marshall v. Betner*, 17 Ala. 832; *Bracken v. Neill*, 15 Tex. 109; *Flack v. Neill*, 22 id. 253; *New Orleans*, etc.

[743] haps more frequently rejected.¹ Injury to the standing and credit of a defendant may be considered in awarding exemplary damages.² As to the admissibility of evidence of the social standing of the parties and wealth of the defendant [744] there are diverse rulings, not corresponding to the conflict in respect to vindictive damages. In an action for false imprisonment, Thompson, C. J., said in an early New York case:³ "Although the defendant is a man of very large fortune, the plaintiff's injury is not thereby enhanced." In a late case in New Hampshire, by a passenger against a railroad company for wrongful expulsion from its cars, Sargent, J., said: "We must remember that in considering this question of actual damage, of compensation for actual injury, it is immaterial what may be the character, standing, condition or means of the defendant. The rule of damages is compensation for the plaintiff's injury; that is all; and that would be the same whether the defendant be a railroad or a private individual; whether the private individual were rich or poor. The question is not how much the defendant is able to pay, but what is a fair compensation to this plaintiff for all the injury he has suffered? That injury is the same whether the defendant is the richest railroad or the poorest individual in the community. . . . In regard to the question of exemplary damages, . . . it would be very different from the one we have been considering. In that case the jury undertake, first, to give the plaintiff damages as a compensation for his injury; and second, they undertake also to punish the offender for the wrong he has done; and when that element is introduced it becomes proper to inquire into the condition and circumstances of the defendant; because what would be a severe punishment for a poor man, by way of fine or exemplary damages, might not be felt by one that was rich. What would be sufficient as damages, by way of example and punishment, for

R. Co. v. Allbritton, 38 Miss. 242; v. Rogers, 21 Minn. 146; Howell v. Thompson v. Powning, 15 Nev. 195. Scoggins, 48 Cal. 355; Falk v. Water-

¹Day v. Woodworth, 18 How. man, 49 Cal. 224.
(U. S.) 363; Earl v. Tupper, 45 Vt. ²Mayer v. Duke, 72 Texas, 445.
275; Barnard v. Poor, 21 Pick. 378; ³McConnell v. Hampton, 12 Johns.
Fairbanks v. Witter, 18 Wis. 287; 236.
Warren v. Cole, 15 Mich. 265; Kelly

a day laborer would be nothing by way either of example or as a punishment for this defendant as a corporation. Not only the ability of the defendant, but the motives and intentions accompanying the act, the malice or oppression exhibited, the wrong and injustice of the act, may be inquired into with a view to fix the proper measure of punitive or exemplary damages.”¹

In other cases it has been held, and the better doctrine from its intrinsic reasonableness is, that so far as the cause of action rests upon an injury to character, or an insult to the [745] person, compensatory damages may be increased by proof of the wealth of the defendant. This is upon the ground that wealth is an element which goes to make up his rank and influence in society, and thereby renders the injury or insult resulting from his wrongful act the greater.² But in such cases, as it is rather the reputation for, than the possession of, wealth which is the cause of this increased rank, the testimony should correspond, and only the general question as to his circumstances can be asked, and not the details.³

§ 405. Same subject. But when exemplary damages are claimed a different question is presented. The defendant's pecuniary ability is then a matter for the consideration of the jury, on the ground that a given sum would be a much greater punishment to a man of small means than to one of larger.⁴

¹ Belknap v. Railroad, 49 N. H. 873; Allen, 100 N. C. 181; Johnson v. 374; Smith v. Wunderlich, 70 Ill. 437.

² Johnson v. Smith, 64 Me. 553; Humphries v. Parker, 52 Me. 507-8; 2 Greenl. Ev., § 269.

³ Stanwood v. Whitmore, 63 Me. 209; Johnson v. Smith. *supra*.

⁴ Brown v. Evans, 17 Fed. Rep. 912; Hayner v. Cowden, 27 Ohio St. 292; Jones v. Greeley, 25 Fla. 629; Drohn v. Brewer, 77 Ill. 280; White v. Murtland, 71 id. 250; Mullin v. Spangenberg, 112 id. 140; Buckley v. Knapp, 48 Mo. 152; Bell v. Morrison, 27 Miss. 68; Webb v. Gilman, 80 Me. 177; Spear v. Hiles, 67 Wis. 350; Sloan v. Edwards, 61 Md. 89; Johnson v. Allen, 100 N. C. 181; Johnson v. Smith; Belknap v. Railroad, *supra*; McBride v. McLaughlin, 5 Watts, 375; Jones v. Jones, 71 Ill. 562; McCarthy v. Niskern, 23 Minn. 90; Winn v. Peckham, 42 Wis. 493; Birchard v. Booth, 4 id. 67; Barnes v. Martin, 15 id. 240; Whitfield v. Westbrook, 40 Miss. 811.

Under the Georgia code the worldly circumstances of the parties cannot be considered, except where the entire injury is to the peace, happiness or feelings of the plaintiff (Georgia R. Co. v. Homer, 73 Ga. 251), as in malicious prosecution. Coleman v. Allen, 79 id. 637.

For this purpose the reputed wealth of the defendant may be proven, subject to his right to controvert the plaintiff's evidence.¹ In cases where it is competent for the plaintiff to prove the wealth of the defendant to increase the damages, it is equally competent for the defendant to show a want of it to diminish them. And in Maine he cannot be deprived of this right by the omission of the plaintiff to offer any proof on that point, or to make any claim of damages on that ground;² the rule is otherwise in Illinois.³ In actions for breach of promise to marry, proof of the defendant's wealth is allowed as material in the estimate of compensation.⁴ In Iowa such proof, even with a view to punitive damages, is not allowed.⁵ In Missouri if a case warrants exemplary damages evidence of the pecuniary condition of the plaintiff and of his family is admissible.⁶

In actions for torts, the damages for which cannot be measured by a legal standard, all the facts constituting and accompanying the wrong should be proved; and though there be a legal standard for the principal wrong, if aggravations exist they may be proved to enhance damages; and every case of [746] personal tort must necessarily go to the jury on its special facts; these embrace the *res gestæ*, the age, sex and *status* of the parties; this, whether the case be one for compensation only, or also for exemplary damages, where they are allowed.⁷

¹ Draper v. Baker, 61 Wis. 450; v. Holland, 27 N. J. L. 86; Bell v. White v. Murtland, 71 Ill. 250, 261.

² Johnson v. Smith, 64 Me. 553.

³ Mullin v. Spangenberg, 112 Ill. 140.

⁴ See ch. 28, vol. 3.

⁵ Hunt v. C. & N. W. R. Co., 26 Iowa, 363; Guengerech v. Smith, 84 id. 348.

⁶ Dailey v. Houston, 58 Mo. 368; Beck v. Dowell, 40 Mo. App. 71.

⁷ Huckle v. Money, 2 Wils. 205; Craker v. Chicago, etc. R. Co., 36 Wis. 657; Lyon v. Hancock, 35 Cal. 372; Jones v. Jones, 71 Ill. 562; White v. Murtland, 71 Ill. 250; Fowler v. Chichester, 26 Ohio St. 9; Magee

v. Holland, 27 N. J. L. 86; Bell v. Morrison, 27 Miss. 68; Scripps v. Reilly, 38 Mich. 10; Andrews v. Askey, 8 C. & P. 7; Hall v. Hollender, 4 B. & C. 660. In Craker v. Railroad Co., *supra*, Ryan, C. J., said: "In Wilson v. Young, 31 Wis. 574, Lyon, J., inadvertently fell into some subtleties found in Mr. Sedgwick's excellent work, which appear to us all now to confuse compensatory and exemplary damages. The distinction was not in that case, and the passage in Sedgwick was cited and approved, as such high authorities often are, without sufficient consideration. We all now concur in disapproving the

To rebut malice the defendant may show any pertinent [747] facts; the advice of counsel as to acts usually thus influenced

distinction.* In giving the elements of damages, Mr. Sedgwick distinguishes between 'the mental suffering produced by the act or omission in question: vexation; anxiety;' which he holds to be ground for compensatory damages; and 'the sense of the wrong or insult, in the sufferer's breast, from an act dictated by a spirit of wilful injustice, or by a deliberate intention to vex, degrade or insult;' which he holds to be ground for exemplary damages only. Sedgwick's Meas. Dam. 35. Mr. Sedgwick himself says that the rule in favor of exemplary damages 'blends together the interests of society and the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender' (id. 38); and following him, this court held in the leading case of *McWilliams v. Bragg*, 4 Wis. 424, and has often since reaffirmed, that exemplary damages are 'in addition to actual damages.' In actions of tort, as a rule, when the plaintiff's right to recover is established, he is entitled to full compensatory damages. When proper ground is established for it, he is also entitled to exemplary damages in addition.

The former are for the compensation of the plaintiff; the latter for the punishment of the defendant and for example to others. This is Sedgwick's blending together of the interest of society and the interest of the plaintiff. And it is plain that there cannot well be common ground for the two. The injury to the plaintiff is the same, and for that he is entitled to full compensation, malice or no malice. If malice be established, then the interest of society comes in to punish the defendant and deter others in like cases by adding exemplary to compensatory damages. We need add no authority to Mr. Sedgwick's that in actions for personal tort, mental suffering, vexation and anxiety are subject of compensation in damages. And it is difficult to see how these are to be distinguished from the sense of wrong and insult arising from injustice and intention to vex and degrade. The appearance of malicious intent may, indeed, add to the sense of wrong; and equally whether such intent be really there or not. But that goes to mental suffering, and mental suffering to compensation. So it seems to us. But if there be

* In *Wilson v. Young* it was held that in an action for assault and battery *compensatory* (as distinguished from *punitive*) damages are of two kinds: (1) Those which may be recovered for the actual personal or pecuniary injury and loss; the elements of which are, loss of time, bodily suffering, impaired physical or mental powers, mutilation and disfigurement, expenses of surgical and other attendance, and the like. (2) Those which may be recovered for injuries to the feelings arising from the insult or indignity, the public exposure and contumely, and the like. The compensation of the first kind is to be determined without reference to the question whether the defendant was influenced by malicious motives in the act complained of; and, on the other hand, evidence of threatening or aggravating language, or malicious conduct on the plaintiff's part (not constituting a legal justification of the defendant's act), cannot be considered in mitigation of such damages. The compensatory damages of the second kind depend entirely upon the *malice* of the defendant; and as evidence of such malice may be given to increase that kind of damages, so evidence of threatening or malicious words or acts on plaintiff's part, just previous to the assault, though not constituting a legal justification, should be admitted to mitigate or even defeat such damages.

is admissible to rebut the presumption of malice,¹ and to prevent exemplary damages,² but the adviser must be one entitled to act in that capacity,³ by being an attorney at law in good standing,⁴ or believed by the defendant to be an attorney;⁵ and the statement of facts submitted must be full and fair else the advice given will not justify the presumption that there was no malice.⁶ In such case it is a material question whether the defendant acted prudently, wisely and in good faith, and for this purpose information on which he acted, whether true or false, is original and material evidence.⁷

a subtle, metaphysical distinction, which we cannot see — what human creature can penetrate the mysteries of his own sensations, and parcel out separately his mental sufferings and his sense of wrong! — so much for compensatory and so much for vindictive damages? And if one cannot scrutinize the anatomy of his own, how impossible to dissect the mental agonies of another, as a surgeon does corporal muscles. If possible, juries are surely not metaphysicians to do it. And we must hold that all mental suffering directly consequent upon tort, irrespective of all such inscrutable distinctions, is ground for compensatory damages in an action for the tort."

In an action in New Jersey by a parent for the abduction of his infant children (*Magee v. Holland*, 27 N. J. L. 86), Elmer, J., said: "The right of the jury to consider all the circumstances of the case, and to award exemplary damages, necessarily drew with it the right to consider the injury done to the feelings of the father, as well as all other circumstances of aggravation. . . . It was not insisted on behalf of the defendant that exemplary damages cannot be awarded in any case, that principle being too well established in this state to admit of question.

The argument urged was, that to justify such damages there must be fraud, wantonness, malice or oppression, and that all these ingredients were wanting in this case. I am not willing to concede that, in an action of this kind, the jury might not properly look at all the circumstances, and apportion the damages to the actual wrong done to the plaintiff's feelings and paternal affection and rights, without any positive proof of malice or oppression."

¹ *Jacobs v. Crum*, 62 Texas, 401.

² *Cochrane v. Tuttle*, 75 Ill. 361; *Stone v. Swift*, 4 Pick. 389; *Bonsteel v. Bonsteel*, 30 Wis. 511. See *Jasper v. Parnell*, 67 Ill. 358; *Dyer v. Denham*, 54 Ga. 224; *Johnson v. Camp*, 51 Ill. 219; *Carpenter v. Barber*, 44 Vt. 441; *Cole v. Curtis*, 16 Minn. 182; *Ash v. Marlowe*, 20 Ohio, 119.

³ *Olmstead v. Partridge*, 16 Gray, 381; *Stanton v. Hart*, 27 Mich. 539; *Livingston v. Burroughs*, 33 Mich. 511; *Strand v. Young*, 36 Md. 246.

⁴ *Roy v. Goings*, 112 Ill. 656, holding that such standing will not be inferred because the attorney consulted was commissioned as state's attorney.

⁵ *Murphy v. Larson*, 77 Ill. 172.

⁶ *Roy v. Goings*, 112 Ill. 656.

⁷ *Livingston v. Burroughs*, 33 Mich. 511.

§ 406. Exemplary damages based on actual damages. Bad motive by itself is not a tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful.¹ But one who does an act maliciously must be careful to see that it is lawful; otherwise though the actual injury may be slight the exemplary damages may be considerable. Actual damage must be found as a predicate for the recovery of exemplary damages.² The latter have been denied when the former was merely nominal.³ In an action for libel in which the jury had rendered a verdict for one dollar, and a motion was made to set it aside for inadequacy,⁴ Peters, J., said: "The legal signification of the verdict is either that there was no actual and express malice entertained toward the plaintiff by the defendant's agent, or that if there was it did the plaintiff no injury. There is no room for punitive damages here. There is no foundation for them to attach to or to rest upon. It is said in vindication of the theory of punitive damages that the interests of the individual injured and of society are blended. Here the interests of society have virtually nothing to blend with. If the individual has but a nominal interest society can have none. Such damages are to be awarded against a defendant for punishment. But if the individual injury is merely technical and

¹ *Kiff v. Youmans*, 86 N. Y. 324; *Jenkins v. Fowler*, 24 Pa. St. 308, 310; *Cooley on Torts*, 690.

² *Kiff v. Youmans*, *supra*; *Stacy v. Portland Pub. Co.*, 68 Me. 287; *Kuhn v. Chicago, etc. R. Co.*, 74 Iowa, 187; *Schippel v. Norton*, 38 Kan. 567; *Travick v. Martin Brown Co.*, 79 Texas, 460; *Maxwell v. Kennedy*, 50 Wis. 648; *Jones v. Matthews*, 75 Texas, 1; *Freese v. Tripp*, 70 Ill. 499; *Reed v. Horn*, 73 id. 596; *McNay v. Stratton*, 9 Ill. App. 215; *Schimmelfenig v. Donovan*, 18 id. 47.

It is said in *McNay v. Stratton*, *supra*, that the rule does not apply in trespass, but it is apprehended that much may depend upon the circumstances. In *Hefley v. Baker*, 19 Kan. 9, the jury found actual damages

when there was only a right to nominal damages, and such as might have been awarded as punitive; because the last was not given the judgment was reversed. The recovery of exemplary damages has been sustained in Canada in the absence of actual injury for sending a postal card with matter on it charging the plaintiff with having engaged in a confidence game. *O'Brien v. Semple*, *Montreal L. Rep.* 6 Super. Ct. 344. It is well settled in Alabama that the infliction of actual damage is not an essential predicate to the imposition of exemplary damages. *Alabama, etc. R. Co. v. Sellers*, 93 Ala. 9, 16.

³ *Barber v. Kilbourn*, 16 Wis. 485.

⁴ *Stacy v. Portland Pub. Co.*, 63 Me. 287.

theoretical what is punishment to be inflicted for? If a plaintiff upon all such elements of injury as were open to him is entitled to recover but nominal damages, shall he be the recipient of penalties awarded on account of an injury or a supposed injury to others besides himself? If there is enough in the defense to mitigate the damages to the individual, so did it mitigate the damages to the public as well. Punitive damages are the last to be assessed in the elements of injury to be considered by the jury and should be the first to be rejected by facts in mitigation. We think the irresistible inference is that if the instruction had been given as it was requested the verdict would not have been increased thereby to the extent of a cent. There may be cases, no doubt, where the actual damage would be but small and the punitive damages large. But this is not of such a kind. It would have been proper in this case for the presiding justice to have informed the jury that if the actual damages were nominal and no more, they need not award punitive damages.”¹ If officers refuse to obey a peremptory *mandamus* commanding them to levy a tax they will be liable for exemplary damages, although the actual damages resulting to the plaintiff were nominal.²

§ 407. Motive of one wrong-doer not imputable to others. If a wrong is done by two or more persons jointly and all are sued together, if only one of them or less than all acted upon such motives as are condemned by the law and punished by exemplary damages, the motive of some will not be imputed to the others, and the liability of the latter will not extend beyond compensatory damages.³ In such a case the plaintiff has his election to proceed against any or all of the wrong-doers. By making them all defendants he waives his right to exemplary damages if some of them are not subject thereto. But the rule does not apply where the plaintiff has no such choice, as where a married woman commits a tort and the law does not give a right of action against her alone. The husband is liable as husband, though he was free from blame.⁴ While the ratification of a trespass by one who did

¹ See *Meidel v. Anthis*, 71 Ill. 241; *Ganssly v. Perkins*, 30 Mich. 492.

² *Wilson v. Vaughn*, 23 Fed. Rep. 229.

³ *Clark v. Newsam*, 1 Exch. 131; *Becker v. Dupree*, 75 Ill. 167.

⁴ *Lombard v. Batchelder*, 58 Vt. 558; *Munter v. Bande*, 1 Mo. App. 484. See ch. 26, vol. 3.

not participate in it will make him liable for compensatory damages, it will not have that effect as to punitive damages,¹ at least where the relation of master and servant² or principal and agent does not exist.³

§ 408. Parties liable; master for servant. Where the master or employer is liable for the tort of his servant or agent, he is liable for full compensation in view of all the concomitant aggravations. If the servant commits a tort in his master's service, in the exercise of his employment or agency, it is deemed, at least for the purpose of compensation to the party injured, as the act and tort of the master. But it is otherwise as to the torts which the servant steps aside from, or goes beyond, his master's employment to commit.⁴ The master is only liable for the act of his servant when the latter is within the scope of his employment; when he injuriously to others disregards by tortious act or omission their rights in the conduct of the master's business.⁵

The same doctrine applies where a corporation is the [750] principal, and the employment in the course of which the servant commits the tort is within the scope of the corporate powers.⁶ In their appropriate sphere, corporations incur lia-

¹ *Pardridge v. Brady*, 7 Ill. App. 639; *Grund v. Van Vleck*, 60 Ill. 487.

² See § 408.

³ *Jacobs v. Crum*, 62 Tex. 401; *Robinson v. Goings*, 63 Miss. 500.

⁴ *McManus v. Crickett*, 1 East, 106; *Howe v. Newmarch*, 12 Allen, 49; *Wright v. Wilcox*, 19 Wend. 843; *Richmond T. Co. v. Vanderbilt*, 1 Hill, 480; *Illinois C. R. Co. v. Downey*, 18 Ill. 259; *Pittsburgh, etc. R. Co. v. Donahue*, 70 Pa. St. 119; *Rounds v. Delaware, etc. R. Co.*, 64 N. Y. 129; *Foster v. Essex Bank*, 17 Mass. 479; *Crocker v. New London, etc. R. Co.*, 24 Conn. 249; *Horner v. Lawrence*, 37 N. J. L. 46.

⁵ *Id.*; *Johnson v. Barber*, 10 Ill. 425; *Hibbard v. New York & E. R. Co.*, 15 N. Y. 455; *Philadelphia, etc. R. Co. v. Derby*, 14 How. (U. S.) 468; *Redding v. South C. R. Co.*, 3 S. C. 1; *Toledo, etc. R. Co. v. Harmon*, 47

Ill. 298; *Griswold v. Haven*, 25 N. Y. 595; *Chamberlain v. Chandler*, 3 Mason, 242; *O'Connell v. Strong*, *Dudley (S. C.)*, 265; *Brusher v. Kennedy*, 10 B. Mon. 28; *Brackett v. Lubke*, 4 Allen, 188; *Tuel v. Weston*, 47 Vt. 634; *Hays v. Millar*, 77 Pa. St. 238; *Reynolds v. Hanrahan*, 100 Mass. 813; *Smith v. Webster*, 23 Mich. 298; *Mahoney v. Mahoney*, 51 Cal. 118; *Southwick v. Estes*, 7 Cush. 385; *Bulmier v. Erie R. Co.*, 84 N. J. L. 151; *Luttrell v. Hazen*, 3 Sneed, 20; *Bar-den v. Felch*, 109 Mass. 154; *Kreiter v. Nichols*, 28 Mich. 496; *Cosgrove v. Ogden*, 49 N. Y. 255; *Eastern Counties R. Co. v. Broom*, 6 Exch. 814; *Seymour v. Greenwood*, 7 H. & N. 355.

⁶ *Redf. on Railways* (3d ed.). 510; *Hanson v. European, etc. R. Co.*, 62 Me. 84; *Goddard v. Grand T. R. Co.*, 57 Me. 202; *Atlantic, etc. R. Co. v.*

bility under the same conditions as private persons; they may thus be guilty of assault and battery,¹ slander and libel,² malicious prosecution, false imprisonment,³ and fraud.⁴ An action for a wrong lies against a corporation where its act — the thing done — is within the purpose of the corporation, and it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual.⁵ There is a legal unity of principal and agent as well in respect to the [751] tortious as the rightful acts of the latter done in the course of his employment.⁶ This identity of master and servant involves the necessary legal consequence that the master is responsible in damages for the wrongful acts of the servant done within the scope of his employment, to the extent of full compensation; but there is some division of judicial opinion as to the basis of the master's liability for exemplary damages.⁷ The immediate ground of such damages is, of course, the mal-

Dunn, 19 Ohio St. 162; Passenger R. Co. v. Young, 21 id. 518; Brokaw v. New Jersey, etc. R. Co., 82 N. J. L. 828; Monument Bank v. Globe Works, 101 Mass. 57; Philadelphia, etc. R. Co. v. Derby, 14 How. (U. S.) 468; Noyes v. Rutland, etc. R. Co., 27 Vt. 110; Jeffersonville, etc. R. Co. v. Rogers, 38 Ind. 116; Ramsden v. Boston, etc. R. Co. 104 Mass. 117; Baltimore, etc. R. Co. v. Blocher, 27 Md. 277; Green v. Omnibus Co., 7 C. B. (N. S.) 290; Hopkins v. Atlantic, etc. R. Co., 36 N. H. 9; Malécek v. Tower Grove, etc. R. Co., 57 Mo. 17.

¹ Denver, etc. Ry. v. Harris, 122 U. S. 597; Atlantic, etc. R. Co. v. Dunn, 19 Ohio St. 162; Goddard v. Grand T. R. Co., 57 Me. 202; Passenger R. Co. v. Young, 21 Ohio St. 518; Higgins v. Watervliet L. & R. Co., 46 N. Y. 23; Craker v. Chicago, etc. R. Co., 36 Wis. 657; Eastern Counties R. Co. v. Brown, 6 Exch. 814; Seymour v. Greenwood, 7 H. & N. 855; Monument Bank v. Globe Works, 100 Mass. 57.

² Samuels v. Evening Mail Ass'n, 9 Hun, 288; Philadelphia, etc. R. Co. v.

Quigley, 21 How. (U. S.) 202; Whitfield v. S. E. R. Co., 96 E. C. L. 115; Maynard v. Firemen's Ins. Co., 34 Cal. 48; Aldrich v. Press Printing Co., 9 Minn. 133.

³ Green v. Omnibus Co., 7 C. B. (N. S.) 290; Vance v. Erie R. Co., 52 N. J. L. 834; Goodspeed v. East Had-dam Bank, 22 Conn. 530; Goff v. Great N. R. Co., 3 El. & E. 672; Roe v. Birkenhead, etc. R. Co., 7 Exch. 36; Wheeler & W. Manuf. Co. v. Boyce, 36 Kan. 850; Jefferson Co. Savings Bank v. Eborn, 84 Ala. 529; Jordan v. Alabama, etc. R. Co., 74 id. 85, overruling Owsley v. M. & W. P. R. Co., 87 id. 360, which held that a corporation was not liable for malicious prosecution.

⁴ Id.; Story on Agency, § 452.

⁵ Green v. Omnibus Co., *supra*, per Erle, C. J.

⁶ New Orleans, etc. R. Co. v. Bailey, 40 Miss. 452.

⁷ It is not settled in Louisiana that the doctrine of exemplary damages applies to corporations. Rutherford v. Shreveport, 41 La. Ann. 793.

ice or misconduct which warrants their imposition against a natural person; but the diversity is in respect to the question whether the malice and misconduct of the servant is the malice of the principal, as the act which it induced or accompanies is his without particular direction or ratification. In a work of much merit it is laid down that "in any case where exemplary damages may be recoverable against the servant they should be allowed against the master, if it appears that he had reasonable notice of the negligent habits of the servant, or if he left the servant without control or supervision in the work."¹ This doctrine is obviously sound; but it is based on an actual fault of the master, not solely on that of the servant; the conclusion of liability does not result purely from the identity of master and servant.

§ 409. Same subject. In a late New York case² Church, C. J., said: "For injuries by the negligence of a servant while engaged in the business of the master, within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to be punished in punitive damages unless he is chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless and of a criminal nature, and clearly established. Corporations incur this liability as well as private persons. If a railroad company, for instance, knowingly and wantonly employs a [752] drunken engineer or switchman; or retains one after knowledge of his habits is clearly brought home to the company, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages; but I am not aware of any principle which permits a jury to award exemplary damages in a case which does not come up to this standard; or to graduate the amount of

¹ Sh. & Red. on Neg., § 749 (4th ed.) *van v. Oregon Ry. & N. Co.*, 12 Ore.

² *Cleghorn v. New York, etc. R. Co.*, 56 N. Y. 47; approved in *Sulli-*

such damages by their views of the propriety of the conduct of the defendant unless such conduct is of the character before specified." According to this view, as was said by Metcalf, J., "the act of a servant is not the act of a master, even in legal intendment or effect, unless the master personally directs or subsequently adopts it. In other cases he is liable for the acts of his servant, when liable at all, not as if the act were done by himself, but because the law makes him answerable therefor."¹ It has been often said and decided that the master is not liable for the voluntary, wilful and malicious act of his servant;² but when so held, according to the best authorities, the servant has gone outside the master's business to commit the wrong. In an English case the court say: "If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce the accident, the master will not be liable. But if in order to perform his master's orders he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct for which the master will be liable."³ And in another: "Suppose a servant driving along a road, in order to avoid a danger, intentionally drove against a carriage of another, would not the master be responsible?"⁴ Grover, J., in a New York case,⁵ states the principle very clearly. A servant employed to remove and pile lumber had disobeyed his employer's orders in piling it [753] where it was the cause of the injury in question. The judge said: "It was an act done by him in the prosecution of their (the master's) business, and they are not relieved from responsibility therefor by his departure from their instructions in the manner of doing it. The test of the master's responsibility for the act of his servant is not whether such act was done according to the instructions of the master to the servant, but whether it is done in the prosecution of the business that the servant was employed by the master to do. If the

¹ *Parsons v. Winchell*, 5 Cush. 592. *T. Co.*, 2 N. Y. 479; *Story on Agency*,

² 2 *Dane's Abr.*, ch. 59, art. 2; § 456.

Wright v. Wilcox, 19 Wend. 343;

³ *Croft v. Alison*, 4 B. & Ald. 590.

Richmond T. Co. v. Vanderbilt, 1

⁴ *Seymour v. Greenwood*, 6 H. & N.

Hill, 480; *Vanderbilt v. Richmond* 859.

⁵ *Cosgrove v. Ogden*, 49 N. Y. 257.

owner of a building employs a servant to remove the roof from his house, and directs him to throw the materials upon his lot, where no one would be endangered, and the servant, disregarding this direction, should carelessly throw them into the street, causing an injury to a passenger, the master would be responsible therefor, although done in violation of his instructions. But should the servant, for some purpose of his own, intentionally throw material upon a passenger, the master would not be responsible for the injury, because it would not be an act done in his business, but a departure therefrom by the servant to effect some purpose of his own.”¹

The same principle is still more comprehensively stated by Hoar, J.: “The master is not responsible as a trespasser unless by direct or implied authority to the servant he consents to the wrongful act. But if a master give an order to a servant which implies the use of force and violence to others, leaving to the discretion of the servant to decide when the occasion arises to which the order applies, and the extent and kind of force to be used, he is liable, if the servant in executing the order makes use of force in a manner or to a degree which is unjustifiable. And in an action of tort, in the nature of an action on the case, the master is not responsible if the wrong done by the servant is done without his authority, and not for the purpose of executing his orders or doing his work. So that if a servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable. But if the act be done in the execution of the authority given him [754] by his master, and for the purpose of performing what the master has directed, the master will be responsible, whether the wrong done be occasioned by negligence, or by a wanton or reckless purpose to accomplish the master’s business in an unlawful manner.”² Accordingly, in a subsequent case, it was held that a master who orders his servants to go to the house of a person named and remove certain furniture, if a sum due the master thereon is not paid, is liable for a wilful assault

¹ Citing *Weed v. Panama R. Co.*, 17 N. Y. 362; *Mali v. Lord*, 39 id. 381.

² *Howe v. Newmarch*, 12 Allen, 56.

committed by them, if done in the execution of the order, and not for some private end or advantage of their own.¹ The wantonness or mischief done by the servant in the execution of his master's orders will enhance the damages against the latter.² Ryan, C. J., in an action against a railroad company for a wanton outrage committed by a conductor in attempting to kiss a female passenger, thus illustrated the fallacy of any distinction in the liability of the master between wilful and negligent injuries: "We do not understand it to be denied that if such an assault on the respondent had been attempted by a stranger, and the conductor had neglected to protect her, the appellant would be liable. But it is denied that the act of the conductor in maliciously doing himself what it was his duty, for the appellant to the respondent, to prevent others from doing, makes the appellant liable. It is contended that, though the principal would be liable for the negligent failure of the agent to fulfill the principal's contract, the principal is not liable for the malicious breach by the agent of the contract which he was appointed to perform for the principal. As we understand it, that if one hire out his dog to guard sheep against wolves, and the dog sleep while a wolf makes away with a sheep, the owner is liable; but if the dog play wolf and devour the sheep himself, the owner is not liable. The bare statement of the proposition seems a *reductio ad absurdum*."³

§ 410. Same subject. In those states where exemplary [755] damages are limited to compensation, and the punitive element is excluded, when the master's liability for the servant's act is determined the whole question is resolved. If he is liable for the act he is liable for the increased injury which results from the manner in which it is done. But in some states where the element of punishment is admitted it is held that though the misconduct took place while the servant was on duty for his master, and he did the act in the prosecution of his master's business, still there must be a ratification, unless the previous directions included the commission of the

¹ Denver, etc. Ry. v. Harris, 122 U. 47 Ill. 298; Chicago, etc. R. Co. v. S. 597; Levi v. Brooks, 121 Mass. 501; Dickson, 63 Ill. 151.

Passenger R. Co. v. Young, 21 Ohio 524-5; Barden v. Felch, 109 Mass. 154; Toledo, etc. R. Co. v. Harmon, Wis. 673. ² Hawes v. Knowles, 114 Mass. 518. ³ Craker v. Chicago, etc. R. Co., 86

wrong in question.¹ The retention of the servant in his employ with knowledge of his wrongful act does not, as matter of law, amount to a ratification of such act,² but it is evidence from which the jury may find a ratification.³ If the benefits of the act done by the servant are accepted with knowledge of the facts connected with it the act is ratified.⁴

In other states it is held that the master may be liable to punitive damages for the act of his servant when the servant is so liable, and the aggravated wrong was done in the master's service, and under such circumstances that the master is liable for full compensation, though the particular act was not directly or impliedly authorized nor ratified. In Ohio it is held that a corporation may be subjected to exemplary and punitive damages for the tortious acts of its agents or servants, done within the scope of their employment, in all cases where natural persons, acting for themselves, if guilty of like acts, would be liable to such damages.⁵ In a comparatively recent case in Maine this subject was very thoroughly considered where a railroad company was the master and defendant.⁶ Walton, J., delivering the opinion of a majority of the court, said: "We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially

¹ *Eviston v. Cramer*, 57 Wis. 570; *Haines v. Schultz*, 50 N. J. L. 481; *City Nat. Bank v. Jeffries*, 73 Ala. 183; *Murphy v. Central Park R. Co.*, 48 N. Y. Super. Ct. 96; *Sullivan v. Oregon Ry. & N. Co.*, 12 Ore. 392; *International, etc. R. Co. v. Garcia*, 70 Texas, 207; *Ricketts v. Chesapeake & O. Ry. Co.*, 33 W. Va. 433; *Dillingham v. Russell*, 73 Texas, 47; *Redwood v. Metropolitan R. Co.*, 6 D. C. 302 (but see *Flannery v. Baltimore & O. R. Co.*, 4 Mackey (D. C.), 111, a later case); *Hagan v. Providence, etc. R. Co.*, 3 R. L. 88; *Turner v. North Beach, etc. R. Co.*, 84 Cal. 594; *Kline v. Central P. R. Co.*, 87 Cal. 400; *Ackerson v. Erie R. Co.*, 32 N. J. L. 254; *McKeon v. Citizens' R. Co.*, 42 Mo. 79; *Louisville, etc. R. Co. v. Smith*, 2 Duval, 556; *Hill v. New Orleans, etc.*

R. Co., 11 La. Ann. 292; *The Amiable Nancy*, 3 Wheat. 546; *Moody v. McDonald*, 4 Cal. 297; *Railroad Co. v. Finney*, 10 Wis. 388; *Craker v. Chicago, etc. R. Co.*, 36 Wis. 657; *Bass v. Chicago, etc. R. Co.*, 42 Wis. 654; *Hays v. H., G. N. R. Co.*, 46 Texas, 280; *G., H. & S. A. Ry. Co. v. Donahoe*, 56 id. 162; *Houston, etc. Ry. Co. v. Cowser*, 57 id. 293; *Willis v. McNeill*, id. 465.

² *Dillingham v. Russell*, 73 Texas, 47.

³ *Bass v. Chicago, etc. Ry. Co.*, 43 Wis. 654.

⁴ *G., H. & S. A. Ry. Co. v. Donahoe*, 56 Texas, 162; *Jacobs v. Crum*, 62 id. 401.

⁵ *Atlantic, etc. R. Co. v. Dunn*, 19 Ohio St. 162.

⁶ *Goddard v. Grand T. R.*, 57 Me. 202, 223.

applied than to railroad corporations in their capacity of carriers of passengers; and it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to mal- [756] treat and insult a passenger, or to cases where such an act is directly or impliedly ratified; for no such cases will occur. A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as schemes of public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are servants' minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation, is sheer nonsense, and only tends to confuse the mind and confound the judgment. Neither guilt, malice nor suffering is predicable of this ideal existence called a corporation. And yet, under cover of its name and authority, there is, in fact, as much wickedness, and as much that is deserving of punishment, as can be found anywhere else. And since these ideal existences can neither be hung, imprisoned, whipped or put in the stocks,—since, in fact, no corrective influence can be brought to bear upon them except that of pecuniary loss,—it does seem to us that the doctrine of exemplary damages is more beneficial in its application to them than in its application to natural persons. If those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants will, for a moment, reflect upon the absurdity of their own thoughts, this anxiety will be cured. Careful engineers can be selected who will not run their trains into open draws; and careful baggage-men can be secured who will not handle and smash trunks and band-boxes, as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, these great and growing evils will be very much lessened, if not en-

tirely cured. There is but one vulnerable point about these ideal existences called corporations; and that is the pocket of the monied power that is concealed behind them; and, if that is reached, they will wince. When it is thoroughly [757] understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places, and not before.”¹

§ 411. Same subject. In South Carolina, Tennessee, Indiana, Kansas, Pennsylvania, the District of Columbia, Arkansas, North Dakota, Alabama, New Hampshire, Mississippi, Kentucky, Maryland, Illinois, Nevada and Missouri, substantially the same view of the liability of corporations to punitive damages prevails.² In Kentucky the rule of liability is carried further than in other jurisdictions. It is held there that the men in charge of a railroad train act for the company; its entire power, *pro hac vice*, is vested in them; “as to passengers *in transitu* they should be considered as the corpo-

¹ *Hanson v. European, etc. Ry. Co.*, 62 Me. 84.

² *Randolph v. Hannibal, etc. R. Co.*, 18 Mo. App. 609 (compare *Rouse v. Metropolitan St. Ry. Co.*, 4 id. 298); *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116; *Flannery v. Baltimore & O. R. Co.*, 4 Mackey (D. C.), 111; *Louisville & N. R. Co. v. Ballard*, 88 Ky. 159; S. C., 85 id. 307; *Dawson v. L. & N. R. Co.*, 6 Ky. L. Rep. 668; *Wheeler & W. Manuf. Co. v. Boyce*, 36 Kan. 850; *Fell v. Northern P. R. Co.*, 44 Fed. Rep. (North Dakota), 248; *Philadelphia, etc. R. Co. v. Larkin*, 47 Md. 155; *Quinn v. South Carolina Ry. Co.*, 29 S. C. 381; *Hart v. Railroad Co.*, 33 id. 427 (a proprietary company was made liable for exemplary damages because of the act of its lessee); *Louisville & N. R. Co. v. Garrett*, 8 Lea (Tenn.), 438; *Haley v. Mobile O. & R. Co.*, 7 Baxter (Tenn.), 243; *Chicago, etc. R. Co. v. Scurr*, 57 Miss. 456; *Lake Shore, etc. Ry. v. Rosenzweig*, 113 Pa. St. 519 (compare *Philad. Traction Co. v. Orbann*, 119

id. 37); *Southern Exp. Co. v. Brown*, 67 Miss. 260; *Henning v. Western U. Tel. Co.*, 41 Fed. Rep. 864; *Malloy v. Bennett*, 15 id. 371; *Beale v. Railway Co.*, 1 Dill. 568; *Citizens' Street Ry. v. Steen*, 42 Ark. 821; *Springer Transportation Co. v. Smith*, 16 Lea, 498; *Alabama, etc. R. Co. v. Frazier*, 93 Ala. 45; *Hopkins v. Atlantic, etc. R. Co.*, 36 N. H. 9; *Vicksburg, etc. R. Co. v. Patton*, 31 Miss. 156; *New Orleans, etc. R. Co. v. Hurst*, 36 Miss. 660; *New Orleans, etc. R. Co. v. Bailey*, 40 Miss. 395; *Bowler v. Lane*, 3 Met. (Ky.) 311; *Louisville, etc. R. Co. v. Mahony*, 7 Bush, 235; *Baltimore, etc. R. Co. v. Blocher*, 27 Md. 277; *Jacobs' Adm'r v. Louisville, etc. R. Co.*, 10 Bush, 263; *Perkins v. Missouri, etc. R. Co.*, 55 Mo. 201; *Travers v. Kansas Pacific R. Co.*, 63 Mo. 421; *Chicago, etc. R. Co. v. Dickson*, 68 Ill. 151; *Illinois C. R. Co. v. Hammer*, 72 Ill. 353; *Singer Manuf. Co. v. Holdfodt*, 86 Ill. 459; *New Orleans, etc. R. Co. v. Burke*, 53 Miss. 200. See *Quigley v. Central P. R. Co.*, 11 Nev. 364-5.

ration itself. It is, therefore, as responsible for their acts in the conduct of the train and the treatment of the passengers as the officers of the train would be for themselves if they were the owners of it. Public interests require this rule. They also demand that the corporation should be, and it is, liable for exemplary damages in case of an injury to a passenger resulting from a violation of duty by one of its employees in the conduct of the train, if it be accompanied by oppression, fraud, malice, insult or other wilful misconduct evincing a reckless disregard of consequences.¹ As to female passengers the rule goes still further. Their contract of passage embraces an implied stipulation that the corporation will protect them against general obscenity, immodest conduct or wanton approach."² It was held that the rule does not extend to "indecorous conduct" on the part of an employee to a female passenger.³ On a second appeal the allowance of exemplary damages, on the ground that the employees were insulting "either in words, tone or manner," was approved.⁴ In Mississippi it is the duty of the conductor of a passenger train to preserve order thereon, protect the passengers from insult and injury. If he fails to do this the company is liable for an injury to a passenger; but it is not answerable in punitive damages for weak and inefficient conduct on his part, though it is liable therefor if the conductor wilfully fails or refuses to act or manifests conduct which indicates that his sympathy is with the wrong-doers.⁵ Wallace, J., said on a motion for a new trial in a libel case in which plaintiff was given a verdict for \$20,000, the actual damages being small: "It cannot be doubted that when the owner of a newspaper delegates to others the power to edit it and publish it and manage its affairs generally, he is responsible for all the acts of omission and commission of his employees in this behalf, and cannot shirk liability for their misconduct because he has abandoned to others that supervision which he might have exercised himself."⁶ Ryan, C. J., speaking for the whole court in Wis-

¹ Dawson v. L. & N. R. Co., 6 Ky. Law Rep. 668.

² Louisville & N. R. Co. v. Ballard, 85 Ky. 387.

³ Ibid.

⁴ Louisville & N. R. Co. v. Ballard, 88 Ky. 159.

⁵ New Orleans, etc. R. Co. v. Burke, 53 Miss. 200.

⁶ Malloy v. Bennett, 15 Fed. Rep. 371.

consin, on the right of railroad companies to adopt and enforce reasonable regulations for the safety and convenience of passengers as well as their own security, vindicates also the soundness of the principle that the company may incur, through its agents, a liability for vindictive damages. Referring to the officers in charge of a passenger train, he says: "These officers may be guilty of acts of arbitrary oppression, beyond endurance, toward passengers, which might warrant resistance. But we feel warranted by principle and authority to hold that in the enforcement of order on the train, and in the execution of reasonable regulations for the safety and comfort of the passengers, and for the security of the train, the authority of these officers, exercised upon the responsibility of the corporations, must be obeyed by the passengers, and that forcible resistance cannot be tolerated. They act on the peril of the corporation, and their own. Indeed, as that fictitious entity, the corporation, can act only through natural persons, its officers and servants, and as it of necessity commits its trains absolutely to the charge of officers of its own appointment, and passengers of necessity commit to them their safety and comfort *in transitu*, under conditions of [758] such peril and subordination, we are disposed to hold that the whole power and authority of the corporation, *pro hac vice*, is vested in these officers; and that as to passengers on board they are to be considered as the corporation itself; and that the consequent authority and responsibility are not generally to be straitened or impaired by any arrangement between the corporation and the officers; the corporation being responsible for the acts of the officers in the conduct and government of the train, to the passengers traveling by it, as the officers would be for themselves, if they were themselves the owners of the road and train. We consider this rule essential to public convenience and safety, and sanctioned by great weight of authority."¹

¹ *Bass v. Chicago, etc. R. Co.*, 86 Wis. 468; *Chamberlain v. Chandler*, 8 Wis. 468, citing *Commonwealth v. Mason*, 242; *Nieto v. Clark*, 1 Cliff. Power, 7 Met. 596; *Day v. Owen*, 5 Mich. 520; *Jencks v. Coleman*, 2 Sumn. 221; *Pittsburgh, etc. R. Co. v. Hinds*, 53 Pa. St. 512; *Philadelphia, etc. R. Co. v. Derby*, 14 How. (U. S.) 468; *Chamberlain v. Chandler*, 8 Wis. 468; *Nieto v. Clark*, 1 Cliff. Power, 7 Met. 596; *Day v. Owen*, 5 Mich. 520; *Jencks v. Coleman*, 2 Sumn. 221; *Pittsburgh, etc. R. Co. v. Hinds*, 53 Pa. St. 512; *Philadelphia, Allen*, 304; *Coleman v. N. Y. etc. R. Co.*, 106 Mass. 160; *Sullivan v. P. &*

§ 412. **Liability of officers, municipalities and estates.** Exemplary damages may be recovered against public officers if the facts warrant;¹ as where a malicious trespass has been committed under color of process,² a *mandamus* disobeyed,³ a levy made upon property for taxes after a tender thereof.⁴ In an early Pennsylvania case they were awarded against a sheriff for the acts of his deputy, though the latter were not recognized nor adopted.⁵ They have been denied against officers who unreasonably, but not corruptly, refused to permit an elector to vote.⁶ Municipal corporations cannot be subjected to vindictive damages;⁷ and such damages are not recoverable from the estate, or against the personal representatives of a deceased wrong-doer.⁸

R. R. Co., 30 Pa. St. 324; Penn. R. Co. v. Vandiver, 42 Pa. St. 365; Sherley v. Billings, 8 Bush, 147; Higgins v. Watervliet T. Co., 46 N. Y. 43; Baltimore, etc. R. Co. v. Blocher, 27 Md. 277; Chicago, etc. R. Co. v. Parks, 18 Ill. 460; Goddard v. Grand T. R. Co., 57 Me. 202; 2 Redf. 220, 230.

¹ Parker v. Shackleford, 61 Mo. 68.

² Nightingale v. Scannell, 18 Cal. 315; Louder v. Hinson, 4 Jones' L. 369; Anonymous, Minor, 52; Rodgers v. Ferguson, 86 Tex. 544.

³ Wilson v. Vaughn, 23 Fed. Rep. 229.

⁴ Willis v. Miller, 29 Fed. Rep. 238.

⁵ Hazard v. Israel, 1 Bin. 240.

⁶ Pierce v. Getchell, 76 Me. 216.

⁷ Wilson v. Wheeling, 19 W. Va. 323, 350; Chicago v. Langlass, 52 Ill. 259; Chicago v. Kelly, 69 Ill. 475; Larson v. Grand Forks, 3 Dak. 307.

⁸ Sheik v. Hobson, 64 Iowa, 146; Wright's Adm'r v. Donnell, 34 Tex. 291; Rippey v. Miller, 11 Ired. L. 247.

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SECTION 1.

PLEADING.

§ 413. Plaintiff must state a case which entitles him to [759] damages. It is, of course, of paramount importance that a plaintiff suing for damages should state such a case as entitles him thereto. It is enough, on demurrer, that he states a case which gives him at least a right to nominal damages.¹

¹ Parker v. Griswold, 19 Conn. 288; Under a declaration charging positive malfeasance there cannot be a recovery of damages upon proof of non-feasance only. Macumber v. Cowley v. Davidson, 10 Minn. 392; Wilson v. Clarke, 20 Minn. 367; Hood v. Palm, 8 Pa. St. 237. See Gould v. Allen, 1 Wend. 182; Rider v. Pond, White River L. & B. Co., 52 Mich. 28 Barb. 447; Thompson v. Gould, 16 195. Abb. (N. S.) 424; S. C., 19 N. Y. 262.

A party cannot by a claim of damages give himself a right to recover more than the facts stated by him will warrant.¹ But when in an action sounding in damages the plaintiff claims more than on the face of his declaration appears to be due, it will not vitiate a verdict; for the amount of the damages being ascertained by the jury, it is to be presumed that they were assessed according to the proof.² In an orderly statement of a case brought for such redress there should be a formal allegation of damage.

§ 414. **The *ad damnum*.** The *ad damnum* is the logical and legal sequence of the case stated; but, as damages can only be claimed as the legal result of the facts alleged when proved, and the *ad damnum* is only the legal conclusion there- [760] from, it is not of substance, and, if omitted or left blank, the judgment will nevertheless be sustained.³ Where the declaration contains several counts, concluding with the common counts, and no damages are laid in a particular count, the court will intend the general averment of damages at the close of the common counts to apply to it.⁴ The general damage laid at the conclusion of a declaration in the ordinary form is distributable over the several counts in it.⁵

§ 415. **Demand of damages in code complaint.** Under the code the claim of damages is essential when judgment is taken by default; such a judgment is erroneous if no amount of, nor

¹ Wainwright v. Weske, 82 Cal. 193; Murphy v. Evans, 11 Ind. 517.

² Ex'r of Van Rensselaer v. Ex'r of Platner, 2 Johns. Cas. 17.

³ Mattingly v. Darwin, 28 Ill. 618; Galena, etc. R. Co. v. Appleby, 28 Ill. 283; Hargrave v. Penrod, 1 Ill. 401; Bank of Metropolis v. Guttschlick, 14 Pet. 19; Proctor v. Crozier, 6 B. Mon. 268; Craghill v. Page, 2 Hen. & Munf. 446; Stephens v. White, 2 Wash. (Va.) 260. Held to be necessary and matter of substance in Brownson v. Wallace, 4 Blatchf. 465.

In Bumpass v. Webb, 3 Ala. 109, it was held that though the declaration omit to lay damages, yet, if they are laid in the writ, the declaration is unobjectionable. In such a case, the

declaration being amendable in the trial court on error, it will be considered as amended. Where the cause of action is a legal liability, certain and defined, as a promissory note, the damages being the statutory rate of interest, they need not be laid either in the writ or declaration. Digges v. Norris, 3 Hen. & Munf. 268; Palmer v. Euback, id. 502; Kennedy v. Woods, 3 Bibb, 322. See Snow v. Grace, 25 Ark. 570; Henrie v. Sweasey, 5 Blackf. 273; Gilligan v. New York, etc. R. Co., 1 E. D. Smith, 453.

⁴ Adams v. McMillan, 7 Port. 78.

⁵ Gell v. Burgess, 7 C. B. 16; Hoffman v. Dickinson, 31 W. Va. 142.

a prayer for, damages be contained in the complaint, notwithstanding the latter states facts sufficient to sustain a judgment for damages.¹ The code requires that the complaint shall contain a demand for the relief which the plaintiff claims; but compliance is principally important in cases where there is [761] failure to answer, for the court is authorized to grant any relief consistent with the case made by the complaint and embraced within the issue.² The controlling part of the complaint, as to the amount of damages, is the prayer for judgment.³ If the complaint in an action on a contract states facts which in law constitutes plaintiff's damages and their measure, it is not insufficient because it does not specifically allege damages.⁴

§ 416. Effect of not answering allegation of damage. The statement of the amount of damages is in some jurisdictions deemed an issuable fact;⁵ in others it is not.⁶ In the common-law action of trespass, where the defendant fails to support by proof a special plea in bar, a trespass or cause of action of the general nature set forth in the declaration is admitted; but the trespasses precisely as laid in all their particulars and

¹ *Pittsburgh Coal M. Co. v. Greenwood*, 89 Cal. 71; *Raun v. Reynolds*, 11 Cal. 14; *Gage v. Rogers*, 20 Cal. 91; *Lamping v. Hyatt*, 27 Cal. 102; *Gautier v. English*, 29 Cal. 165; *Parrott v. Den*, 34 Cal. 79; *Bond v. Pacheco*, 30 Cal. 530; *Simonson v. Blake*, 12 Abb. Pr. 331; *Walton v. Walton*, 32 Barb. 203; *Andrews v. Monilaws*, 8 Hun, 65.

² *Smith v. Havena*, 6 Colo. 297; 2 Wait Pr. 387; *Nevada Co. v. Kidd*, 37 Cal. 282.

³ *Schultz v. Third Avenue R. Co.*, 46 N. Y. Super. Ct. 211; *Riser v. Walton*, 78 Cal. 490; *Weaver v. Mississippi & Rum R. B. Co.*, 28 Minn. 542.

⁴ *Bartlett v. Odd Fellows' Savings Bank*, 79 Cal. 218.

⁵ *Tucker v. Parks*, 7 Colo. 62; *Cole v. Holbury*, 36 Kan. 263, explaining *Union P. Ry. Co. v. Pillsbury*, 29 id. 652; *Patterson v. Ely*, 19 Cal. 28; *Dimick v. Campbell*, 31 Cal. 238;

Carlyon v. Lannon, 4 Nev. 156; *White v. N. W. Stage Co.*, 5 Ore. 99; *Huston v. Twin, etc. Road Co.*, 45 Cal. 550. See next note.

⁶ *Newman v. Otto*, 4 Sandf. 668; *Jenkins v. Steanka*, 19 Wis. 126; *Bartlett v. Braunsdorf*, 57 id. 1; *Thompson v. Lumley*, 7 Daly, 74; *McLees v. Felt*, 11 Ind. 218; *Raymond v. Traffarn*, 12 Abb. Pr. 52; *Connoss v. Meir*, 2 E. D. Smith, 314; *McKensie v. Farrell*, 4 Bosw. 192; *Woodruff v. Cork*, 25 Barb. 505.

These cases turn upon the signification given to the words "material allegation" in the codes. In states where these words are not defined by the code the courts usually give them their common-law meaning. But where those words are defined to mean an allegation essential to the claim or defense, as they are in some codes, their common-law meaning is considered to be extended.

variety are not admitted. The failure of the defendant to prove his plea entitles the plaintiff to nominal damages, but nothing beyond, until he shows by proof a claim to more.¹

§ 417. *Ad damnum* limits recovery. The general rule is that the *ad damnum* limits the plaintiff's recovery. He cannot take judgment for a greater sum. If he does it is error.²

¹ Rich v. Rich, 16 Wend. 663.

Under a replication *de injuria* to a plea of *son assault demesne*, the defendant cannot give evidence in mitigation of damages to contradict the averment of aggravated injuries laid in the *narr*: he is confined to proving an excuse for the battery. He was not entitled for this reason to show in mitigation that he had been indicted, convicted and punished for the same battery. The general rule in regard to such a replication is, that, as it puts in issue only the matter alleged in the plea, nothing can be given in evidence under it which is beyond and out of the plea. Frederick v. Gilbert, 8 Pa. St. 454; 2 Greenlf. Ev., § 96.

An assessment of damages by jury is necessary at common law though those alleged in the declaration be not denied. Thompson v. Thompson, 7 B. Mon. 421; Wells v. Commonwealth, 8 id. 459.

² Tyner v. Hays, 37 Ark. 599; Burke v. Koch, 75 Cal. 356; Cooper v. Livingston, 19 Fla. 684; Stafford v. Oskaloosa, 57 Iowa, 748; Flournoy v. Childress, Minor (Ala.), 93; Derrick v. Jones, 1 Stew. 18; McWhorter v. Sayre, 2 id. 225; Hall v. Hall, 42 Ind. 585; White v. Cannada, 25 Ark. 41; Annis v. Upton, 66 Barb. 370; Robnett v. Morris, Hardin, 93; Davenport v. Bradley, 4 Conn. 309; Henderson v. Staintor, Hardin, 118; Moore v. Texas, 1 Tex. 563; McLellan v. Crofton, 6 Me. 307; Palmer v. Reynolds, 3 Cal. 396; Dox v. Dey, 3 Wend. 356; Snow v. Grace, 25 Ark.

570; Cheveley v. Morris, 2 W. Bl. 1800; McIntire v. Clark, 7 Wend. 330; Lake v. Merrill, 10 N. J. L. 288; Herbert v. Hardenberg, id. 222; Hawk v. Anderson, 9 id. 319; Cortelyou v. Cortelyou, 2 id. 318; Daniel v. Park, id. 1004; Rowan v. Lee, 3 J. J. Marsh. 97; Edwards v. Weister, 2 A. K. Marsh. 382; Harris v. Jaffray, 3 Harr. & J. 543; Grist v. Hodges, 3 Dev. 208; Dinsmore v. Austill, Minor (Ala.), 89; Coursey v. Covington, 5 Harr. & J. 45; Wilde v. Crow, 10 Up. Can. C. P. 406.

In Calumet I. & S. Co. v. Martin, 115 Ill. 358, 374, the trial court instructed the jury not to assess plaintiff's damages above the amount claimed. In answer to an objection thereto it was said: "It does not appear from the amount of the verdict or otherwise that this instruction affected the action of the jury. While it is certainly censurable it will not justify a reversal of the judgment." This was an action of negligence. In an action of *assumpsit* the rule is the same in Illinois as elsewhere. Kelley v. Third Nat. Bank, 64 Ill. 541.

In Texas if actual and exemplary damages are claimed and the facts show the latter are not recoverable, the judgment will not be reversed because it awards as actual damages an amount in excess of the sum prayed for as such. I. & G. N. R. Co. v. Gordon, 72 Texas, 44.

In an action of trespass to try title to land the plaintiff is allowed to recover damages beyond the sum laid in the writ and declaration. Mc-

[762] He may be allowed in the discretion of the court to amend the *ad damnum* by increasing it before or at the trial, and even after verdict; or he may be permitted to cure the error of a larger verdict by a *remittitur*.¹ An erroneous claim [763] of damages in a declaration does not make it demurrable; objection should be made to such claim on the trial.²

Whorter v. Standifer, 2 Port. 519; Graves v. Dodson, 8 Yerg. 161; Malone v. Donnally, Minor (Ala.), 12; Boddie v. Ely, 8 Stew. 182.

In debt the amount stated in the caption is the debt demanded. Hampton v. Barr, 8 Dana, 578. The *ad damnum* merely covers the interest (Hoff v. Hutchinson, 14 How. 586); and where the damages recovered are more than the amount laid in the declaration, it is held not to be error. Stuart v. Davidson, Peck, 208; Executors of Van Rensselaer v. Platter, 2 Johns. Cas. 18; Carver v. Adams, 40 Vt. 552; Thompson v. French, 10 Yerg. 452. See Friedley v. Schultz, 9 S. & R. 156. In debt on a bond, damages need not be laid in the declaration or found by the jury. Taylor v. McLean, 8 Call, 481; Payne v. Ellzey, 2 Wash. (Va.) 185; Allen v. Smith, 12 N. J. L. 159.

Where the court has jurisdiction of the parties, the *ad damnum* may be amended by increasing or decreasing it, to bring the case within its jurisdiction as to amount. Merrill v. Curtis, 57 Me. 152; Converse v. Damariscotta Bank, 15 Me. 481; Hart v. Waitt, 8 Allen, 582; McLellan v. Crofton, 6 Me. 307. But see Hoit v. Molony, 2 N. H. 322; Flanders v. Atkinson, 18 id. 167; Taylor v. Jones, 42 id. 25; McQuade v. O'Neil, 15 Gray, 52.

¹ Cooper v. Livingston, 19 Fla. 684; McClennahan v. Smith, 76 Mo. 428; Johnson v. Brown, 57 Barb. 118; Taylor v. Jones, 42 N. H. 25; Pierson v. Finney, 87 Ill. 29; Schneider v.

Seely, 40 Ill. 257; Pickering v. Pulsifer, 9 Ill. 79; Dox v. Dey, 3 Wend. 356; Cahill v. Pintony, 4 Munf. 371; Lewis v. Cooke, 1 Harr. & McH. 159; Green v. Wright, 8 M. & W. 360; Lautz v. Frey, 19 Pa. St. 366; Pickwood v. Wright, 1 H. Bl. 648; Hardy v. Cathcart, 1 Marsh. 180; Usher v. Dansey, 4 M. & S. 94; Deane v. O'Brien, 18 Abb. 11; Grass Valley M. Co. v. Stackhouse, 6 Cal. 418; Baltzell v. Hickman, 4 Litt. 265; Wilde v. Crow, 10 Up. Can. C. P. 406; Fowlkes v. Webber, 8 Humph. 580; Corning v. Corning, 6 N. Y. 97.

The excess may be cured by amendment on error, when the record shows something to amend by (Miller v. Weeks, 22 Pa. St. 89); or the court authorized to try the case as though originally brought there (Dressler v. Davis, 12 Wis. 58; Palmer v. Wylie, 19 Johns. 276; Jackson v. Covert, 5 Wend. 139; Moore v. Tracy, 7 Wend. 229); or by allowing the party to remit excess where the appellate court has power to render such judgment as the court below might have given. Crabbs' Ex'r v. Nashville Bank, 6 Yerg. 332.

An offer to remit does not avail in Arkansas. Tyner v. Hays, 37 Ark. 599.

In New York the courts will not allow an amendment after verdict without granting a new trial. Pharis v. Gere, 31 Hun, 448; Corning v. Corning, 6 N. Y. 97.

² Western U. Tel. Co. v. Hopkins, 49 Ind. 228; Dowd v. Seawell, 3 Dev. 185; Leland v. Tousey, 6 Hill, 328.

§ 418. **What provable under general allegation of damage.** Under a general allegation of damage the plaintiff may prove and recover those damages which naturally and necessarily result from the act complained of; for the law implies that they will proceed from it. These are called general, as contradistinguished from special, damages which are the natural but not the necessary consequence.¹

§ 419. **Special damages must be alleged.** Special damages are required to be stated in the declaration for notice to the defendant and to prevent surprise at the trial.² This rule applies to a cross-bill in equity where such damages are claimed as a set-off.³ Under a general averment of damage,

¹ *Moline Water Power Co. v. Waters*, 10 Ill. App. 159; *Rothschild v. Williamson*, 88 Ind. 887; *Atchison, etc. R. Co. v. Rice*, 86 Kan. 593; *Simmons v. Haas*, 56 Md. 153; *Hancock v. Hubbell*, 71 Cal. 537; *Mitchell v. Clarke*, id. 163; *Tucker v. Parks*, 7 Colo. 62; *Conner v. Pioneer Co.*, 29 Fed. Rep. 629; *Bradbury v. Benton*, 69 Me. 194; *Tinsley v. Rowe*, 17 Ill. App. 326; *Hutts v. Shoaf*, 88 Ind. 395; 1 *Chitty's Pl.* 395-6; *Stevenson v. Smith*, 28 Cal. 102; *Roberts v. Graham*, 6 Wall. 578; *Warner v. Bacon*, 8 Gray, 397; *Potter v. Froment*, 47 Cal. 165; *Nunan v. San Francisco*, 88 Cal. 689; *Rowand v. Billinger*, 8 Strobb. L. 373; *Andrews v. Stone*, 10 Minn. 72; *Squire v. Gould*, 14 Wend. 159; *Spencer v. St. Paul, etc. R. Co.*, 21 Minn. 362; *Wampach v. Same*, id. 364; *Alston v. Huggins*, 2 Brev. 309; *Fagen v. Davison*, 2 Duer, 153; *Bedell v. Powell*, 13 Barb. 183; *Adams v. Barry*, 10 Gray, 361; *Cole v. Swanton*, 1 Cal. 51; *Ryerson v. Marseillis*, 16 N. J. L. 450; *Trenton M. Life, etc. Ins. Co. v. Perrine*, 23 id. 402; *Strang v. Whitehead*, 12 Wend. 64; *Vanderslice v. Newton*, 4 N. Y. 130; *Burrell v. New York, etc. Co.*, 14 Mich. 34; *Bogert v. Burkhalter*, 2 Barb. 525; *Tomlinson v. Derby*, 43 Conn. 562; *Bristol Manuf. Co. v. Gridley*, 28

Conn. 201; *Baldwin v. Western R. Co.*, 4 Gray, 333; *Solms v. Lias*, 16 Abb. Pr. 311; *Plimpton v. Gardiner*, 64 Me. 360; *Lewis v. Paull*, 42 Ala. 136; *Shaw v. Hoffman*, 21 Mich. 151; *Birchard v. Booth*, 4 Wis. 67; *Fatten v. Libbey*, 32 Me. 378; *Agnew v. Johnson*, 22 Pa. St. 471; *Hart v. Evans*, 8 id. 13; *Boyden v. Burke*, 14 How. (U. S.) 575; *Olmstead v. Burke*, 25 Ill. 86; *Hallock v. Belcher*, 42 Barb. 199; *Hunter v. Stewart*, 47 Me. 419; *Prentiss v. Barnes*, 6 Allen, 410; *Stevens v. Lyford*, 7 N. H. 360; *Hutchinson v. Granger*, 13 Vt. 386; *Laraway v. Perkins*, 10 N. Y. 371; *O'Leary v. Rowan*, 31 Mo. 117; *Park v. McDaniels*, 37 Vt. 594; *Lusk v. Briscoe*, 65 Mo. 555; *Adams v. Gardner*, 78 Ill. 568; *Rice v. Coolidge*, 121 Mass. 393; *Gray v. Ballard*, 22 Minn. 278; *De Forest v. Leete*, 16 Johns. 122; *Butler v. Kent*, 19 id. 228; *Dumont v. Smith*, 4 Denio, 319; *Johnson v. Von Kettler*, 84 Ill. 315.

² *Ibid.* If proof of special damages is not objected to when it is offered the right to have it ruled out is waived. *Lashus v. Chamberlain*, 6 Utah, 385; *Roberts v. Graham*, 6 Wall. 578.

³ *Hooper v. Armstrong*, 69 Ala. 343.

interest may be recovered on an alleged breach of a contract to pay money; for it is the precise legal measure of damages [764] on that breach. When damages are sought to be recovered for the breach of a special contract the action must be upon that contract;¹ and when it is so, under a general allegation of damage the plaintiff may prove and recover those damages which necessarily result, and are therefore implied by law from the breach assigned.² If a contractor in a building contract is prevented by the other party from fulfilling it, under such a general allegation he will be entitled to recover the profits he would have made had he been suffered to complete the work;³ for breach of a contract of sale the profits with reference to the market value at the time the defendant was bound to deliver or accept the goods according to the contract may be recovered. If special circumstances existed, entitling the purchaser to greater damages, for defeating a particular purpose known to the contracting parties, they must be stated, and also the facts which, under the circumstances, rendered the injury greater.⁴

§ 420. Same subject; illustrations. Where the action is for the conversion or destruction of property, or any tortious act or omission involving its loss, the law infers an injury measured by its value, and the injured party may recover by that standard under the general averment of damage. But if he is entitled to recover other damages, they are special and exceptional, arising from peculiar circumstances which must be alleged and proved. Loss of subscriptions will not be legally inferred from destruction of a subscription list;⁵ of an account from destruction of an account book.⁶ The expense of keeping horses, or boarding them elsewhere, is not a necessary result of eviction from a barn;⁷ nor is it a necessary result of detaining an animal that it will be reduced in flesh by

¹ *Trunkey v. Hedstrom*, 131 Ill. 204; *Royalton v. Royalton & W. T. Co.*, 14 Vt. 311. *more v. New York, etc. Co.*, 40 N. Y. 422; *Griffin v. Colver*, 16 N. Y. 489; *Cole v. Swanston*, 1 Cal. 50; *Liljengren F. & L. Co. v. Mead*, 42 Minn. 420.

² *Lashus v. Chamberlain*, 6 Utah, 385.

³ *Burrell v. New York, etc. Co.*, 14 Mich. 84.

⁴ *Fletcher v. Tayleur*, 17 C. B. 21; *Smeed v. Foord*, 1 E. & E. 602; *Mess-*

⁵ *Nunan v. San Francisco*, 88 Cal. 689.

⁶ *Id.*

⁷ *Shaw v. Hoffman*, 21 Mich. 151.

being kept on short pasturage; or that from detaining a mare, a breeding season will be lost.¹ A wrong by which the owner is deprived of possession of his property does not necessarily oblige him to incur expense to regain possession;² or if [765] his horse is injured, expense for its care and cure.³ To recover for loss of rents, or injury to business, there must be a statement of facts from which such a loss must arise, and the allegation of a loss of that kind.⁴ Injury to a sucking colt is not necessarily the result of harm done to its dam.⁵ In an action to recover for the destruction of a fence and injury done to trees by the direct acts of the defendant, there cannot be a recovery for labor made necessary to prevent the destruction of crops unless the declaration alleges the facts which made such labor necessary.⁶

But where a tort or breach of contract is so alleged that loss is the direct and necessary consequence damages therefor may be recovered under a general allegation.⁷ A plaintiff declared in case that the defendant had placed a quantity of sand, lime and other building material in a highway opposite to and adjoining his premises, so as to interrupt the free passage to his store, and damaged his goods. It was held that proof that customers were prevented from frequenting the store, and that a tenant who occupied it quit it in consequence of the annoyance; and that the store afterwards remained unoccupied was inadmissible because not alleged in the declaration as special damages.⁸ No more than nominal damages can be recovered in an action upon the warranty against incumbrance on the general assignment of a breach. The fact that the plaintiff had discharged an incumbrance cannot be proved unless

¹ *Stevenson v. Smith*, 28 Cal. 102.

² *Gray v. Ballard*, 22 Minn. 278.

³ *Patten v. Libbey*, 32 Me. 378.

⁴ *Wampach v. St. Paul, etc. R. Co.*, 21 Minn. 364; *Agnew v. Johnson*, 22 Pa. St. 471; *Spencer v. St. Paul R. Co.*, 21 Minn. 363; *Plimpton v. Gardiner*, 64 Me. 360; *Taylor v. Dustin*, 43 N. H. 493; *Potter v. Frqment*, 47 Cal. 165; *Dickinson v. Boyle*, 17 Pick. 78; *Parker v. Lowell*, 11 Gray, 355; *Adams v. Barry*, 19 N. H. 561.

⁵ *Gamble v. Mullin*, 74 Iowa, 99.

⁶ *Krueger v. Le Blanc*, 62 Mich. 70.

⁷ *Jutte v. Hughes*, 67 N. Y. 267; *Reckert v. Snyder*, 9 Wend. 416; *Francis v. Schoellkopf*, 53 N. Y. 152; *Richardson v. Chasen*, 10 Q. B. 756; *Hart v. Evans*, 8 Pa. St. 13; *McKeon v. See*, 4 Robt. 449; *St. John v. Mayor, etc.*, 6 Duer, 315; *Ruff v. Rinaldo*, 55 N. Y. 664; *Laraway v. Perkins*, 10 N. Y. 871; *Dewint v. Wilt e*, 9 Wend. 325.

⁸ *Squier v. Gould*, 14 Wend. 159.

pecially alleged, for it is not a damage necessarily arising from the breach assigned.¹ An unmarried woman cannot recover damages on account of her prospects of marriage being lessened by the personal injury for which she sues, unless such special damage be alleged.² In an action for a nuisance, the plaintiff's premises being affected by the flow of filth from the defendant's adjacent privy, the plaintiff was not permitted to show that the nuisance tainted his well, from which he was in [766] the habit of drawing to make beer, and in consequence the beer was unmerchantable, because not alleged as special damages.³

When damages are the gist of the action they must be specially alleged.⁴ In case of public nuisance the plaintiff must aver special damages to him, inasmuch as the law does not presume or imply damage to any particular individual from the public offense.⁵ But for a private nuisance, such as turning the course of an ancient stream so that it no longer flowed through the plaintiff's field, it is an intendment of law that he is injured by the loss of the water. Then to determine this damage, proof to show that he was thereby compelled to haul water from a distance to supply the uses of the stream was held to be only giving the jury certain data from which to estimate the real damage; it was not a claim for a distinct injury not necessarily resulting from the nuisance.⁶ The depreciation in value of private property in consequence of a nuisance adjacent to it is a natural consequence; but the failure of the owner to find a purchaser for the property at a stated price is not such a consequence.⁷

§ 421. Same subject. The law infers bodily pain and suffering from personal injury, and loss of time from the disabling effect thereof. In some jurisdictions loss of earnings in a special employment or profession or from any peculiar condition of the party injured must be alleged.⁸ In others,

¹ De Forest v. Leete, 16 Johns. 122.

² Hunter v. Stewart, 47 Me. 419.

³ Solms v. Lias, 16 Abb. Pr. 811.

⁴ Swan v. Tappan, 5 Cush. 104.

⁵ Hart v. Evans, 8 Pa. St. 18.

⁶ Id.

⁷ Comminge v. Stevenson, 76 Texas, 642.

⁸ Conner v. Pioneer Co., 29 Fed. Rep. 629; Pueblo v. Griffin, 10 Colo. 366; Joslin v. Grand Rapids Ice Co., 50 Mich. 516 (the court intimate that if the practice would permit the defendant to demand that plaintiff make his allegations more specific it would hold otherwise); Heiser v.

when the complaint states facts showing that the injury has been such as to render it impossible for the injured party to pursue his ordinary business, and damages are claimed for the loss of time therein, the plaintiff is permitted to show upon the trial what his business is and what damages he has suffered by reason of inability to pursue the same. This is held on the reasonable presumption that ordinarily the business of the plaintiff will be known to the defendant and the latter will not be surprised at the introduction of evidence on that point; and under the codes if the defendant is ignorant concerning it he may move to have the complaint made more definite and certain.¹ If plaintiff's profession is stated and it is alleged that he has been unable to attend to it, he may show the amount of his monthly earnings.² Under a general allegation of damage the loss of profits from any special engagement cannot be shown.³ In an action to recover for injuries sustained by an assault the plaintiff may, without an allegation of the fact, show that he became subject to fits as the result of it.⁴ But in an action where the damages claimed are all special and the allegation is that plaintiff was "hurt," "bruised" and "wounded," evidence of fractures of the shoulder, arm and hand and a temporary strain of the hip resulting in permanent injury and some disability has been ruled to be inadmissible.⁵ Except in cases of very serious personal injury it is not inferred as a matter of law that the plaintiff has incurred expense for medical or surgical aid,⁶ or on account of his inability to conduct his business.⁷ It is implied that injury to the feelings follows

Loomis, 47 Mich. 16; Tomlinson v. Derby, 48 Conn. 562; Taylor v. Monroe, *id.* 36; Baldwin v. Western R. Co., 4 Gray, 333.

¹ Luck v. Ripon, 52 Wis. 196; Bierbach v. Goodyear Rubber Co., 54 *id.* 208; Bloomington v. Chamberlain, 104 Ill. 268; Wade v. Leroy, 20 How. (U. S.) 84.

² Collins v. Dodge, 87 Minn. 508.

³ Chicago v. O'Brennan, 65 Ill. 160; Chicago West Division Ry. Co. v. Klauber, 9 Ill. App. 613.

⁴ Tyson v. Booth, 100 Mass. 258; Sloan v. Edwards, 61 Md. 89.

⁵ Shadock v. Alpine Plankroad Co., 79 Mich. 7.

⁶ South Covington, etc. Ry. Co. v. Ware, 84 Ky. 267; Jesse v. Shuck, 12 S. W. Rep. 804; Folsom v. Underhill, 36 Vt. 580.

⁷ Gumb v. Twenty-third Street Ry. Co., 114 N. Y. 411. In this case it was alleged that plaintiff was personally injured and that his property was damaged, and he was put to ex-

serious personal hurts¹ or insult, and that such is the case on the part of a parent whose daughter has been seduced.² In an action for false imprisonment the law does not imply injury from deficient food during confinement, or from the bad condition of the jail;³ nor that expenses are incurred for the services of an attorney to get discharged.⁴

§ 422. Not necessary to allege matter of aggravation. Where there are aggravations accompanying a tort it does not appear to be necessary in common-law pleading to specially aver them in order to let in proof of them in an action [767] for the tort.⁵ In a replevin suit the trial court instructed the jury that in estimating damages they were not confined to the value of the property; but if they thought the taking was accompanied by circumstances of outrage and oppression they could go beyond its value. The property was valued at \$150, and a verdict for \$250 was sustained, notwithstanding objection that the declaration contained no clause of special damage, or that the taking was accompanied with such aggravation. Strong, J., said: "The rules of pleading do not require that the circumstances which attended the taking should be specially averred in order to entitle the plaintiff to recover damages commensurate with them. If consequential damages are claimed, not necessarily or naturally resulting from the tortious act, they must be specially alleged. But if outrage and oppression attended the taking

pense in repairing it and in endeavoring to be healed of his hurts, and was prevented from going on with his business. Evidence that he employed men to work in his place was inadmissible.

¹ *T. & P. Ry. Co. v. Curry*, 64 Texas, 85; *Brown v. Hannibal, etc. Ry. Co.*, 99 Mo. 310; *Chicago, etc. R. Co. v. Warner*, 108 Ill. 538; *Central R. & B. Co. v. Lanier*, 83 Ga. 587; *Chicago v. McLean*, 133 Ill. 148; 8 L. R. A. 765.

² *Phillips v. Hoyle*, 4 Gray, 568.

³ *Atchison, etc. R. Co. v. Rice*, 36 Kan. 593; *Johnson v. Von Kettler*, 84 Ill. 315.

⁴ *Strang v. Whitehead*, 12 Wend. 64.

⁵ *Schofield v. Ferrers*, 46 Pa. St. 438.

Exemplary damages are not special damages which need be claimed in the complaint. *Wilkinson v. Searcy*, 76 Ala. 176; *Alabama, etc. R. Co. v. Arnold*, 84 id. 159; *Savannah, etc. Ry. Co. v. Holland*, 82 Ga. 257; *Gustafson v. Wind*, 62 Iowa, 281. But the facts which warrant the assessment of the former must be alleged under the codes of some states. *Sullivan v. Oregon Ry. & N. Co.*, 12 Ore. 392; *Welsh v. Stewart*, 31 Mo. App. 376.

In Texas the claims for actual and exemplary damages must be separately stated. *Belo v. Wren*, 63 Texas, 727.

they belong to the wrongful act itself, and are not merely special injury.”¹ It is held that this doctrine, that the circumstances attending a trespass to realty may be given in evidence for the purpose of enhancing damages, though not alleged in the declaration, does not apply where those circumstances of themselves constitute an independent cause of action, as where in trespass *de bonis* there is an assault upon the person.² In an action of trespass to real estate, where the breaking and entering the close was by breaking down and removing fences, it was held correct to instruct the jury that the breaking and entry were the substantive ground of the action; and so far as this was effected by the act or means of breaking down a fence belonging to the close, the damage occasioned thereby might properly be taken into consideration as part of the damage to be recovered. It was part of the natural and necessary consequences of the act charged.³ In a like action in New Jersey it appeared that the de- [768] fendant illegally entered upon the plaintiff's premises, and put upon his door an insulting, libelous hand-bill. The question arose whether the contents of this hand-bill could be proved. Southard, J., said: “Is this hand-bill to be regarded as part of his cause of complaint, or is it not? . . . I understand it to be admitted that it was proper to charge and prove the putting up of the hand-bill because it was of the same character with, and a part of the trespass; but not proper to charge or prove the contents of the hand-bill because they do not partake of the character of the trespass, and a remedy for them must be sought by an action on the case for the libel or slander. But I do not perceive how the two are to be separated. The plaintiff complains of a trespass. The jury are to determine the extent of it and the injury resulting from it.

¹ Schofield v. Ferrers, 46 Pa. St. 438. Kibbe, 33 Ill. 175, citing Kidgell v. Moore, 14 Jurist, 790.

² Plumb v. Ives, 39 Conn. 120; Simpson v. Markwood, 6 Baxter, 340. See Thayer v. Sherlock, 4 Mich. 173. In fixing a *quantum meruit* for wages on a whaling voyage, it is competent for the court to take into

³ Clark v. Boardman, 42 Vt. 667. The allegation of special damages as a matter of aggravation is not an inference of law resulting from facts antecedently stated. McConnell v. Allen v. Hitch, 2 Curtis, 147. view the unusual protraction of the voyage, and the condition of the vessel and the crew, though not specially alleged or relied on in the libel.

To do this they must not only know what was done, but, as far as possible, the motives with which it was done. How will they learn them? By being informed that the defendant passed over the gravel walk? No, for this was not all he did; and this he might have done with the best intentions, and have committed no punishable trespass. That he put his foot upon the sill and left a paper there? No, for these acts might have been, and no harm done to the plaintiff. But this might also have been and the plaintiff deeply wounded by them. How is the jury, then, to say whether he was or was not injured? How are they to determine whether the defendant came as a friend or foe? to leave a paper containing information salutary to his safety, or poisonous to his reputation and peace? to commit a trespass, or to do a kindness? It can only be done by looking into the contents of the hand-bill; and shall the jury be compelled to decide, and yet precluded from this only means of judging? Suppose the contents of the bill had been of a kind and friendly nature, and designed expressly for benefit to the plaintiff, would not the defendant have been permitted to show it? And would not the jury in such case have refused the plaintiff anything? Yet the rule must operate both ways. A man enters my house and strikes my child, but when he does it adds the most malignant and unfounded slanders of him. May I not charge or prove these to show the temper with which he did it, and the extent of [769] the wrong? I may, and the jury will estimate his acts accordingly. I understand the true rule on this point to be this: in trespass you may charge and prove the whole circumstances accompanying the act, and which were part of the *res gestæ*, in order to show the temper and purposes with which the trespass was committed and the extent of the injury. A contrary rule would certainly produce the effect argued by the plaintiff's counsel. It would take away all distinction from acts of trespass."¹

§ 423. **Matters of aggravation not traversable.** If accompanying circumstances or torts are alleged by way of aggravation they are not traversable, and may be stated in a very general manner. They are not separate and substantive subjects of damage, but serve to characterize the principal

¹ Ogden v. Gibbons, 5 N. J. L. 518.

act which is the cause of action. That act must be proved or the action will fail, though the matter alleged by way of aggravation be proved, and would, if properly stated as part of the *gravamen* of the action, have alone sustained it.¹ Such accompanying facts, when of such a nature as to be ground for a separate action, may be alleged with certainty in connection with the act which otherwise would be the principal one, and thus a wrong which is divisible is, as an entirety, made the subject of the action.² Where trespass to real estate is the gist of the action, and there is an illegal entry, whatever is done after the breaking and entry is but aggravation,³ and may be proved to enhance damages, whether it might be the subject of a distinct and different action or not. Thus, if after a tortious entry the trespasser assaulted the plaintiff,⁴ debauched his servants, uttered a slander, or was guilty of a libel, or committed a trespass to or conversion of personal property,⁵ the whole wrong may be embraced in the same complaint and made parts of one cause of action, of which the illegal entry is the vital and paramount fact — essentially the ground of the action, even though not the gravest element in the estimate of damages.⁶ Under the code, matters of aggravation, as well as of mitigation, should be pleaded.⁷

¹ *Bracegirdle v. Orford*, 2 M. & S. 77; *Russell v. Carne*, 1 Salk. 119; *Newman v. Smith*, 2 id. 642; *Chamberlain v. Greenfield*, 8 Wils. 292; *Smalley v. Kerfoot*, 2 Strange, 1094; *Ford v. Kelsey*, 4 Rich. 365; *Rucker v. McNeeley*, 4 Blackf. 179; *Howard v. Black*, 42 Vt. 258; *Eames v. Prentice*, 8 Cush. 337; *Bishop v. Baker*, 19 Pick. 517; *Sampson v. Henry*, 18 Pick. 36; *Brown v. Manter*, 22 N. H. 468; *Howe v. Willson*, 1 Denio, 181; *Wright v. Chandler*, 4 Bibb, 422; *Carlewis v. Laurie*, 12 Q. B. 640; *Pritchard v. Long*, 9 M. & W. 666; *Thayer v. Sherlock*, 4 Mich. 173.

² *Id.*; *Brewer v. Temple*, 15 How. Pr. 286; *Robinson v. Flint*, 16 id. 240.

³ *Brown v. Manter*, *supra*; *Van Leuven v. Lyke*, 1 N. Y. 515; *Taylor v. Cole*, 3 T. R. 292; *Smalley v. Kerfoot*, 2 Strange, 1094; *Angus v.*

Rudin, 5 N. J. L. 815; *Dolph v. Ferris*, 7 W. & S. 367; *Beckwith v. Shordike*, 4 Burr. 2092.

⁴ *Plumb v. Ives*, 39 Conn. 120; *Druse v. Wheeler*, 22 Mich. 439.

⁵ *Bracegirdle v. Orford*, 2 M. & S. 77; *Adams v. Rivers*, 11 Barb. 390; *Snively v. Fahnestock*, 18 Md. 391; *Burson v. Cox*, 6 Baxter, 360; *Ogden v. Gibbons*, 5 N. J. L. 518; *Allison v. Chandler*, 11 Mich. 542; *McAfee v. Crofford*, 13 How. (U. S.) 447; *United States v. Magoon*, 3 McLean, 171; *Smith v. Smith*, 50 N. H. 212.

⁶ *McAfee v. Crofford*, 13 How. (U. S.) 447; *Howe v. Willson*, 1 Denio, 181; *Taylor v. Wells*, 2 Saund. 74, note; *Monts v. Witmer*, 3 Gill & J. 118; *Welch v. Piercy*, 7 Ired. L. 365; *Johnson v. Gorham*, 38 Conn. 513; *Barnes v. Burt*, *id.* 541.

⁷ *Leavitt v. Cutler*, 37 Wis. 46;

§ 424. **Not necessary to itemize damages.** It is unnecessary in most actions where the demand is unliquidated, and sounds wholly in damages, and where there is but a single cause of action, to state specifically and in separate amounts the different elements or items which go to make up the sum total of damages. It is enough to claim so much in gross as damages for the wrong done.¹ As a general rule, it is not necessary for a defendant in an action to recover possession of personal property to claim special damages in his answer to entitle him to recover them for the taking and detention of his property from him by the plaintiff,² or in an action to recover the value of such property to specially enumerate the qualities which gave it the value claimed for it.³

§ 425. **Statutory damages must be specially claimed and alleged.** Whenever penal damages are given by statute to the party injured, where he had a remedy at common law, if he claims the statutory damages he should do so by a reference to the statute.⁴ The facts must be averred which bring [771] the case within the statute; but if the case stated constitutes a cause of action of that form at common law, and is established, though all the elements alleged to constitute the case for which the statute gives penal damages are not proved, single damages, or those allowed by the common law, may be recovered.⁵ The claim for damages in the declaration in such cases may be the same whether those recoverable are penal or single.⁶

§ 426. **Pleading in actions to recover for death.** The law imposes upon a father who has the ability to do so the duty

Klopper v. Bromme, 26 Wis. 372; McKyring v. Bull, 16 N. Y. 297, 307; Huger v. Tibbits, 2 Abb. (N. S.) 97; Fink v. Justh, 14 id. 107. But see Allis v. Nanson, 41 Ind. 154.

Matter merely in mitigation need not be pleaded. Hoxsie v. Empire Lumber Co., 41 Minn. 548.

¹ Shepard v. Pratt, 16 Kan. 209; Dooley v. Missouri P. Ry. Co., 86 Mo. App. 381.

² Woodruff v. Cook, 25 Barb. 505.

³ Chicago, etc. Ry. Co. v. Harmon, 12 Ill. App. 54; Lanning v. Chicago, etc. Ry. Co., 68 Iowa, 502.

⁴ Bell v. Norris, 79 Ky. 48; Palmer v. York Bank, 18 Me. 166; Bayard v. Smith, 17 Wend. 88; Keiny v. Ingraham, 66 Barb. 250; Royse v. May, 93 Pa. St. 454; Chapman v. Emerick, 5 Cal. 239; Illinois, etc. R. & C. Co. v. People, 19 Ill. App. 141.

⁵ Starkweather v. Quigley, 7 Hun, 26; Dubois v. Beaver, 25 N. Y. 123; Sprague v. Irwin, 27 How. Pr. 51; Barnes v. Quigley, 59 N. Y. 265; Clark v. Field, 42 Mich. 342; Swift v. Applebone, 23 Mich. 252.

⁶ Clark v. Field, *supra*.

of supporting his minor children. Hence a complaint which shows that the deceased was a laboring man and left no widow, but only a child of tender years, sufficiently alleges that the child suffered pecuniary damages by the death of his father; it appearing that the latter was earning money at the time of his death, it will be presumed that he was able to discharge his duty to his child.¹ But a complaint by a son of the deceased as his administrator must state facts which show a pecuniary loss resulting from the death to the widow or other relatives.² In some jurisdictions nominal damages may be recovered in the absence of such an averment.³ In Minnesota it is said that the statute which gives the right of action assumes that the widow and next of kin of the deceased had a pecuniary interest in his life, and where the complaint names the next of kin, states their relation to the deceased and alleges damage to them, it is good though it does not recite the circumstances which may be considered in arriving at the amount of damages.⁴ A parent cannot recover for the loss of a child's services during its minority unless they are specially declared for.⁵

SECTION 2.

ASSESSMENT OF DAMAGES.

§ 427. **Writ of inquiry.** By the common-law practice the assessment is by a writ of inquiry. An interlocutory judgment is first entered up that the plaintiff ought to recover his damages; but, because the court knows not what damages he hath sustained, therefore the sheriff is commanded that by the oaths of twelve honest and lawful men he inquire into said damages, and return such inquisition into court.⁶ The writ is issued accordingly, directed to the sheriff, who in the

¹ Kelley v. Chicago, etc. Ry. Co., 50 Wis. 381.

² Regan v. Chicago, etc. Ry. Co., 51 Wis. 599; Safford v. Drew, 8 Duer, 627.

³ Johnston v. Cleveland & T. R. Co., 7 Ohio St. 337; Chicago & A. R. Co. v. Shannon, 43 Ill. 338; Chapman v. Rothwell, Ellis, Bl. & E. 168; Old-

field v. New York & H. R. R., 14 N. Y. 310; Quin v. Moore, 15 id. 432.

⁴ Barnum v. Chicago, etc. Ry. Co., 30 Minn. 461; Johnson v. St. Paul & D. R. Co., 31 id. 283.

⁵ Pennsylvania Co. v. Lilly, 78 Ind. 252; Gilligan v. New York & H. R. Co., 1 E. D. Smith, 458.

⁶ Jacobs' Law Dict., Judgment, 1.

execution of it sits as judge, and tries by a jury what damages the plaintiff hath really sustained, under very nearly the same rules of law as upon a trial by jury at *nisi prius*. When their verdict is rendered the sheriff returns the inquisition, and final judgment is thereupon entered that the plaintiff recover the damages so assessed. Some of the authorities would seem to sustain the view that as the writ of inquiry is merely an inquest of office to inform the conscience of the court they [772] may, if they please, themselves assess the damages without the intervention of the writ.¹ This view is supported by the authorities generally so far as it relates to actions brought for a sum certain, or which may be made certain by computation.² It is at the option of the plaintiff to have a writ of inquiry in all cases, but not of the defendant. The latter, having suffered default, has no election in the case.³

§ 428. **When assessed without a jury.** It is the constant practice of the court, with the consent of the plaintiff, to assess the damages either by itself or by referring the cause to a master, prothonotary or the clerk for that purpose when they may be assessed by computation,—where there are records or other indisputable documents which determine the amount,—as a judgment,⁴ a note or bill of exchange;⁵ and where the damages on protested bills of exchange are fixed by the *lex fori* these may be assessed by the court.⁶ The court may not assess where the obligation is payable in a for-

¹ Bruce v. Rawlins, 3 Wils. 61.

Andrews v. Blake, id. 529; Graham v. Bickham, 4 Dall. 148.

² Price v. Dearborn, 34 N. H. 481; Renner v. Marshall, 1 Wheat. 215; Tannehill v. Thomas, 1 Blackf. 144; Van Vleet v. Adair, id. 346; Begg v. Whittier, 48 Me. 314; Crommett v. Pearson, 18 Me. 344; Blackmore v. Flemyng, 7 T. R. 446; Fleming v. Nall, 1 Texas, 246; Dicken v. Smith, 1 Litt. 209; McLain v. Rutherford, Hempst. 47; Cartwright v. Roff, 1 Texas, 78; McCoy v. Elder, 2 Blackf. 183; Reed v. Bank of Ky., 1 T. B. Mon. 92; Campion v. Crawshay, 6 Taunt. 356; Maunsell v. Massareene, 5 T. R. 87; Arden v. Cornell, 5 B. & Ald. 883; Mayhew v. Thatcher, 6 Wheat. 129; Rashleigh v. Salmon, 1 H. Bl. 252;

³ Holdip v. Otway, 2 Saund. 107; Price v. Dearborn, 34 N. H. 481; Blackmore v. Flemyng, 7 T. R. 446.

⁴ Harrington v. Witherow, 2 Blackf. 87.

⁵ Andrews v. Blake, 1 H. Bl. 529; Rashleigh v. Salmon, id. 252; Longman v. Fenn, id. 541; Gould v. Hammersley, 4 Taunt. 148; Phipps v. Addison, 7 Blackf. 375; Randolph v. Parish, 9 Port. 76; Cullum v. Casey, id. 131; Campion v. Crawshay, 6 Taunt. 356.

⁶ Grigsby v. Ford, 3 How. (Miss.) 184. A note on which damages are assessed must be produced, or its ab-

eign currency;¹ nor where the interest is to be ascertained by the law of another state or country.² Such mode of assessing damages is not forbidden by a constitutional provision preserving the right of trial by jury, because it was in use when the constitution was adopted.³

§ 429. What a default or demurrer admits. A de- [773] fault only admits the defendant's liability to *some* damages, where they depend upon facts *in pais*; and, though they are stated in a common-law declaration, they are not admitted; the damages must, in most jurisdictions, be proved before and assessed by a jury.⁴ In Maine it has frequently been ruled that in case of default the assessment may be made by the court or by the jury, and that the option as to the mode is with the plaintiff.⁵ Such is the practice in tort actions in Connecticut,⁶ and, apparently, in Missouri.⁷ Where damages are assessed after a demurrer overruled, there is a like confession of the action.⁸

sence accounted for. *Brandt v. Foster*, 5 Iowa, 287.

¹ *Lynch v. Barr, Sneed* (Ky.), 170; *Maunsell v. Massareene*, 5 T. R. 87.

² *Peacock v. Banks, Minor* (Ala.), 387; *Evans v. Irvin*, 1 Port. 890; *Pauling's Adm'r v. Sartain*, 4 J. J. Marsh. 238; *Johnson v. Williams*, 1 id. 489.

³ *Seeley v. Bridgeport*, 53 Conn. 1; *Raymond v. Danbury & N. R. Co.*, 14 Blatch. 133.

⁴ *Grace v. Park*, 5 J. J. Marsh. 57; *Goff v. Hawks*, id. 341; *Kennon v. McRae*, 3 Stew. & Port. 249; *Van Vleet v. Adair*, 1 Blackf. 846; *Wood v. Morgan*, 6 Barb. 507; *Campbell v. Woolen*, 5 Blackf. 80; *Langdon v. Bullock*, 8 Ind. 341; *Hanrick v. Farmers' Bank*, 8 Port. 539; *Logan v. Jennings*, 4 Rawle, 355; *Roulhac v. Miller*, 90 N. C. 174; *Hanover F. Ins. Co. v. Lewis*, 23 Fla. 193.

⁵ *Begg v. Whittier*, 48 Me. 315; *Cummings v. Smith*, 50 id. 568; *Wood v. Leach*, 69 id. 560.

⁶ *Raymond v. Danbury & N. R. Co.*,

14 Blatch. 133; *Lennon v. Rawitzer*, 57 Conn. 588.

⁷ *Wetzell v. Waters*, 18 Mo. 896; *Snider v. St. Louis, etc. Ry. Co.*, 73 id. 465. See *Gemmell v. Davis*, 71 Md. 458.

⁸ *Havens v. Hartford, etc. R. Co.*, 28 Conn. 69.

In *Lamphear v. Buckingham*, 33 Conn. 237, Butler, J., said: "Every action at law to redress a wrong or enforce a right, if properly instituted, is a syllogism, of which the major premise is the proposition of law involved, and the minor premise the proposition of fact, and the judgment the conclusion. Blackstone states it thus (Com., vol. 3, p. 396): 'The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination or sentence of *the law*. It is the conclusion that naturally and regularly follows from the premises of law and fact, which stand thus: — against him who hath rode over my corn, I may recover

[774] A jury may assess damages conditionally in case of a demurrer to evidence, or they may be discharged without

damages by law; but A. hath rode over my corn; therefore, I shall recover damages against A.' Usually the major premise is not set out in the declaration, but the proposition claimed is implied from or involved in the facts stated. The plaintiff in an action of tort, for instance, summons the defendant to answer, for that at a certain time and place he committed, in a certain manner, a certain wrong, to the plaintiff's damage, etc.; and by so doing impliedly claims that the law is so that he is entitled on those facts to recover. To this syllogism the defendant must answer according to the rules of law. If he expressly admits on the record the law and the fact, both premises, he consents to the conclusion, the judgment, or, as it is technically expressed, '*confesses judgment.*' If he declines or omits to appear pursuant to the summons, or appearing declines or omits to answer when called upon to do so, he impliedly admits both propositions or premises to be true by his default, and judgment follows, technically, as a judgment by default, pursuant to a necessary rule of law, stated broadly by Mr. Taylor (Ev., 669) thus: 'Whenever a material averment, well pleaded, is *passed over* by the adverse party without denial, whether it be by pleading in confession and avoidance, or by traversing some other matter, or by demurring in law, or by suffering judgment to go by default, it is, thereby, for the purpose of pleading, if not for trial before the jury, conclusively admitted.' So the defendant may traverse or expressly deny the facts or the minor premise, and will be held on the same principle to have admitted the major,

and, if the minor is found true, judgment — the conclusion — is awarded in the verdict. And so he may deny the major premise, the proposition of law involved, by a demurrer, and failing thereby to deny, and passing over the facts, if well pleaded and sufficient to constitute a premise, *he defaults as to them*, and thereby and by the same rule is holden to have admitted them; and if the issue in law is found, final judgment passes for the plaintiff. The facts, if well pleaded and sufficient, are admitted, not because the demurrer admits them expressly, or by force of any office it performs, but because the defendant has not denied, and has defaulted as to them. A defendant, therefore, who demurs to a declaration, admits, not by his demurrer, but his omission to deny them, all the material well-pleaded facts alleged in it; and when his demurrer is overruled, the case is in the same condition precisely that it would have been if he had suffered a default and not demurred. All the difference between the two is that in one case he denied the major premise of law, and it has been found true; and the minor having been admitted by a failure to deny, both are to be holden true; in the other, he denied neither, and, therefore, both are to be holden true.

"The condition of a case before the court after a demurrer overruled, and after a default, being precisely the same, and the effect of demurring or defaulting being precisely the same, in admitting the facts the question as to both is answered by what is the law as to either. What then is the effect of a default? What facts does it admit? It has been

making the assessment. In the latter case, should the demurrer be overruled, the damages may be assessed by an- [775]

said by some writers and judges that it admits *the* cause of action, and by others *a* cause of action merely. Mr. Roscoe in his work on evidence states the proposition broadly thus: 'Suffering a judgment by default is an admission on the record of the cause of action.' The true rule is that it admits the cause of action *as alleged* in full, or to some extent, according to the nature of the action. As it admits all the *material* facts well pleaded, if a distinct, definite, entire cause of action is set forth, which entitles the plaintiff to a sum certain *without further inquiry*, it admits the cause of action in full as alleged. If by the rules of law further inquiry is to be had to ascertain the amount due, or the extent of the wrong done, and of the damage to be recovered, then it admits the cause of action, but not to the extent alleged, and subject to such inquiry. Thus, if it be debt on a bond for a sum certain, the whole is admitted, and no further inquiry is had; and so if *assumpsit* on a note or bill, and there are no indorsements entered on it, and the defendant does not move for an inquiry, the cause of action and the amount claimed are admitted. The note must be produced, but need not be proved. *Greene v. Hearne*, 8 T. R. 301; *Roscoe Ev.*, 10th ed. 71. But in actions of tort, for unliquidated damages, a *different* rule is *necessarily* applied. In such actions the plaintiff does not declare for a specific thing, but has an unlimited license in declaring, and may allege as much of wrong and injury, and demand as much damage, as he will, and recover by proving any amount, however small, if sufficient to sustain an action. A

defendant, therefore, in an action of tort is not holden to have admitted by his default the *extent* of the injury. It is assumed that, as the plaintiff may allege more than is true, he probably has done so; and the defendant by his default is considered as admitting the wrong to some extent, leaving that extent to be inquired into to enable the court to fix the damages, because such an inquiry is always and necessarily had in such cases. But he admits the wrong, and consequent right of the plaintiff to recover to some extent. By our practice this inquiry is not by writ of inquiry, or by reference, but made by the court on a hearing in damages. On that hearing it results from the very nature of the inquiry, that any evidence tending to belittle or mitigate the injury complained of and admitted, and any evidence tending to aggravate it, is admissible. If in proving the extent to which he was in fault the defendant prove that he was not in fault at all, and that the injury occurred through the fault of the plaintiff, the plaintiff cannot complain. The evidence does not deprive him of his right to judgment; it merely shows that, as he is not in fact entitled to any damages, he can only have such as the law gives him by reason of the admission on the record."

Where a jury has assessed damages by the true measure in a case where the court may assess them, the verdict will not be set aside. *Newton v. Newbegin*, 43 Me. 293.

Damages should not be assessed on one count before the issues on others are disposed of. *Ewing v. Coddington*, 5 Blackf. 433; *Fleming v. Langton*,

other jury on a writ of inquiry.¹ A confession of judgment, but for no certain sum, in an action sounding in damages is not sufficient to authorize the court to make the assessment; a writ of inquiry is necessary.² And to warrant the assessment of damages otherwise than by jury, the declaration should not embrace any claim requiring a jury. Where the common counts are added to a special count on a note or bill, a *nolle prosequi* should be entered on them before assessment of damages by the court.³ Though the action be debt, if it be brought on an account, the damages must be assessed by a jury.⁴ A demurrer does not admit the items of an account, [776] and there must be a jury to assess the damages.⁵ Nor will a default in an action for assault and battery admit any of the stated particulars; it admits the assault and battery so far as to entitle the plaintiff to maintain his action; not, however, that it was committed at the time or with the circumstances of aggravation stated in the declaration.⁶ On the assessment some damages must be found; the jury cannot find a verdict for the defendant.⁷

§ 430. Defendant may offer evidence in reduction of damages. The defendant is entitled to appear, cross-examine the plaintiff's witnesses, and introduce evidence to mitigate the damages.⁸ He may show the whole *res gestæ*; and though it

¹ Strange, 532; Duperoy v. Johnson, 7 T. R. 478; McClure v. Hall, 19 Wend. 25.

² Hanover F. Ins. Co. v. Lewis, 23 Fla. 193; McCreary v. Fike, 2 Blackf. 374; Andrews v. Hammond, 8 id. 540.

³ Dunbar v. Lindenberger, 3 Munf. 169.

⁴ Beard v. Van Wickle, 3 Cow. 335; Starbuck v. Lazenby, 7 Blackf. 268; McFall v. Wilson, 6 id. 260; Carter v. Spencer, 4 Ind. 78; Burr v. Waterman, 2 Cow. 36, n.; Wood v. Lemon, 1 Blackf. 198.

⁵ Wilson v. Darwin, 1 Hill, 670; Patterson v. Blakeney, 33 Ala. 338.

⁶ Darrah v. Steamboat, 15 Mo. 187. It is otherwise in Maine. Hanley v. Sutherland, 74 Me. 212.

⁶ Baker v. Loomis, 5 Wend. 134; Havens v. Hartford, etc. R. Co., 28 Conn. 69. But see Hyde v. Moffatt, 16 Vt. 271.

⁷ Jackson v. Rathbone, 8 Cow. 297; Hanks v. Evans, Hardin, 45; Frazier v. Lomax, 1 Cranch. C. C. 328; Turner v. Carter, 1 Head, 520.

⁸ Chicago, etc. R. Co. v. Ward, 16 Ill. 522; Hightower v. Hawthorne, Hempst. 42; South Ottawa v. Foster, 20 Ill. 296; Cox v. Way, 3 Blackf. 143; Ewing v. Coddington, 5 id. 433; Dennison v. Mair, 14 East, 622; Cairo, etc. R. Co. v. Holbrook, 72 Ill. 419; Thompson v. Haislip, 14 Ark. 220; Mizell v. McDonald, 25 Ark. 38; Bridges v. Stephenson, 10 Ill. App. 369; Madison Co. v. Smith, 95 Ill. 328.

may establish that the plaintiff has no legal claim to any damages, it will only have the effect to reduce or mitigate those he may recover.¹

¹ Briggs v. Sneghan, 45 Ind. 14; Turner v. Carter, 1 Head, 520; Carey v. Day, 86 Conn. 152; Dailey v. New York, etc. R. Co., 32 Conn. 856; Daniels v. Saybrook, 34 Conn. 877; Lamphear v. Buckingham, 38 Conn. 237.

In Havens v. Hartford, etc. R. Co., 28 Conn. 69, the court considered the effect of a demurrer overruled on the assessment of damages, and held that the case stood with reference to the evidence necessary and admissible, precisely as it would have stood upon default; that the admissions of the demurrer are applicable even to the principal wrongful act only in its relation to the question whether there is a cause of action, and not at all in its relation to the question of damages. And as to the scope of exonerating evidence for the purpose of mitigation, Ellsworth, J., said: "Nothing would be more extraordinary than, on such a general open declaration as this, for the court to overlook and reject evidence already received, conducing to show the cause, occasion or extent of any supposed injuries sued for. We say it would be an extraordinary spectacle — a court overlooking and disregarding material and decisive proof, upon the idea that a demurrer blinds the eyes of the judge to whatever is beneficial to the defendants. Why, on a hearing in damages even, that which might have availed as a complete defense, had it been so pleaded, may be brought in to reduce the damages — as the payment of an account, or a discharge and release, is evidence before auditors in an action of account, to prove there is nothing in

arrears. In the case of Williams v. Miner, 18 Conn. 464, this court held that evidence tending to prove the truth of the slanderous words might be admitted to affect the question of damages, although a plea in bar might have been put in. In this case, Ch. J. Church says: 'We are not satisfied that a defendant should be deprived of the benefit of mitigating circumstances for no better reason than that they conduce to prove the truth of the charge.' The same general doctrine is held in Hyde v. Moffatt, 16 Vt. 271. Besides, for aught that appears, the plaintiff was willing that all this evidence should come in. He certainly did not object to it until afterwards, and perhaps the material parts of it came from his own lips in his testimony in chief or on his cross-examination. And so, too, he need not have gone into the transaction at all, if he had confidence in the consequences of the demurrer; and we think he would not, but would have remained silent, if he had not believed and was not instructed by counsel that the burden of proof lay on him if he expected to recover substantial damages. And certainly whatever the plaintiff might attempt to prove to aggravate the damage he sought to recover, the defendant may meet with counter-proof, and so confine him to his mere nominal damages.

"I have already said that the most correct view of this declaration is, that the defendants are sued as common carriers for a breach of duty in not carrying the plaintiff safely and carefully to Middleton. If this be so, if negligence and omission are the gist of the action, and all that is said

[777] § 431: Not allowed to disprove cause of action. It is generally held that on the assessment of damages after a default, or on an equivalent state of the record, evidence denying the cause of action or tending to show that no right of

about the ticket and the scuffle and the special injuries sustained by the plaintiff are collateral to the issue, and need not be proved to enable the plaintiff to recover, then they are not admitted, any of them, by the demurrer, and there is nothing left for further controversy between the parties.

“Following out this view of the declaration I inquire what are we to understand as admitted *in this case* by the demurrer? In my judgment nothing but that the defendants were common carriers on the road in question, and received the plaintiff into one of their cars to carry him with care and safety from New Haven to Middleton, and have failed to do as it agreed. This gives a complete cause of action. Strike this out of the declaration and it is by no means certain that there is enough left to enable the plaintiff to recover; but with this in and the rest stricken out there is enough left for a good cause of action. The wrongful acts specified go only to the manner and special consequences of the defendant's default. But if we are wrong in our view, if the action is founded in misfeasance rather than non-feasance, and the gist of the action is the positive acts of the defendant's agents, the result will not be essentially different; for that only one of these acts needs to be proved on the general issue—the tearing of the plaintiff's coat—the putting the hand violently upon his person—the raising him from the seat—or the attempt to eject him from the car; each would sustain the action, even in that point of view; and therefore

only one is proved by the verdict or demurrer, and not even that specifically. May not the defendants show on the hearing in damages, notwithstanding the demurrer, that the plaintiff's knee was not hurt at all? Or if so that it was caused by his attempt to assail the conductor, or in his twisting his limb under the seat to keep from being ejected from the car, or in springing over the seat to avoid the conductor? If so and the injury to the knee may be denied and disproved, the manner and degree in which it is claimed to have been done by the defendants may be disproved; for the greater includes the less, and the proof of the manner may well show, as it did in this case, that the plaintiff was the author of this particular injury; and were it true that the defendants by plea could have set up such misconduct of the plaintiff in bar of the action, which we by no means concede, still the entire proof being before the court, and it appearing that there had been no negligence, misconduct or fault of the defendants, it would be strange indeed for the court to adjudge the defendants to pay the plaintiff damages brought upon himself by his unpardonable contumacy and violence, when it is not found that the particular injury to the knee was caused by the defendants' agents at all.

“Nor does it follow from the demurrer that the character of the scuffle in the car, when the plaintiff set the rules of the company at defiance, cannot be known and judged of and made the rule of right between the parties. It cannot be so. The demurrer cannot be allowed to

action exists is inadmissible in mitigation of damages.¹ [778] In an action for false imprisonment it is not admissible to show that the plaintiff was guilty of the offense charged and the regularity of the proceedings against him. The default admitted all the material averments properly set forth in the declaration, and, of course, the false imprisonment and everything essential to establish the right to recover. The only debatable question for the examination or consideration of the jury is the amount of damages, and that ought to be examined and decided on the assumption that the false imprisonment had been committed by the defendants.² The evidence in such a case would not be admissible under the general [779] issue in justification, without being specially pleaded, unless made so by statute; and the reasons given are to prevent surprise upon the plaintiff on the trial and to enable him to meet the defendant upon equal terms in respect to the evidence.³ These reasons are equally strong against allowing the evidence without notice *in mitigation* of damages, besides the inconsistency of hearing evidence in contradiction of the legal effect of the record, and which is not pertinent to any issue presented by it. If this practice were tolerated it would enable defendants to have substantially the benefit of a justification in every case in which evidence could be procured to establish it without notice to the plaintiff of such defense; for, if admissible, and the justification should be proved, the least effect that could reasonably be given to it would be to reduce the inquest to nominal damages. This would be the standard of damages in all cases upon such proof.⁴ When an action is brought on a contract set out in the declaration, and there is

clothe the acts of the defendants' agents (supposing them to be improper) with a character or quality which will not allow a full examination of them on their merits, or which *must* exonerate the plaintiff contrary to the justice of the case, and contrary to what would have been the result in a trial on the general issue."

¹ Russ v. Gilbert, 19 Fla. 54; Lee v. Knapp, 90 N. C. 171; Froust v. Eerton, 15 Mo. 619; Sweet v. McDaniels,

89 Vt. 272; Garrard v. Dollar, 4 Jones' L. 175; Curry v. Wilson, 48 Ala. 638. See McKyring v. Bull, 16 N. Y. 297.

As to the difference between the proceedings in this particular under the statutory and common-law writ of inquiry, see Reeb v. Bosch, 17 Ill. App. 426.

² Foster v. Smith, 10 Wend. 377.

³ Id.; 1 Chitty's Pl. 493.

⁴ Foster v. Smith, *ubi supra*, per Nelson, C. J.

a default on the assessment of damages, no evidence which goes to deny the existence of the contract, or tends to avoid it, is competent; the default admits it as set forth and concludes the defendant from denying it.¹

A sheriff's jury was not uniformly resorted to at common law or by the English practice for the assessment of damages upon proof. When it was anticipated that some difficult point of law would arise in the course of the inquiry, or where the facts were deemed important, the inquiry was conducted before the chief justice or a judge of assize.² So in this country as to the manner of selecting the jury and conducting the inquiry, or under what circumstances a referee by some name may perform the same office, there is no uniformity.

§ 432. **Jury tam quam.** Where there are several defendants and one suffers default and the others plead the same jury that tries the issue will assess the damages on the default. [780] If those who plead succeed, only nominal damages can be assessed against the defaulting defendant.³ On the determination of the issue on a plea in abatement the judgment is peremptory, and the same jury should assess damages;⁴ but if this is omitted they may be subsequently assessed as upon default by another jury or the court according to the nature of the case.⁵

§ 433. **When new jury may be called.** It was laid down in an early case in New Jersey that where the jury who try the cause omit to assess the damages, in case the matter omitted to be inquired of by them is such as goes to the very point of the issue and constitutes the gist of the action, as in *assumpsit* and trespass, and upon which, if a false verdict be found by the jury, an attaint will lie against them, then such matter cannot be supplied by a writ of inquiry; for there the party injured may lose his action of attaint, which will not lie upon an inquest of office. But where the matter omitted

¹ Id.; *East India Co. v. Glover*, 1 Strange, 612; *Lamphear v. Buckingham*, 33 Conn. 248-250; *Curry v. Wilson*, 48 Ala. 638.

² 1 Sellon's Prac. 344; *Havens v. Hartford, etc. R. Co.*, 28 Conn. 90.

³ *State v. Reinhardt*, 81 Mo. 95; *Day v. Brawley*, 1 Pa. St. 429.

⁴ *Eichorn v. Le'maitre*, 2 Wils. 367.

⁵ *Frye v. Hinckley*, 18 Me. 320.

to be inquired of by the principal jury does not go to the point in issue, nor constitute the gist of the action, but is collateral thereto, it may be supplied by a writ of inquiry. Therefore, in an action for dower, the jury not having assessed damages, a writ of inquiry was allowed.¹

§ 434. Correction of error in assessment. If the court or referee assessing damages have made a mistake in the computation of the amount, which can be clearly shown, it may even after judgment be corrected by the court, if it be of such a nature that it may be done without injustice to the opposite party. In an early case in New York² there was a mistake in the assessment of damages by computing interest for one year less than the actual time. It not being observed, judgment was perfected and collected; and plaintiff's satisfaction thereof was entered of record. When the mistake was shown to the court it was adjudged that the proceedings should be amended subsequently to the interlocutory judgment, [781] unless the defendant should pay the additional interest within thirty days after service of the rule. A new trial may be granted where the verdict has been taken for too small a sum in consequence of the plaintiff's attorney inadvertently computing interest for too short a time.³ And the proper mode of making such corrections, as for excessive interest, is by a new trial. Where a verdict was taken on a note and the jury had to ascertain simply principal and interest, and the error assigned was that the amount found exceeded both, it was held that as the jury determined the matter on evidence, and it was their peculiar province to assess damages, neither the appellate court, nor even the court below, had control over the matter unless by awarding a new trial. And such a trial cannot be awarded by the appellate court for insufficiency of evidence.⁴

¹ *Stalcope v. Copner*, 2 N. J. L. 131.

² *Mechanics' Bank v. Menthorn*, 19 Johns. 244.

³ *Winn v. Young*, 1 J. J. Marsh. 51.

⁴ *Baldwin v. Stebbins*, 1 Ala. 180.

SECTION 3.

PAYING MONEY INTO COURT.

§ 435. **Admits cause of action to amount paid.** Payment of money into court admits the cause of action stated in the declaration to the amount paid in, but nothing more; and beyond that amount the defendant may make his defense.¹ It is a payment *pro tanto*.² The plaintiff has a right to take it out, and the defendant has not.³ The subsequent death of the defendant, and the revival of the action against his administrator, do not change the effect of the payment.⁴

[782] § 436. **Payment to plaintiff after suit.** Payments made by the defendant to the plaintiff after suit brought may be proved under the general issue to reduce damages.⁵ If after suit brought the defendant pays and the plaintiff receives the full amount of the claim sued for, the latter cannot afterwards obtain judgment for nominal damages so as to recover costs. Such payment, it has been held, may be proved under the general issue with notice of payment; a special plea to the further maintenance of the action is not necessary.⁶ When paid into court the sum paid is considered as stricken out of the declaration; if the plaintiff proves no larger indebtedness the defendant is entitled to the verdict.⁷ But if the jury find that a larger sum was due, the verdict and judgment should be for the whole amount of the plaintiff's demand;⁸ the sum paid in will be credited on the execution.

¹ Spaulding v. Vandercook, 2 Wend. 431; Johnston v. Columbian Ins. Co., 7 Johns. 315; Murray v. Bethune, 1 Wend. 191; Phelps v. Town, 14 Mich. 374; Hubbard v. Knous, 7 Cush. 556.

² Murray v. Bethune, *supra*; Goslin v. Hodson, 24 Vt. 140.

³ Id.; Reed v. Armstrong, 18 Ind. 446; Hopkins v. Stephenson, 1 J. J. Marsh. 341; Morrow v. Smith, 4 B. Mon. 99.

⁴ Id.; Carey v. Choat, 6 Up. Can. Q. B. (O. S.) 467.

⁵ McMillian v. Wallace, 3 Stew. 185; Williams v. Tappan, 23 N. H. 385; Britton v. Bishop, 11 Vt. 70; Dana v. Sessions, 46 N. H. 509.

⁶ Buell v. Flower, 39 Conn. 462; Bendit v. Annesley, 27 How. Pr. 184. But see Williams v. Tappan, 23 N. H. 385.

⁷ Bank of Columbia v. Sutherland, 8 Cow. 336; Dakin v. Dunning, 7 Hill, 30.

⁸ Dakin v. Dunning, *supra*; Bennett v. Odom, 30 Ga. 940.

SECTION 4.

EVIDENCE.

§ 437. **Must be adapted to damages claimed.** The proof of damages must vary with the causes for which they are recoverable. They are, however, susceptible of one general division, marking a plain distinction in respect to the matter of proof; that is, a division into damages which are fixed by rules of law, and measurable by pecuniary valuation; and those recoverable in other cases, in which elements of [783] damage may be considered by the jury without pecuniary estimate of the injury in evidence, or any precise legal guide for determining the amount. Of the former class are damages for breach of contract, other than promises to marry; and for torts in respect to property, unaccompanied by aggravations for which punitive damages are allowed. Of the latter class are all damages recoverable for bodily pain or mental suffering. The inquiry of damages, when it is properly entered upon, whether upon trial of an issue, or mere assessment, presupposes a right of action established, except where actual injury and damage are the gist of the action. In either case a specific cause of injury, stated in the declaration, is assumed; and unless it can be legally assumed the inquiry of damages is premature. On trial the plaintiff is entitled to that assumption when he has introduced proof of that cause which gives him a right to go to the jury upon it; and in cases of default or demurrer overruled, the cause stated is admitted by failure to deny it by pleading. If that assumption or admission is maintained the law declares, except in cases where actual injury is the gist of the action, that the plaintiff has sustained some damage. Whether he shall have more than nominal damages depends on whether the case stated and proved or admitted includes the legal measurement of his damages to a larger amount; or, otherwise, whether the required proof to show them has been introduced.

In the nature of things, therefore, the evidence appropriate to the mere question of damages must relate to and tend to show the extent of the injury, and aid the jury in fixing an equivalent expression in money. In many supposable cases

much of the learning which pertains to that luxuriant branch of the law may be invoked on this question, but it is not practicable or necessary for the present purpose to pursue the subject into much detail.

§ 438. Burden of proof. An important consideration at the outset of the inquiry of damages, and at every step in its progress, is the *burden of proof*, or to what extent the plaintiff has made a *prima facie* showing. If his action is upon an express promise to pay money, the establishment of the right to maintain it involves a *prima facie* showing of the amount due according to the purport and tenor of the promise. Matter of discharge or reduction must be shown by the defendant. A promise, not fulfilled, of something else which is definite in quantity and capable of valuation presents, at first, only the one question of value at the time when the contract should have been performed.

§ 439. Intendments against defendant for holding back evidence. When money or property has been intrusted by the plaintiff, or has otherwise come to the defendant under such circumstances as to impose on him the duty to return or account for it, the plaintiff may rest on proof of the value of that which would naturally and directly result from the performance of that duty. The defendant's refusal or omission to account according to his duty, or to make disclosure necessary on account of his fault or superior means of information, will subject him to the consequences of having all doubts resolved on the most favorable hypothesis for the plaintiff, within his proof.¹ In other words, the law will make every reasonable intendment against him.² Thus, where a person who has wrongfully converted property will not produce it, it will be presumed against him to be of the best description.³ A man who wilfully places the property of others in a situation where it cannot be recovered, or its true amount or value ascertained, either by mixing it with his own, or in any other manner, will

¹ Bryant v. Stilwell, 24 Pa. St. 314; Arrott v. Brown, 6 Whart. 9; Mc-Askew v. Odenheimer, 1 Baldwin, 380; Reynolds v. McCord, 6 Watts, 288.

² Mortimer v. Cradock, 7 Jurist, 45; Preston v. Leighton, 6 Md. 88.

³ Thompson v. Thompson, 9 Ind. 323; Armory v. Delamirie, 1 Str. 504; Betts v. Jackson, 6 Wend. 180; 1 Smith Lead. Cas. 584; Curry v. Gray v. Haig, 20 Beav. 219; Jones v. Wilson, 48 Ala. 638.

Murphy, 8 Watts & S. 275, 301;

be compelled to bear all the inconveniences of the uncertainty or confusion which he has produced, even to the extent of surrendering the whole if the parts cannot be discriminated; or responding in damages for the highest value at which it can be reasonably estimated.¹

§ 440. **Same as to plaintiff.** If goods are sold with- [785] out any express stipulation as to price, and the vendor refuses to give clear evidence of their value, they are presumed to be worth only the lowest price for which goods of that description usually sell; unless the vendee himself be shown to have suppressed the means of ascertaining the truth; then a contrary presumption arises, and they are taken to be of the very best description.² Where a contractor was prevented by the defendant, his employer, from fulfilling his contract, for which an entire sum was to be paid, and the cost of completing it could not be shown, the plaintiff was held entitled to recover as the measure of damages the contract price.³ The plaintiff is not entitled to recover, without proof of damages, solely on the presumption *contra spoliatores*; but, by its operation, his evidence will receive more favorable consideration; and he may have the right to resort to evidence of inferior grade.⁴

§ 441. **Plaintiff must prove pecuniary items; opinions.** The plaintiff must prove pecuniary elements of damage, payments made, liabilities incurred, or any other losses sustained; and that they proceeded as effects from the act complained of. His proof, for this purpose, must often be required to exhibit pecuniary loss occasioned by the defendant preventing, by the alleged wrong or breach of contract, a state of things which the plaintiff had contracted or otherwise prepared for, or by the destruction or partial change of an existing state of things which he had a right to have continue. In making this proof the general rule in respect to witnesses must be observed, that

¹ Note to *Armory v. Delamirie*, 1 Smith Lead. Cas. 589, citing *Lupton v. White*, 15 Ves. 432; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 108. See *Gilbert v. Kennedy*, 22 Mich. 117; *Allison v. Chandler*, 11 Mich. 542; *Harris v. Rosenberg*, 48 Conn. 227.

² Smith's Note to *Armory v. Dela-*

mirie, supra; *Clunnes v. Pezzey*, 1 Camp. 8 and note.

³ *Baldwin v. Bennett*, 4 Cal. 392; *Coffee v. Meiggs*, 9 Cal. 368.

⁴ *Askew v. Odenheimer*, 1 Baldw. 380; *Life, etc. Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend. 81; *Harden v. Hesketh*, 4 H. & N. 175.

they can only testify to facts; except that in matters of science and skill, or as to value, those having special knowledge may give their opinions. The exception, in other words, is that a witness may be asked his opinion as an expert when the question relates to a deduction from facts supposed, or from facts which are within his knowledge, and they are peculiar to a science, art or profession in which he has special training or knowledge not common to the world.

§ 442. Opinions upon subjects of common experience and observation. In some cases a witness who is not an expert is allowed to state his conclusion as to a fact of common experience and observation, when that conclusion is arrived at by the exercise of judgment in view of a multitude of minute particulars which cannot be adequately described to a jury.¹ In an action upon a building contract a mason may be asked how long, in his opinion, it would take to dry the walls of a house so as to render it safe and fit for human habitation.² A witness properly qualified has been allowed to give his opinion to aid in establishing how much or what proportion of the grain was left upon the straw by a tenant after threshing [787] buckwheat.³ There is a growing tendency to the doc-

¹ *Smith v. Gugerty*, 4 Barb. 614; 288; *Brill v. Flagler*, 23 Wend. 354; *Missouri, etc. R. Co. v. Richards*, 8 Whitbeck v. N. Y. C. R. Co., 36 Kan. 101; *Alfonso v. United States*, 2 Barb. 644; *Joy v. Hopkins*, 5 Denio, Story, 421; *Tibbetts v. Haskins*, 16 84; *Sisson v. Cleveland, etc. R. Co.*, Me. 283; *Crouse v. Holman*, 19 Ind. 14 Mich. 489; *Whitman v. Boston, etc. R. Co.*, 7 Allen, 313; *Simpkins v. Low*, 49 Barb. 382; *Brainard v. Boston, etc. R. Co.*, 12 Gray, 407; *Clark v. Baird*, 9 N. Y. 183; *McDonald v. Christie*, 42 Barb. 36; *White v. Hermann*, 51 Ill. 243; *Ohio, etc. R. Co. v. Irvin*, 27 Ill. 178; *Same v. Taylor*, 27 Ill. 207; *La Fayette, etc. R. Co. v. Winslow*, 66 Ill. 219; *McCollum v. Seward*, 62 N. Y. 316.

² *Smith v. Gurgerty*, 4 Barb. 614.

³ *Harpending v. Shoemaker*, 37 Barb. 270. In this case Johnson, J., said: "The standard works upon the law of evidence do not furnish us any light upon this question, and the reported cases do not seem to have established any clear and well

trine, if it be not already established, that opinions of ordinary witnesses may be given upon matters of which they have personal knowledge in all cases in which, from the very nature

defined rule upon the subject of the admissibility of evidence resting in the judgment or opinion of an informed and competent witness, in matters of common experience and observation, having little, if any relation to questions of science and skilled experts. Indeed, the cases appear to have created confusion and uncertainty, instead of establishing order and certainty upon this subject. I shall cite only a few of them. *DeWitt v. Barly*, 17 N. Y. 340; S. C., 5 Seld. 371; *Clark v. Baird*, id. 183; *Morehouse v. Mathews*, 2 Comst. 514; *People v. Eastwood*, 14 N. Y. 562; *Roch. & Syr. R. Co. v. Budlong*, 6 How. Pr. 467; S. C., 10 id. 289; *Cook v. Brockway*, 21 Barb. 531; *Nellis v. McCarn*, 35 id. 115. The books are full of cases upon this subject, but enough have been cited to show that the rule is not yet fixed upon any well defined principle. . . .

"Much of the difficulty, I think, upon many of these questions, has arisen from not discriminating between mere opinion, founded and expressed upon some hypothesis stated, or statement of facts related by another, and knowledge of a witness, which is in part opinion or judgment, and in part observation and experience, in regard to the very matter upon which he is called to testify. It is every day's experience in the trial of causes at the circuit that witnesses are called upon to state their judgment or opinion, upon questions of value, of quantity, of size, of distance, of time and the like, where there has been no test applied by measurement or otherwise. And this species of evidence has been found absolutely necessary

to even a tolerable administration of justice. Indeed, to refuse it would in very many cases operate as a complete denial of justice. A brief reference to a very few of the most common cases will not be inappropriate in the discussion of this question. In actions of trespass, to recover for the destruction of crops, partial or total, by animals or otherwise, witnesses acquainted with the crop, and the average yield of such crops, after seeing the extent of the destruction, are allowed to state their judgment or opinion as to the quantity of grain destroyed. In actions of tort, for taking an unmeasured quantity of grain, or an unmeasured portion from a quantity measured, witnesses who had seen the grain before, and the portion, if any, left afterwards, are allowed to give their opinion or judgment as to the quantity taken. In actions of assault and battery, where the instrument is not produced, witnesses who saw it are uniformly allowed to state their judgment or opinion as to the length and size of it, and the distance they were at the time of the affray from the spot where it took place, the time when, etc. Many more instances might be mentioned, equally in point, in which the rule would scarcely be disputed by any one; where it is perfectly obvious that the knowledge, in great part, rests on the judgment or opinion of the witness, founded upon his observation. It is his conclusion of fact from what he saw or experienced. That this is *the common law of evidence* upon trials, and must have been always, will, I am confident, be confirmed by the assent of all judges and

[788] of the subject, the facts disconnected from such opinions cannot be so presented to a jury as to enable them to pass upon the question with the requisite knowledge.¹

§ 443. Instances of rejection and admission of opinions. Ordinary witnesses may testify whether a person is intoxicated or sober.² Upon such a question it was said in a

lawyers of much experience in trials at *nisi prius*. A question of this character, precisely, was put to the same witness upon the trial in this case. The crop, it seems, had been injured by the frost, and the witness was asked what proportion of the crop had been destroyed by the frost. He answered that, in his judgment, one-half had been thus destroyed. The question was objected to, but the answer was allowed. That it was properly allowed can, I think, admit of no doubt. The fact could scarcely be proved to the apprehension of the jury in any other way. No description in language could have brought the facts before their minds in such a manner as would enable them to form any intelligent judgment upon it. But the question rejected was precisely of the same character. It sought to ascertain the proportion or quantity of the grain left upon the straw after threshing. How could this be described to a jury, so as to enable them to decide, without the conclusion of fact of the witness, founded upon his examination? This question was not framed with much skill, but the object of it is entirely apparent. It did not call for a mere opinion, but for the knowledge of the witness, of an existing fact; knowledge inferior in degree, however, to that which is absolute and certain. But it was his knowledge, nevertheless, derived partly from observation and partly from opinion or judgment. And this knowledge must, of necessity, have existed in

the mind of the witness, with far greater clearness and certainty than it could have been communicated to the minds of the jury by any statement he might have made of what he saw merely, however clear and lucid such statement might have been. If witnesses were to be permitted to state to a jury those facts only of which they have absolute and certain knowledge, not only the range of inquiry but the province of remedial justice would be very materially contracted."

¹ *Spear v. Drainage Com'rs*, 113 Ill. 632; *Carthage T. Co. v. Andrews*, 102 Ind. 134 (citing numerous cases); *Parker v. Chambers*, 24 Ga. 518; *Kearney v. Farrell*, 28 Conn. 317; *Townsend v. Bonwill*, 5 Harr. 474; *Lund v. Tyngsborough*, 9 Cush. 36; *Detroit, etc. R. Co. v. Van Steinburg*, 17 Mich. 99; *Norton v. Moore*, 3 Head, 480; *Curtis v. Chicago, etc. R. Co.*, 18 Wis. 312; *Butler v. Mehrling*, 15 Ill. 488; *Harris v. Panama R. Co.*, 3 Bosw. 7; *Willis v. Quimby*, 31 N. H. 485; *Eastman v. Amoskeag M. Co.*, 44 id. 143; *Carrier v. Boston, etc. R. Co.*, 34 id. 498; *Hackett v. B. C. & M. R. Co.*, 35 id. 390; *State v. Avery*, 44 id. 392; *Whittier v. Franklin*, 46 id. 23; *State v. Shinborn*, id. 497; *Hardy v. Merrill*, 56 id. 227; *McKee v. Nelson*, 4 Cow. 355; *Commonwealth v. Sturtevant*, 117 Mass. 122; *Benson v. McFadden*, 50 Ind. 431; *State v. Folwell*, 14 Kan. 105; *Underwood v. Waldron*, 33 Mich. 232; *Milwaukee & M. R. Co. v. Eble*, 3 Pin. (Wis.) 334.

² *People v. Eastwood*, 14 N. Y. 562.

New York case: "A child six years old may answer whether a man (whom it has seen) was drunk or sober; it does not require science or opinion to answer the question, but observation merely; but the child could not, probably, describe the conduct of a man so that from its description others could decide the question. Whether a person is drunk or sober, or how far he was affected by intoxication, is better determined by the direct answer of those who have seen him than by their description of his conduct. Many persons cannot describe particulars; if their testimony were excluded great injustice would frequently ensue."¹ The opinions of unprofessional witnesses may be received on the question of mental imbecility or insanity,² and as to the health or physical condition of

¹ Id. See *Clark v. Baird*, 9 N. Y. 196. In this case Johnson, J., said: "Evidence of opinion is also recognized as proper on the same ground of necessity in cases where language is not adapted to convey those circumstances on which the judgment must be formed. In questions of identity of persons or things language is wholly incapable to convey the appearances and sensible marks on which alone an intelligent judgment can be formed. So, too, in respect to handwriting; who would undertake to describe in words the ground upon which he recognizes his own, with any expectation, by that means, of enabling another person to pronounce upon its genuineness? In these cases the opinion of the witness is received because there are no other means of investigation adapted to the inquiry." *Mayor v. Pentz*, 24 Wend. 675; *Priest v. Nichols*, 116 Mass. 401.

² *De Witt v. Barly*, 17 N. Y. 340; *White v. Bailey*, 10 Mich. 155.

In *Beaubien v. Cicotte*, 12 Mich. 501, Campbell, J., after an extended review of cases, said: "From the best examination which it has been possible for us to make of the Eng-

lish practice, we are satisfied that in all of the courts, civil and criminal, as well as in the ecclesiastical courts, the practice concerning proof of mental condition is the same, and permits all who have had means of observation to testify concerning the existence and measure of capacity with reference to the matter in controversy; while it does not permit those who do not testify from personal observation to give a direct opinion of capacity, except upon some given hypothesis. In every case the witnesses who speak from their own observation are expected to describe, as well as they can, what has led to their conclusions, as well as the means of observation. But the cases referred to show that, in many instances, the results of very limited observation have been permitted;—the safeguard of cross-examination and a comparison of testimony being deemed sufficient to prevent any mischief from the imperfect knowledge of single witnesses. In the United States the authorities all require the witness to state such facts as he can, in order that the jury may be better enabled to determine the value of his opin-

another person. When questions as to the condition of the mind or body are in issue there are many things in the acts, deportment and appearance of the party which create a fixed and reliable judgment in the mind of the observer that words cannot convey to the jury. That a person appears to be sick or sad may well be known by observation, and yet there is no way to describe the appearance except by words that necessarily embody the conclusion reached by observation.¹

[793] A witness cannot be permitted to express an opinion which depends upon events which may or may not transpire, and which cannot be foreseen and foretold as the result of any experience, nor stated as a deduction of science or law.² And cannot be asked his opinion of the amount of injury from a competitive business carried on in violation of an agreement,³ nor of the value of the reversion of land over which a railroad has been located; for it depends on the length of time that the easement will continue, and in rela-

tions;—stress being, of course, laid upon his opportunities of judging. In many cases the facts which can be described will be very significant to a jury, while there are many facts susceptible of a different interpretation from which a jury could obtain no light whatever without the aid of the witnesses' judgment. The strongest indications of mental weakness or aberration often exist in expressions and appearances incapable of reproduction, even by an accomplished mimic; and yet decisive to any intelligent eye-witness. The great body of decisions in the United States adopt the English practice, and open the door to all testimony which can enlighten the jury, from every kind of witnesses. . . . The mere fact that a person is a physician does not of necessity qualify him to speak *ex cathedra* on this subject, especially when every one can assume the title with impunity. Men of real knowledge can always gain a respectable hearing on their own merits. The fact that in all impor-

tant litigations the experts are found arrayed against each other renders it necessary for the jury to determine which is right, and in doing this they must fall back upon their own knowledge of human nature. Judge Redfield has referred to this difficulty in the chapter on Senile Dementia, Am. Law Reg., vol. 13, 458, 459. See, also, Taylor's Med. Juris., 890, 891, 907, and *DeLafield v. Parish*, 25 N. Y. 9. And where the witnesses speak from their own observation, the questions which may be put to one may be also properly put to another." *Hardy v. Merrill*, 56 N. H. 227; *Hathaway v. National L. Ins. Co.*, 48 Vt. 355.

¹ *Carthage T. Co. v. Andrews*, 102 Ind. 138; *Bridge v. Oshkosh*, 17 Wis. 368; *Sydleman v. Beckwith*, 43 Conn. 9; *Thompson v. Stevens*, 71 Pa. St. 161; *Wilkinson v. Moseley*, 30 Ala. 562.

² *Dana v. Fiedler*, 12 N. Y. 40; *Norman v. Wells*, 17 Wend. 162.

³ *Norman v. Wells*, 17 Wend. 136.

tion to that there has been no experience on which a satisfactory opinion can be based.¹ For the same reason the opinions of witnesses are regarded as mere conjectures in respect to the detriment to a turnpike from a near railroad by reason of its trains frightening horses traveling upon such turnpike;² so as to the effect of building a railroad on the good will of a mill;³ or the effect in depreciating the value of a stock of goods by impairing their reputation from the seizure and detention of them on an attachment.⁴ To ascer-

¹ *Boston, etc. R. Co. v. Old Colony, etc. Co.*, 8 Allen, 142. See *Perrine v. Hotchkiss*, 58 Barb. 77.

² *Troy, etc. R. Co. v. Northern Turnpike Co.*, 16 Barb. 100.

³ *Canandaigua, etc. R. Co. v. Payne*, 16 Barb. 273.

In a petition for the assessment of damages caused by the location of a railroad upon a wharf used for the wood and lumber business and the land connected therewith, one who has been engaged in the lumber business for several years, on a wharf in the vicinity, and has been for several years connected with railroads, but who has no particular means of knowledge as to the effect of constructing railroads over wharves similar to that in question, is not thereby qualified to give an opinion as an expert as to the effect of the location or the value of that wharf for the business there conducted. *Boston, etc. R. Co. v. Old Colony, etc. R. Co.*, 8 Allen, 142.

⁴ *Alexander v. Jacoby*, 23 Ohio St. 858. In this case a witness testified that there would, by the mere act of seizure and levy of attachment, be a stigma or discredit cast on them which would diminish their market value in the hands of the owners, to whom they were returned, from five to fifteen per cent. He added that it arises from the fact that the community would expect to buy the

goods lower on account of their having been seized by the sheriff. That it depended to some extent on the length of time the sheriff held them, and the extent that it was known in the community, and the amount of competition which existed at the time in that business at that place, and the extent of the interruption of the business. *McIlvaine, J.*, said: "We think . . . that the admission of this testimony cannot be justified. . . . The testimony given cannot be regarded as an opinion as to the market value of the goods discharged from the attachment. No reference was had to knowledge of the goods, or prices realized on sales, or prices demanded or offered in the market. The opinion was not based upon a knowledge of any fact, nor upon the assumption of any fact, which fairly and reasonably indicates the amount of loss or damage resulting from the causes named, unless it be the very limited experience of the witness in relation to matters of that sort. But experience in such matters is not within the exception in favor of the opinion of experts. There is no skill or peculiar knowledge to be acquired by persons engaged in that particular line of trade, or any other trade, whereby a better opinion may be given in relation to the effect of the causes referred to. Customers would

[794] tain the value of a growing crop damaged by an overflow of water, it is competent to ask a witness conversant with the growth of such crops how much, in his opinion, a given field would produce per acre.¹ An expert witness' opinion is admissible in an action for breach of a covenant against incumbrances to prove the difference in value occasioned by a right of way.² In an action for a personal injury, a physician who attended the plaintiff after he had been in the care of another physician for two weeks may be asked and testify what, so far as he can judge, had been the first physician's treatment, and in what respects it differed from his own; what effect, so far as he could judge, it had upon the plaintiff; and whether or not he saw any evidence that the plaintiff had been injured by such treatment.³ If the apprehended consequences of a personal injury are such as in the ordinary course of nature are reasonably certain to ensue, experts may testify concerning them; but not if such consequences are contingent, speculative and merely possible.⁴ A competent witness may give his opinion of the amount of work a mill would do in a given time to assist a jury in determining the amount of damage a party sustained by the failure of a mill-wright to complete its construction within the agreed time.⁵ A competent practical machinist may testify whether a machine is so made as to successfully do the work it was designed for;⁶ but opinions as to the profits which might have been realized from the use of a machine if plaintiff's possession of it had not been disturbed are not admissible.⁷

be quite as capable as tradesmen to form an opinion in relation thereto. Indeed, the only end accomplished by the admission of such testimony is the substitution of witnesses for jurors, and theories for facts."

In *Knapp v. Barnard*, 78 Iowa, 347, it is held that a dealer in goods similar to those attached may testify as an expert as to the damage done by carrying over to another season goods which were only salable at certain periods.

¹ *Phillips v. Terry*, 5 Abb. (N. S.)

827; *Lommeland v. St. Paul, etc. Ry. Co.*, 35 Minn. 412.

² *Wetherbee v. Bennett*, 2 Allen, 428.

³ *Barber v. Merriam*, 11 Allen, 323.

⁴ *Strohm v. New York, etc. R. Co.*, 96 N. Y. 305; *Turner v. Newburgh*, 109 id. 301; *Griswold v. New York, etc. R. Co.*, 115 id. 61.

⁵ *Clifford v. Richardson*, 18 Vt. 620.

⁶ *Greenleaf v. Stockton H. & A. Works*, 78 Cal. 606.

⁷ *Crabbs v. Koontz*, 69 Md. 59.

§ 444. **Opinions as to amount of damages.** Ordinarily a witness is not allowed to give his opinion of the amount of *damages* a party sustains from a given act or omission, because when he does so he includes the law as well as the fact. It is the duty of the jury to assess the damages according to the rule of law which it is the province of the court to lay down for their guidance; and witnesses are allowed only to furnish the data from which the amount is arrived at.¹ And where the injury consists of distinct elements it is not competent to ask a witness to make a general estimate, but he should [795] be asked to estimate the specific items separately.² But where unliquidated damages result from an injury complicated in its circumstances and difficult of description, a witness acquainted personally with all the facts may be permitted to give his opinion of the total or aggregate loss or value, as some evidence of the fact.³ Thus, experienced gardeners may testify as to the amount of damage done to a garden and nursery by smoke, heat and gas.⁴ The amount of damage resulting from an aggravated trespass has been held to be a proper subject for the opinion of a competent witness.⁵ In some jurisdictions

¹ Van Deusen v. Young, 29 N. Y. 9; Morehouse v. Matthews, 2 id. 514; Harger v. Edmonds, 4 Barb. 256; Giles v. O'Toole, id. 261; Clark v. Baird, 9 N. Y. 183; Rodgers v. Fletcher, 18 Abb. 299; Doolittle v. Eddy, 7 Barb. 74; Atlantic, etc. R. Co. v. Campbell, 4 Ohio St. 588; Cleveland, etc. R. Co. v. Ball, 5 id. 568; Richardson v. Northrup, 66 Barb. 85; Thompson v. Dickhart, id. 604; Green v. Plank, 48 N. Y. 669; Whitmore v. Bowman, 4 G. Greene, 148; Norman v. Wells, 17 Wend. 136; Fish v. Dodge, 4 Denio, 811; Doff v. Lyon, 1 E. D. Smith, 536; Evansville, etc. R. Co. v. Fitzpatrick, 10 Ind. 120; Armstrong v. Smith, 44 Barb. 120; Simons v. Monier, 29 id. 419; Gilbert v. Cherry, 57 Ga. 128; Montgomery, etc. R. Co. v. Varner, 19 Ala. 185; Stein v. Burden, 24 id. 130; Decker v. Myers, 81 How. Pr. 872; Bass Furnace Co. v. Glasscock, 82 Ala. 452; Chandler v. Bush, 84 id. 102; Young v. Cureton, 87 id. 727; L. R. M. R. & T. Ry. v. Haynes, 47 Ark. 497; Montelius v. Atherton, 6 Colo. 224; Central R. v. Senn, 73 Ga. 705; Stewart v. Lanier House Co., 75 id. 582; Hurt v. St. Louis, etc. Ry. Co., 94 Mo. 255; White v. Stoner, 18 Mo. App. 540; Wakeman v. Wheeler & W. Manuf. Co., 101 N. Y. 205; Reed v. McConnell, id. 270; Houston, etc. R. Co. v. Burke, 55 Texas, 328; Bain v. Cushman, 60 Vt. 343; B. & M. R. Co. v. Schuntz, 14 Neb. 421; Same v. Beebe, id. 463.

² Dougherty v. Stewart, 48 Iowa, 648.

³ White Deer Creek Imp. Co. v. Sassaman, 67 Pa. St. 415.

⁴ Vandine v. Burpee, 18 Met. 288.

⁵ Razzo v. Varni, 81 Cal. 289; Chicago, etc. R. Co. v. Schaffer, 26 Ill. App. 280.

witnesses are not permitted to give opinions as to the amount of damage sustained by taking land under condemnation proceedings; they are restricted to giving estimates of its value before and after it was taken or injured.¹ In others such opinions are received.² Expert evidence is not competent to show the damages resulting to a horse from its having run away, no wound or physical injury following.³

§ 445. Proof of value. Proof of value is important in the great majority of cases. If the value in question is general, and there is a market value, the latter governs.⁴ The proof of it is not altogether by opinions; it is capable of proof as a fact in many cases. Many staple commodities and articles of merchandise are very definitely classified, and a multitude of transactions fix a standard of values every day, which are the prices paid and received for them. When the value of such property is in question a witness must exercise judgment and give his opinion as to the class to which the property belongs; but the current or market price of that class at a given time and place is matter of fact. A witness who can by his special knowledge classify the property, and who is also acquainted with the current market price, may be asked in a single question what in his opinion is its market value; or he may testify alone to the market value, or alone to its quality, and [796] how it should be classified.⁵ In such cases the market

¹ Alabama, etc. R. Co. v. Burkett, 42 Ala. 83; Brunswick, etc. R. Co. v. McLaren, 47 Ga. 546; Hagaman v. Moore, 84 Ind. 496; Harrison v. Iowa, etc. R. Co., 86 Iowa, 823; Ottawa, etc. R. Co. v. Adolph, 41 Kan. 600; Grand Rapids v. Grand Rapids & I. R. Co., 58 Mich. 641; Atlantic, etc. R. Co. v. Campbell, 4 Ohio St. 583; Brown v. Providence, etc. R. Co., 12 R. I. 238.

² Tucker v. Massachusetts C. R., 118 Mass. 546; Keithsburg & E. R. Co. v. Henry, 79 Ill. 290; Spear v. Drainage Com'rs, 113 id. 632; Portland & R. Co. v. Deering, 78 Me. 61; Sherman v. St. Paul, etc. Ry. Co., 30 Minn. 227; Telephone Tele. Co. v. Forke, 2 Tex. App. Civil Cas. 318; Railroad

Co. v. Foreman, 24 W. Va. 662; Snyder v. Western Union R. Co., 25 Wis. 60; White Deer Creek Imp. Co. v. Sasaman, 67 Pa. St. 415; Rochester & S. R. Co. v. Budlong, 6 How. Pr. 467; S. C., 10 id. 289; Hine v. New York E. R. Co., 36 Hun, 293.

³ Van Wagoner v. New York C. Co., 36 Hun, 552. Compare Donnelly v. Fitch, 186 Mass. 558.

⁴ Dana v. Fiedler, 12 N. Y. 40; Graham v. Maitland, 6 Abb. (N. S.) 327; Berry v. Dwinel, 44 Me. 255; Muller v. Eno, 14 N. Y. 597; McCarty v. Quimby, 12 Kan. 494; Smith v. Griffith, 3 Hill, 333; Pfeil v. Kemper, 8 Wis. 315; Stevens v. Springer, 23 Mo. App. 875.

⁵ Washington Ice Co. v. Webster,

price is so precise that witnesses may be allowed to give their opinion of the value of an article described, though not seen. And so in any case when the subject to be valued can be stated hypothetically.¹ A witness may testify to market prices from hearsay, for in the nature of things a knowledge of them must be so gained.²

Where the question is, what was the value at a particular place, and there was no market value there, proof may be given of such value at other places, with the cost of transportation, or other facts which will enable the jury to deduce the value at the place in question.³ Evidence of the value at other places than that in question is inadmissible where the evidence is clear that there is a value at that place.⁴ But to exclude evidence of the price elsewhere, it should appear that like property had been bought and sold at the place in question in the way of trade in sufficient quantity or often enough to show a market value.⁵ To some extent the proof of values at other places is within the discretion of the court,⁶ though the

68 Me. 449; *Whitbeck v. New York C. R. Co.*, 86 Barb. 644; *Miller v. Smith*, 112 Mass. 470; *Beecher v. Denniston*, 18 Gray, 354; *McCollum v. Seward*, 62 N. Y. 816; *Mercer v. Vose*, 67 N. Y. 56; *Browne v. Moore*, 32 Mich. 254; *Shepherd v. Willis*, 19 Ohio, 142; *Todd v. Warner*, 48 How. Pr. 234.

¹ *Id.*; *Whiton v. Snyder*, 88 N. Y. 299. See *Toledo, etc. R. Co. v. Smith*, 25 Ind. 288.

² *Whitney v. Thacher*, 117 Mass. 523; *Whelan v. Lynch*, 60 N. Y. 469; *Lush v. Druse*, 4 Wend. 818; *Stone v. Covell*, 29 Mich. 359; *Cliquot's Champagne*, 3 Wall. 114; *Sisson v. Cleveland, etc. R. Co.*, 14 Mich. 489; *Cleveland, etc. R. Co. v. Perkins*, 17 Mich. 296; *Savercool v. Farwell*, *id.* 308; 1 Whart. on Ev., § 449; *Thatcher v. Kancher*, 2 Colo. 698.

³ *Harris v. Panama R. Co.*, 58 N. Y. 660; *Washington Ice Co. v. Webster*, 68 Me. 449; *Berry v. Dwinel*, 44 Me. 255; *Hanson v. Lawson*, 19 Kan.

201; *Young v. Lloyd*, 65 Pa. St. 199; *Eaton v. Mellus*, 7 Gray, 566; *Rice v. Manley*, 66 N. Y. 82; *Wemple v. Stewart*, 22 Barb. 154; *Sellar v. Clelland*, 2 Colo. 532; *Gregory v. McDowel*, 8 Wend. 485; *Dubois v. Glaub*, 52 Pa. St. 238; *Williamson v. Dillon*, 1 Har. & G. 444; *Cleveland, etc. R. Co. v. Perkins*, 17 Mich. 296; *Marshall v. New York C. R. Co.*, 45 Barb. 502; *Savercool v. Farwell*, 17 Mich. 308; *Diefendorff v. Gage*, 7 Barb. 18; *Kansas Stock Yard Co. v. Couch*, 12 Kan. 612; *Grand Tower Co. v. Phillips*, 23 Wall. 471; *Coxe v. England*, 65 Pa. St. 212; *Toledo, etc. R. Co. v. Kickler*, 51 Ill. 157; *Hill v. Canfield*, 56 Pa. St. 454.

⁴ *Gregory v. McDowel*, 8 Wend. 485; *Wemple v. Stewart*, 22 Barb. 154; *McCarty v. Quimby*, 12 Kan. 494; *Durst v. Burton*, 47 N. Y. 167.

⁵ *Harris v. Panama R. Co.*, 58 N. Y. 660.

⁶ *Durst v. Burton*, *supra*. This was an action for fraud in the sale of

[797] value is to be fixed at a particular time; yet, where the damages depend upon the market value of merchandise, such, for instance, as cotton, the law contemplates the range of the entire market, and the average of prices thus found running through a reasonable period of time,¹ so that sudden, unnatural and spasmodic values, not indicating the real state of the market, may not prevail.² Where the price or value at the

cheese, which, by the terms of the contract, was purchased to be forwarded to and sold in New York. After the plaintiffs had proven its value in New York the defendants offered to prove that cheese was shipped and sold by plaintiffs in the London market at a certain price, and that the cheese market in New York was regulated and controlled mainly by the prices in London and Liverpool. The trial court having excluded this evidence, the decision was affirmed. Church, C. J., said: "Where the evidence is clear and explicit that there is a market at the place of delivery, the value at other places is not strictly competent. 8 Wend. 485. Nor was it material whether the plaintiff actually realized more or less, because the result of his final disposition of it might be produced by contingencies entirely foreign to the principle upon which the rule rests. The only possible relevancy of the proposed proof was its legitimate bearing upon the value of the cheese in New York on the 11th day of August; and a majority of the court think it was properly rejected for the reasons: First, that there was explicit proof of the value of the cheese in New York. Second, the evidence offered tended not to prove the value at that time, but a considerable period afterwards. Third, the offer should have negatived any material change in the price up to the time of the sale in London, and should have embraced

the circumstances, if they existed, which, presumptively at least, would repel the idea of any claim for reclamation." *Lowell v. County Com'rs*, 146 Mass. 408; *Raridan v. Central Iowa Ry. Co.*, 69 Iowa, 527.

¹ *Graham v. Maitland*, 6 Abb. (N. S.) 327; *Smith v. Griffith*, 3 Hill, 333.

² *Durst v. Burton*, 47 N. Y. 167; *Kansas Stock Yard Co. v. Couch*, 12 Kan. 612; *Cronouse v. Fitch*, 14 Abb. 346. See *Wilson v. Holden*, 16 Abb. 183. In *Trout v. Kennedy*, 47 Pa. St. 387, the court held it not erroneous to instruct the jury that "'it is not allowable for one to trespass upon the rights of another, and in his defense allege that there was no market for the property taken or destroyed, or that it was of less value on this account than it had been before or was subsequently.'" The language must be taken with the context. So far as any rule for the measurement of damages was stated, it was that the plaintiff was entitled to the just and full value of the property. If, at the time of the trespass, the market was depressed, the jury were told that too much importance was not to be given to that fact. The owner might have intended to keep the property for a better market, or have designed it for his own use. And a trespasser is to have meted out to him in damages an assessment commensurate with the injury he has done. If, at any particular time, there be no market demand for an article, it is not, of course, on that

time in question cannot be directly proved it may be inferred from circumstances; and among those which may be [798] proved are sales at other times near that date, especially if the property is such as bears a stable, rather than a fluctuating, price.¹ Where the property to be valued cannot be definitely graded, and, therefore, is not susceptible of valuation by a precise market standard, but being property which is frequently bought and sold, has, in some sort, a market value, there is more scope for testimony which is matter of opinion in the proof of value.

§ 446. Value may be proved by opinions. Except in New Hampshire² it is competent to prove the value of property by the opinions of witnesses who have the requisite knowledge. A witness who swears to a knowledge of horses from having kept and dealt in them for a number of years, and that he is acquainted with the horse in question, is competent to give an opinion of its value.³ So one acquainted with real estate, the worth of which is in dispute, may give his opinion of its value.⁴ Any person knowing the property and its value may testify on that question. The witness is not required to be, or to have been, engaged in buying and selling such property.⁵ Every one is supposed to have some idea of the value of such property as is in general use; as it was said in one case, it is not necessary to have been a butcher or drover to prove the

account, of no value. What a thing will bring in the market at a given time is, perhaps, the measure of its value then, but it is not the only one."

¹ *Denton v. Smith*, 61 Mich. 481; *White v. Concord R. Co.*, 80 N. H. 188; *Benham v. Dunbar*, 103 Mass. 365; *Abell v. Munson*, 18 Mich. 306; *Roberts v. Dunn*, 71 Ill. 46; *Columbia Bridge Co. v. Geisse*, 38 N. J. L. 39; *French v. Piper*, 43 N. H. 439; *Waterson v. Seat*, 10 Fla. 326; *Campbell v. United States*, 8 Ct. of Cla. 240; *Cohen v. Platt*, 69 N. Y. 348.

² *Rochester v. Chester*, 3 N. H. 349; *Peterborough v. Jeffrey*, 6 id. 462; *Whipple v. Walpole*, 10 id. 130; *Beard*

v. Kirk, 11 id. 397; *Hoitt v. Moulton*, 21 id. 586.

³ *McDonald v. Christie*, 42 Barb. 36; *Haskell v. Mitchell*, 53 Me. 468; *Vandine v. Burpee*, 13 Met. 288.

⁴ *Shaw v. Charlestown*, 2 Gray, 107; *Clark v. Baird*, 9 N. Y. 183; *Whitman v. Boston, etc. R. Co.*, 7 Allen, 313; *Kellogg v. Krauser*, 14 S. & R. 137; *Snow v. Boston, etc. R. Co.*, 65 Me. 230; *Ohio, etc. R. Co. v. Taylor*, 27 Ill. 207; *La Fayette, etc. R. Co. v. Winslow*, 66 Ill. 219; *Kankakee & S. R. Co. v. Horan*, 131 Ill. 288.

⁵ *Lafayette v. Nagle*, 113 Ind. 425; *White v. Hermann*, 51 Ill. 243; *Browne v. Moore*, 32 Mich. 254.

value of a cow.¹ An operator in coal mines who knows the thickness of a vein of coal, its convenience to transportation facilities and market, may approximately estimate the value of a lease of the land for mining purposes.² To a large extent value in a business sense consists of the opinions of persons familiar with the market, and these are based upon what is said and reported by others. Hence if a person shows that his business is such that, by commercial reports or like means, he is familiar with the current market prices, he is competent to testify on the subject although he may not have actual personal knowledge of any particular sales.³

In an action to recover compensation for services, witnesses acquainted with their value in the vicinity in which they were rendered may give their opinion thereof.⁴ The value of services [799] requiring the exercise of professional or artistic skill may be proved by common usage; that is, what is the usual or customary rate of compensation.⁵ Attorneys and solicitors are entitled to have allowed them for their professional services what they reasonably deserve, having due reference to the nature of the service, and their standing in the profession for learning, skill and proficiency; and for the purpose of aiding the jury in determining the matter it is proper to receive evidence as to the price usually charged and received for similar

¹ Ohio, etc. R. Co. v. Irvin, 27 Ill. 178; Brill v. Flagler, 23 Wend. 354; Pennsylvania, etc. R. Co. v. Bunnell, 81 Pa. St. 414.

² Chambers v. Brown, 69 Iowa, 213.

³ Hoxsie v. Empire Lumber Co., 41 Minn. 548.

It is held in Massachusetts that whenever the value of any particular kind of property, which may not be presumed to be within the actual knowledge of all juries, is in issue, the testimony of witnesses acquainted with the value of similar property is admissible, although they have never seen the very property in question. Miller v. Smith, 112 Mass. 475; Beecher v. Denniston, 13 Gray, 354; Fitchburg R. Co. v. Freeman, 12 Gray, 401; Brady v. Brady, 8

Allen, 101; Cornell v. Dean, 105 Mass. 435; Lawton v. Chase, 108 Mass. 238. But see Westlake v. St. Lawrence Ins. Co., 14 Barb. 206.

It is held in Fairley v. Smith, 87 N. C. 367, that a witness cannot be permitted to testify to knowledge of the market value of a commodity in a distant city if his information is solely derived from reading the market reports in a paper published at a point remote from such city.

⁴ Lewis v. Trickey, 20 Barb. 387; Hough v. Cook, 69 Ill. 581; Parker v. Parker, 33 Ala. 459; Kendall v. May, 10 Allen, 59.

⁵ Pfeil v. Kemper, 3 Wis. 315; Tibbetts v. Haskins, 16 Me. 283; Elfelt v. Smith, 1 Minn. 125.

services by other persons of the same profession, practicing in the same court,¹ and the opinions of those in the same profession as to their value.² A witness who is an attorney, and who knows the service performed by another, is competent to testify as to its value. It is proper, in such a case, to take into consideration the amount in controversy, the legal questions involved, and the general importance of the case. But what one attorney receives is no criterion of the value of the services of another attorney in the same case in the absence of any showing that the services were similar, the skill equal, and the time spent the same.³

§ 447. **By actual sales.** Evidence of actual sales of other similar property to that in question may be shown.⁴ It is competent to prove the value of other like property by which the property in question may be compared.⁵ It was held in an Illinois case,⁶ in an action to recover damages for the breach of a contract to convey land, that the plaintiff in order to show the value of the premises in controversy might prove, not only the worth of other adjacent property at or near the date of such contract, but even the value of land of a different quality lying in the immediate vicinity, leaving it to the jury to [800] determine the difference in value.⁷

The market value of a commercial commodity may be de-

¹ *Stanton v. Embrey*, 93 U. S. 548; *ject. Head v. Hargrave*, 105 U. S. 45.
Vilas v. Downer, 21 Vt. 419.

When a lawyer is employed professionally to take entire charge of matters involving at the same time professional and non-professional services, it is not possible to draw a line and say that his whole employment is not professional. *Kelly v. Richardson*, 69 Mich. 430. See *Turnbull v. Richardson*, id. 400.

² *Thompson v. Boyle*, 85 Pa. St. 477; *Williams v. Brown*, 28 Ohio St. 547; *Covey v. Campbell*, 52 Ind. 157; *Lamoure v. Carol*, 4 Denio, 370; *Hart v. Vidal*, 6 Cal. 56.

Opinions as to the value of an attorney's services are not to preclude the jury from exercising their "own knowledge and ideas" on the sub-

³ *Ottawa University v. Parkinson*, 14 Kan. 159; *Same v. Welsh*, 14 Kan. 164.

⁴ *Paine v. Boston*, 4 Allen, 168; *Gilpin v. Consequa*, 8 Wash. C. C. 184; *Truitt v. Baird*, 12 Kan. 420.

⁵ *Blanchard v. New Jersey S. B. Co.*, 59 N. Y. 292; *Simmons v. Carvill*, 68 Mo. 416. But see *Gouge v. Roberts*, 58 N. Y. 619.

⁶ *White v. Hermann*, 51 Ill. 248.

⁷ It is not competent for a defendant in condemnation proceedings to show what other persons have been allowed for their property in order to establish the value of his by comparison. *Springfield v. Schmook*, 68 Mo. 394.

terminated by offers to sell, made by dealers in the ordinary course of business, as well as by actual sales; and the statements of dealers in answer to inquiries as to price are competent evidence.¹ An offer of sale made by the owner of property, otherwise than by way of compromise, may be considered as evidence of value.² The market reports of such newspapers as are relied upon by the commercial world may be given in evidence.³ The credit to be given to them depends upon extrinsic evidence; and in New York they are not admissible without proof as to the sources from which the information they purport to give is derived.⁴

§ 448. **By elements of value.** In an action by the assignee against the assignor of a claim upon the United States, assigned to the plaintiff in payment for goods sold in California just before its annexation to the United States, and which the plaintiff had been prevented by the defendant's acts from collecting, evidence of the first cost of the goods in the United States, the expense of transporting them to California, the duties there, and the usual and proper addition for profits, and also of sales of like articles for cash during three or four months before and after the sale, and that the plaintiff within two months afterwards repurchased some of the same goods for cash at advanced rates, was held admissible in connection with other evidence of the market value of the goods at that time and place.⁵ In this case Dewey, J., said: "We are to remember that these sales were made in California in 1847, when the state of things was very different from that of the present time, and when the market value of merchandise could not be settled as easily and satisfactorily as it could be in New York and Boston. Under the circumstances of this case, we think the verdict should not be set aside on account of the admission of this evidence. It might have some tendency to aid in settling the market value of such property at that distant and uncertain market. . . . Such evidence as was admitted, in the present case, could only be used in aid

¹ *Harrison v. Glover*, 72 N. Y. 451; 14 Mich. 489; *Peter v. Thickstun*, 51 Stevens v. Springer, 23 Mo. App. 375. *id.* 589; *Fairley v. Smith*, 87 N. C.

² *Springfield v. Schmook*, 68 Mo. 367; *Henkle v. Smith*, 21 Ill. 238. 394.

⁴ *Whelan v. Lynch*, 60 N. Y. 469.

³ *Sisson v. Cleveland & T. R. Co.*,

⁵ *Eaton v. Mellus*, 7 Gray, 566.

of the other evidence in the case, or resorted to from peculiar circumstances, as in a case where no market value could be shown directly. It might be of very little weight, but we do not think that the verdict should be set aside for its admission." When the property has no market value, proof may be made of such facts as exist tending to show value or to aid the jury in estimating it. The cost of manufacturing a raw article [801] for and transporting it to market may properly be inquired into.¹ When, however, it appears that a manufactured article has an established market value, evidence as to the cost of the material and of the manufacture is irrelevant and inadmissible.² In an action for the conversion of forty of the San Francisco W. W. Co.'s bonds of \$500 each, claimed by plaintiff to have been purchased by the defendant as agent for him, which bonds did not express in what kind of money they were to be paid, and which were purchased by defendant with his own funds at more than their face in currency, it appeared that the company received gold for its water dues; that gold continued in use in California during the period involved, and that payments and contracts were made in and on the basis of gold; that bonds of this issue were not bought and sold in the market, but that money was borrowed upon them as collateral at par in gold. Plaintiff offered to show that they were paid in gold; this evidence was rejected. The court directed a verdict for nominal damages, stating in substance that the legal tender acts substantially made \$100 in greenbacks worth \$100 in gold. Held error; that said acts did not affect the question as to the value of chattels in an action for their conversion; nor did they forbid the recognition of the difference between gold and currency in fixing the damages in such an action; the evidence was sufficient to require the submission of that question to the jury.³ Witnesses qualified by knowledge may testify to the state of the market with reference to the property in question, the large or small supply, the price at which sales were made; and these are all proper subjects for the consideration of the jury.⁴ It has been held that where there have been no actual sales of an article, a witness may

¹ *Brizsee v. Maybee*, 21 Wend. 144;
Masterton v. Mayor, 7 Hill, 61.

³ *Simpkins v. Low*, 54 N. Y. 179.

⁴ *Washington Ice Co. v. Webster*,

² *Althouse v. Alvord*, 28 Wis. 577. 68 Me. 449.

[802] give his opinion of its value.¹ So if there is no near market.² Where a span of horses was sold with a warranty that they were all right for a livery team, and it appeared that one was with foal, evidence was offered in respect to its difference in value on that account; and the court held that, there being no market value, a witness could not be asked to give his opinion of a mare in that condition for livery purposes, and her value if not in that condition, and then give his opinion as to the difference in value.³

§ 449. **Proof of the value of dogs.** In New York it has been held that in an action to recover damages for killing a dog the opinions of witnesses as to its value are not admissible in evidence.⁴ It is said that dogs in general have no market value, and their price is fanciful, depending on the taste of the owner; that in order to justify opinions as to their value they must be such in particular as have a market value.⁵ But in Illinois it was held in trespass for killing a dog that it could not be assumed as matter of law that dogs have no commercial value; that it was a question of fact. And it was held that an instruction was wrong that the jury should find the value of the dog from its qualities, rather than from the opinions of witnesses who placed their estimate on the loss of services of the dog for a given time; the jury have a right to consider both in fixing its value.⁶ In determining the value of the property in question, the cost or contract price may be shown, as well as what it sold for even at auction.⁷

¹ *Simpkins v. Low*, 49 Barb. 382; *Erd v. Chicago, etc. R. Co.*, 41 Wis. 65; *Whitfield v. Whitfield*, 40 Miss. 352; *Anson v. Dwight*, 18 Iowa, 241; *Rogers v. Ackerman*, 22 Barb. 184; *Watson v. Bauer*, 4 Abb. (N. S.) 273; *Derby v. Gallup*, 5 Minn. 119; *Nellis v. McCarn*, 35 Barb. 115; *Robertson v. Knapp*, 35 N. Y. 91; *Lanning v. Chicago, etc. R. Co.*, 68 Iowa, 502; *St. Louis, etc. Ry. Co. v. Chapman*, 38 Kan. 307.

² *Burger v. Northern Pacific R. Co.*, 22 Minn. 343.

³ *Whitney v. Taylor*, 54 Barb. 586.

⁴ *Dunlap v. Snyder*, 17 Barb. 561.

⁵ *Brown v. Hoburger*, 52 Barb. 15. See *Brill v. Flagler*, 28 Wend. 354; *Cantling v. Hannibal, etc. R. Co.*, 54 Mo. 385.

⁶ *Spray v. Ammerman*, 66 Ill. 309. Dogs are property for the malicious destruction or injury of which an action for damages will lie. *Johnson v. McConnell*, 80 Cal. 545; *State v. McDuffie*, 34 N. H. 523.

⁷ *Luse v. Jones*, 39 N. J. L. 707; *French v. Piper*, 43 N. H. 439; *Roberts v. Dunn*, 71 Ill. 46; *Ford v. Smith*, 27 Wis. 261.

§ 450. **Witnesses may be asked grounds of opinions.** A witness who has given his opinion of value, or upon any other matter of common experience and observation, may be asked in his examination in chief to state the grounds of his opinion.¹ If the party calling a witness to testify as to the damages does not ask for the grounds or reasons of his opinion, and the cross-examination does not cover that ground, the appellate court will not heed an objection on that account.²

§ 451. **Physical examination of plaintiff.** A majority of the courts which have passed upon the question hold that in a suit to recover for personal injuries the trial court may exercise its discretion by making an order requiring the plaintiff to submit to a physical examination by surgeons or physicians for the purpose of enabling them to testify concerning the nature and extent of the injuries sustained.³ In Arkansas the defendant has a right to such examination if the expert evidence is not abundant, in which case the exercise of the court's discretion will not be reviewed.⁴ In Texas, if the right exists, the courts will not enforce it unless it is shown to be essential to the accomplishment of justice between the parties.⁵ In Nebraska if the application is made during the trial and it is sought to have the examination made by experts called by the defendant alone, and not by those which may be mutually agreed upon or selected by the court, it may be denied.⁶ The

¹ *Dickinson v. Fitchburg*, 13 Gray, 546; *Hatton v. Board of Com'rs*, 55 Ind. 194; *Tate v. Missouri, etc. R. Co.*, 64 Mo. 149; *Carpenter v. Robinson*, 1 Holmes, 67; *Jones v. Merrimack R. L. Co.*, 31 N. H. 381; *Clark v. State*, 12 Ohio, 483; *Mahoney v. Ashton*, 4 Har. & McH. 63; *Goodwyn v. Goodwyn*, 20 Ga. 600; *Dickinson v. Barber*, 9 Mass. 225; *Doe v. Reagan*, 5 Blackf. 217; *Wilson v. McClean*, 1 Cr. C. C. 465; *Bank of Columbia v. McKenny*, 3 id. 361; *Gentry v. McMinnis*, 3 Dana, 382; *Morse v. Crawford*, 17 Vt. 499; *Crawford v. Andrews*, 6 Ga. 244; *Royall v. McKenzie*, 25 Ala. 363; *Sherman v. Blodgett*, 28 Vt. 149; *Riggins v. Brown*, 12 Ga. 271; *Dunham's Appeal*, 27 Conn. 192; *Choice v. State*, 31 Ga. 424.

² *Razzo v. Varni*, 81 Cal. 289.

³ *Atchison, etc. R. Co. v. Thul*, 29 Kan. 466; *Schroeder v. Chicago, etc. R. Co.*, 47 Iowa, 375 (the original and leading case); *White v. Milwaukee City Ry. Co.*, 61 Wis. 536; *Miami & M. T. Co. v. Baily*, 37 Ohio St. 104; *Shepard v. Missouri P. Ry. Co.*, 85 Mo. 629, qualifying *Lloyd v. Railroad*, 53 id. 629; *Alabama, etc. R. Co. v. Hill*, 90 Ala. 71; *S. C.*, 93 id. 515; *Owens v. Kansas City, etc. R. Co.*, 95 Mo. 169; *Stuart v. Havens*, 17 Neb. 211; *Richmond & D. R. Co. v. Childress*, 82 Ga. 719. See *Hatfield v. St. Paul & D. R. Co.*, 33 Minn. 130.

⁴ *Sibley v. Smith*, 46 Ark. 275.

⁵ *L. & G. N. Ry. v. Underwood*, 64 Texas, 463.

⁶ *Sioux City & P. R. Co. v. Finlay-*

Illinois court denies the existence of the power to order such an examination,¹ and so does the New York court of appeals,² the United States supreme court³ and the supreme court of Indiana.⁴ In Ohio the plaintiff's refusal to comply with such an order may result in the dismissal of his action or the court may refuse to hear his evidence.⁵

§ 452. Exhibition of injured parts. In order to show the extent of their disability or suffering plaintiffs in suits to recover for personal injuries may exhibit to the jury their wounds or injured limbs;⁶ but this will not be permitted if a disclosure of the private part of the body is necessary. In such a case examination should be made by experts and testimony given by them concerning it.⁷

§ 453. Expressions of sufferer. The natural utterances and expressions made by an injured person either to his attending physicians or others are proper matters for proof whenever the physical or mental condition of such person is a pertinent subject of inquiry.⁸

§ 454. Photographs. Stereoscopic views and photographs of damaged premises and injured persons, if taken soon after the injury complained of occurred, and properly verified as to their correctness, are admissible to show their condition,⁹ and also to illustrate a defect in a highway.¹⁰

son, 16 Neb. 578; *Stuart v. Havens*, 17 id. 211.

¹ *Parker v. Enslow*, 102 Ill. 272.

² *McQuigan v. Delaware, etc. R. Co.*, 129 N. Y. 50. Previous to the decision by the court of appeals the New York authorities were in conflict; the existence of the power was affirmed in *Walsh v. Sayre*, 58 How. Pr. 334, and denied in *Newman v. Third Avenue R. Co.*, 50 N. Y. Super. Ct. 412, and in *Roberts v. Ogdensburgh R. Co.*, 29 Hun, 155.

³ *Union P. Ry. Co. v. Botsford*, 141 U. S. 250.

⁴ *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401.

⁵ *Miami & M. T. Co. v. Baily*, 37 Ohio St. 104.

⁶ *Schroeder v. Chicago, etc. R. Co.*, 47 Iowa, 375, 382; *Barker v. Perry*,

67 id. 146; *Osborne v. Detroit*, 33 Fed. Rep. 36; *Jordan v. Bowen*, 46 N. Y. Super. Ct. 355; *Hiller v. Sharon Springs*, 28 Hun, 344; *Hatfield v. St. Paul & D. R. Co.*, 33 Minn. 130.

⁷ *Brown v. Swineford*, 44 Wis. 282.

⁸ *Western U. Tel. Co. v. Henderson*, 89 Ala. 510; *Carthage T. Co. v. Andrews*, 102 Ind. 138; *McKeigue v. Janesville*, 68 Wis. 50; *Bridge v. Oshkosh*, 71 id. 363; *Bacon v. Charlton*, 7 Cush. 586; *Hatch v. Fuller*, 131 Mass. 574; *Insurance Co. v. Mosley*, 8 Wall. 397, 405.

⁹ *German Theological School v. Dubuque*, 64 Iowa, 736; *Cozzens v. Higgins*, 1 Abb. App. Dec. 451; *Reddin v. Gates*, 52 Iowa, 210.

¹⁰ *Blair v. Pelham*, 118 Mass. 420; *Barker v. Perry*, 67 Iowa, 146.

§ 455. **Life and annuity tables.** Standard life and annuity tables are admissible in evidence to show the expectancy of life where there is a permanent injury completely destroying the earning power of the party injured, and to prove the probable duration of life. They are not to be accepted as forming a legal basis for a calculation, but as evidence to be considered in connection with all the other evidence upon the question.¹

SECTION 5.

VERDICT AND JUDGMENT.

§ 456. **Deliberations of the jury.** So far as the [803] amount of the verdict depends upon opinion the jurors are to determine it upon their own judgment. They should proceed upon the description of the subject as they find it from the testimony, and avail themselves of such aid as is afforded by the opinions of witnesses allowed to be given them. They are not obliged, however, to yield their own judgment, and should not to conform their verdict to such opinions. Their finding may be more or less in amount than that stated by any witness.²

They will not vitiate their verdict by taking an arithmetical average of their several estimates as an experiment to ascertain their present judgments, or as a basis of their further consideration of the case.³ But it will be a violation of their duty

¹ Knapp v. Sioux City & P. R. Co., 71 Iowa, 41, overruling Simonson v. Chicago, etc. Ry. Co., 49 id. 87; Texas M. Ry. Co. v. Douglass, 69 Texas, 694; Lincoln v. Smith, 28 Neb. 762; Berg v. Chicago, etc. R. Co., 50 Wis. 427; Mulcairns v. Janesville, 67 id. 24; McKeigue v. Janesville, 68 id. 50; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545; Sauter v. New York C. R. Co., 66 N. Y. 50; Central R. v. Crosby, 74 Ga. 737; Hunn v. Michigan C. R. Co., 78 Mich. 513; Cooper v. Lake Shore, etc. Ry. Co., 66 id. 261.

In Shippen's Appeal, 80 Pa. St. 391,

it was ruled that the Carlisle tables were not to be relied upon in estimating the value of an estate by the curtesy; each case must be determined by its own circumstances. They are only admissible when the age of the person whose rights are in question is within the computation contained in them. Rajnowski v. Detroit, etc. R. Co., 74 Mich. 20.

² Western & A. R. Co. v. Brown, 58 Ga. 534; Harvey v. Boswell, 65 id. 550; Brewer v. Tyringham, 12 Pick. 547.

³ Ponca v. Crawford, 28 Neb. 662; Parshall v. Minneapolis, etc. Ry. Co.,

[804] and afford cause for setting aside their verdict if they agree before taking such average to adopt it as their verdict, and determine the amount accordingly,¹ or arrive at it by any game or process of chance.² When a verdict is arrived at by such means there is not a concurrence of views by that intelligent discussion and consideration of the merits of the case which the law enjoins. Every verdict should be the result of reflection, and not the effect of chance or lot. Jurors being sworn to determine according to evidence, suitors have a right to expect that they will examine and decide according to the best of their ability and discernment.³

Whether the affidavits of jurors may be read to show that a verdict has been agreed to in such an irregular way is not settled. In England there are conflicting decisions.⁴ In this

85 Fed. Rep. 649; *McMurdock v. Kimberlin*, 23 Mo. App. 523; *Willey v. Belfast*, 61 Me. 569; *Hunt v. Elliott*, 77 Cal. 588; *Kinsley v. Morse*, 40 Kan. 588; *Deppe v. Chicago, etc. R. Co.*, 38 Iowa, 592; *Barton v. Holmes*, 16 id. 252; *St. Louis, etc. R. Co. v. Myrtle*, 51 Ind. 566; *Guard v. Risk*, 11 id. 156; *Kreider's Estate*, 18 Pa. St. 874; *White v. White*, 5 Rawle, 61; *Harvey v. Rickett*, 15 Johns. 87; *Grinnell v. Phillips*, 1 Mass. 580; *Dorn v. Fenno*, 12 Pick. 521; *Dunn v. Hall*, 8 Blackf. 32; *Pekin v. Winkel*, 77 Ill. 56; *Hendrickson v. Kingsbury*, 21 Iowa, 879.

¹ *Id.*; *Haight v. Hoyt*, 50 Conn. 588; *East Tennessee, etc. R. Co. v. Winters*, 85 Tenn. 240; *Illinois C. R. Co. v. Able*, 59 Ill. 131; *Parkham v. Harney*, 6 S. & M. 55; *Smith v. Chatham*, 3 Caines, 57; *Boynton v. Trumbull*, 45 N. H. 408; *Manix v. Malony*, 7 Iowa, 81; *Barton v. Holmes*, 16 id. 252; *Thompson v. Perkins*, 26 id. 486; *Deppe v. Chicago, etc. R. Co.*, 38 id. 592; *Thomas v. Dickinson*, 12 N. Y. 364; *Harvey v. Rickett*, 15 Johns. 87; *Roberts v. Failis*, 1 Cow. 238; *St. Martin v. Desnoyer*, 1 Minn. 156; *Forbes v. Howard*, 4 R. L. 364; *Schanler v.*

Porter, 7 Iowa, 482; *Ellege v. Todd*, 1 Humph. 43; *Wilson v. Berryman*, 5 Cal. 44.

² *Mitchell v. Ehle*, 10 Wend. 595; *Ruble v. McDonald*, 7 Iowa, 90; *Thompson v. Perkins*, 26 id. 486; *Donner v. Palmer*, 23 Cal. 40; *Birchard v. Booth*, 4 Wis. 67; *Mellish v. Arnold*, Bunb. 51; *Hale v. Cove*, 1 Str. 642.

³ Per *Livingston* in *Smith v. Chatham*, 3 Caines, 57.

In *Roy v. Goings*, 112 Ill. 657, the jury in answer to the court's inquiry said their verdict was the result of addition and division. After being reprobated for their conduct they were sent out again. On returning their verdict was in plaintiff's favor for the same sum as before. On being polled each juror said the verdict was his. It was presumed that the admonition of the court was observed by the jury and the verdict was sustained.

⁴ *Phillips v. Fowler*, Barnes, 441; *Mellish v. Arnold*, Bunb. 51; *Prior v. Powers*, 1 Keb. 811; *Vaise v. Delaval*, 1 T. R. 11; *Jackson v. Williamson*, 2 id. 281; *Rex v. Woodfall*, 5 Burr. 2661; *Aylett v. Jewel*, 2 W. Bl.

country affidavits are rejected,—not in all but in a majority of the states;¹ the decisions have fluctuated in several states, and, when compared, are not referable to any consistent principles.² In Iowa, after some fluctuation, the court lay down this as the true rule: “that affidavits of jurors may be received for the purpose of avoiding a verdict to show any matter occurring during the trial, or in the jury room, which does not essentially inhere in the verdict; as that a juror was improperly approached by a party, his agent or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of the jurors; that the verdict was determined by aggregation and average, or by lot or game of chance, or other artifice or improper manner; but that such affidavit, to avoid the verdict, may not be received to show any matter which does essentially inhere in the verdict itself; as that the juror did not assent to it; that he misunderstood the instructions of the court, the statements

1299; *Clark v. Stevenson*, id. 803; *Straker v. Graham*, 4 M. & W. 721; *Burgess v. Langley*, 5 M. & G. 722; *Addison v. Williamson*, 5 Jurist, 466; *Owen v. Warburton*, 1 B. & P. N. R. 826. See, also, as to general subject of admitting or rejecting affidavits of jurors, *Milsom v. Hayward*, 9 Price, 184; *Hindle v. Birch*, 1 Moore, 455; *Metcalfe v. Dean*, Cro. Eliz. 189; *Vicary v. Farthing*, id. 411; *Heyler v. Hall*, Palm. 325; *Harvey v. Hewitt*, 8 Dowl. P. C. 598; *Norman v. Beamont*, Willes, 484; *Cogan v. Ebdon*, 1 Burr. 883; *Rex v. Simmons*, Sayre, 34.

¹ *McMurray v. Basnett*, 19 Fla. 609, 627; *Reed v. Thompson*, 88 Ill. 245; *Chesapeake & O. R. Co. v. Patton*, 9 W. Va. 648; *Stanley v. Sutherland*, 54 Ind. 339; *Lucas v. Cannon*, 13 Bush, 650; *Roy v. Goings*, 112 Ill. 656; *Johnson v. Allen*, 100 N. C. 131; *Dana v. Tucker*, 4 Johns. 487; *Meade v. Smith*, 16 Conn. 346; *State v. Freeman*, 5 id. 348; *Allison v. People*, 45 Ill. 37; *State v. McLeod*, 1 Hawkes, 344; *O'Barr v. Alexander*, 37 Ga.

195; *Browell v. McEwen*, 5 Denio, 367; *People v. Common Pleas*, 1 Wend. 297; *Knowlton v. McMahon*, 13 Minn. 386; *Cluggage v. Swan*, 4 Bin. 150; *Willing v. Swazey*, 1 Browne (Pa.), 128; *Bosley v. Chesapeake Ins. Co.*, 3 Gill & J. 473, note; *Bladen v. Cockey*, 1 Har. & McHen. 230.

² *Smith v. Chatham*, 3 Cai. 56; *Warner v. Robinson*, 1 Port. 194; *Crawford v. State*, 2 Yerg. 60; *Cochran v. Street*, 1 Wash. (Va.) 79; *Little v. Larabee*, 2 Me. 37; *Howard v. Cobb*, 3 Day, 309; *United States v. Freis*, 8 Dall. 515, note; *Bradley's Lessees v. Bradley*, 4 Dall. 112; *Buckman v. Greenleaf*, 48 Me. 394; *Tenney v. Evans*, 13 N. H. 462; *State v. Hascall*, 6 id. 352; *Ferrill v. Simpson*, 8 Pick. 359; *Grinnell v. Phillips*, 1 Mass. 530; *Woodward v. Leavitt*, 107 id. 453; *Price v. Warren*, 1 Hen. & M. 385; *Commonwealth v. Drew*, 4 Mass. 391; *Suttrel v. Dry*, 1 Murphy, 94; *Cochran v. State*, 7 Humph. 544; *Luster v. State*, 11 id. 169; *Hudson v. State*, 9 Yerg. 408.

of the witnesses, or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow-jurors; or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast."¹ This rule seems to be now settled in that state by being repeatedly approved and restated in subsequent cases. It is also the rule in Kansas² and Tennessee,³ and by statute in California that affidavits of jurors may be read to show that the verdict was arrived at by "a resort to the determination of chance."⁴ The rule excluding jurors' affidavits extends to cases in which they are offered to show mistake on the part of the jurors in respect to the merits of the action, or irregularity or misconduct, or that there was a misconception of the effect of the verdict.⁵ There are some exceptions which will be noticed hereafter.⁶ Such affidavits are competent to support verdicts.⁷ Juries are not bound to itemize their verdicts according to the elements of damage proved.⁸

§ 457. Rendering and amending verdicts. The jury retire from the presence of the court for consideration of their verdict to be given; and it is subject to their consideration until it has been reported to and accepted by the court, actually or constructively recorded, affirmed by them in open court, and they have separated and thus become accessible to the parties.⁹ Thus, in one case,¹⁰ by a misconception of legal terms, the jury had returned a verdict the reverse of what they intended; and it was affirmed by them in open court; but they

¹ Wright v. Illinois, etc. Tel. Co., 20 Iowa, 195.

² Johnson v. Husband, 22 Kan. 277.

³ Crawford v. State, 2 Yerg. 60; Cochran v. State, 7 Humph. 544; Hudson v. State, 9 Yerg. 408; East Tennessee, etc. R. Co. v. Winters, 85 Tenn. 240.

⁴ Hoare v. Hindley, 49 Cal. 274.

⁵ Dalrymple v. Williams, 63 N. Y. 361, citing Clum v. Smith, 5 Hill, 560; Ex parte Caykendall, 6 Cow. 53; Jackson v. Williamson, 2 T. R. 281; Vaise v. Delaval, 1 id. 11; Davis v. Taylor, 2 Chitty, 268.

⁶ §§ 457, 458, *post*.

⁷ Dana v. Tucker, 4 Johns. 487;

O'Brien v. Merchants' F. Ins. Co., 38 N. Y. Super. Ct. 482; Moore v. New York E. R. Co., 24 Abb. New Cas. 77; McMurdock v. Kimberlin, 23 Mo. App. 523; Douner v. Baxter, 30 Vt. 467.

⁸ Ohio & M. Ry. Co. v. Judy, 120 Ind. 397; Union P. Ry. Co. v. Dunden, 37 Kan. 1.

⁹ Cole v. Laws, 104 N. C. 651; Pepper v. Philadelphia, 114 Pa. St. 96, 110; Nickelson v. Smith, 15 Ore. 200; Root v. Sherwood, 6 Johns. 68; Blackley v. Sheldon, 7 id. 32; Goodwin v. Appleton, 23 Me. 453; Lawrence v. Stearns, 11 Pick. 501.

¹⁰ Ward v. Bailey, 23 Me. 316.

had not separated or left their seats, though the writ in the next case had been read to them; when the error being discovered, the presiding judge explained the terms which had been misunderstood, and delivered the papers to the jury again. When a verdict has thus been rendered the duties of the jury have been fully performed and their power exhausted; they cannot afterwards be recalled to alter or amend it.¹ Any recommendation by the jury for a change of their verdict after they have rendered it and separated is inoperative; and any alteration of it made upon such recommendation is invalid.² A verdict was brought into court in writing for the defendant, handed to the clerk, who read it as a verdict for the plaintiff; as so read it was affirmed by the jury, and ordered to be recorded; and thereupon the jury were discharged. Afterwards the wrong reading having been suggested, and it appearing by the written verdict and the affidavit of the jurors that they intended to find for the defendant, the judge ordered the verdict for the defendant to be recorded. This was held erroneous; because the verdict as found and written had not been affirmed in open court, and the order was set aside.³ In another case a jury under instructions from the court found for the plaintiff on both counts of his declaration, and assessed separate damages on each. Thereupon the court instructed them that the plaintiff was not entitled to recover on the second count and ordered them to find for the defendant, which they accordingly did. On the case being brought into [807] the court of last resort on exceptions it was held that the court had no authority to amend the verdict so as to make it conform to the first finding although the first instruction to the jury was right and the last wrong.⁴

The parties may waive the affirmation of the verdict before the separation of the jury after they have agreed. This is frequently done where it is anticipated that the jury will agree upon a verdict during an intermission of the court; they are

¹ *Snell v. Bangor Nav. Co.*, 30 Me. 337; *Walter v. Jenkins*, 16 S. & R. 414; *Sargent v. State Bank*, 11 Ohio, 472; *Sasser v. State*, 13 id. 453; *Rigg v. Cook*, 9 Ill. 336; *Miller v. Hoc*, 1 Fla. 189; *Martin v. Morelock*, 32 Ill. 485; *Richards v. Page*, 81 Me. 563.

² *Id.*; *Shelton v. O'Brien*, 76 Ga. 820.

³ *Bucknam v. Greenleaf*, 48 Me. 894.

⁴ *Roberts v. Rockbottom Co.*, 7 Met. 46.

then directed to reduce it to writing, seal it up, and deliver it to their foreman or the clerk of the court.¹ The jury must appear and affirm their verdict after the court convenes; it is not their verdict before; in other words, the functions of the jury continue until they have rendered their verdict in court, affirmed it and been discharged.² A jury rendered a verdict in writing which had been sealed, and after which they had separated, for the sum of "sixteen and seventy-four dollars." The clerk read it to them \$1,674, and each affirmed it as read. The court say: "Under our practice this last answer by each juror made the verdict. Neither giving an assent in the jury room, nor the signing of a writing there, nor the delivery of it to the clerk, absolutely bound the conscience of any juror in this case; all these are revocable acts; until he gave an affirmative answer to this last question by the clerk, there was space for change of opinion and an opportunity to recall any previous act or word."³ In a late case in Maine a jury were allowed to seal up their verdict after the adjournment of the court for the day, and then to separate for the night. In the morning it was opened and affirmed by eleven, by consent, the twelfth juror being absent by leave after this consent was obtained. [808] The verdict, as affirmed, was for \$9.31. A few minutes after its affirmation, the eleven jurors having retained their seats, they made known to the court that they intended to give a verdict for \$74.31, being \$65 sued for, and \$9.31 interest, and that, by mistake, only the latter sum was inserted in the blank. The defendant's counsel would not consent to the correction. After awaiting the return of the twelfth juror, and finding that he confirmed the statement of his fellows, the court allowed the jury to retire and bring in a new verdict for the sum of \$74.31. This was held to be error, and a new

¹ In practice this course is generally assented to by the parties; consent is probably not necessary. *id.* 254; *Commonwealth v. Dorus*, 108 *id.* 488; *Winslow v. Draper*, 8 Pick. 170.

Sutleff v. Gilbert, 8 Ohio, 405; *Sargent v. State*, 11 *id.* 472; *State v. Eagle*, 13 Ohio, 490; *Green v. Bliss*, 12 How. Pr. 428; *Chapman v. Coffin*, 14 Gray, 454; *Pritchard v. Hennessy*, 1 *id.* 294; *Commonwealth v. Carrington*, 116 Mass. 37; *Brown v. Dean*, 123 *id.* 254; *Commonwealth v. Dorus*, 108 *id.* 488; *Winslow v. Draper*, 8 Pick. 170.

² *Bunn v. Hoyt*, 3 Johns. 255; *Douglass v. Tousey*, 2 Wend. 352; *Morgan v. Bell*, 41 Kan. 345.

³ *Griffin v. Larned*, 111 Ill. 438; *Watertown Ecclesiastical Society's Appeal*, 46 Conn. 230; *Ederlen v. Thompson*, 2 Har. & Gill, 81.

trial was granted. The court say: "Where the error has been committed by the jury, either by returning a verdict for the wrong party, or for a larger or smaller sum than they intended; and by the amendment proposed the verdict would be reversed, or the damages increased or diminished, and the substantial rights of the parties thus changed; when the verdict has been affirmed in open court, and the jury separated, and become accessible to the parties, the only remedy for such a mistake is by setting aside the verdict and granting a new trial." But where the finding of the jury, or the record of it, is defective or erroneous in matter of form, having no connection with the merits of the case, nor affecting the rights of the parties, the court may make the correction.¹ Two recent New York cases extend the rule as to the power of the court over verdicts after the jury has been discharged. In one of them² the foreman mistakenly announced the verdict to be different from what had been agreed to. His statement was recorded by the court. Immediately thereafter and after the jury was discharged the court corrected the error so that the verdict conformed to the action of the jury. Affidavits of the jurors were read to show the mistake. In the other case the action was upon a contract wholly free from all elements of unliquidated damages. The plaintiff, if entitled to a verdict, had a right to a sum certain and *conceded*. The court so charged and stated the precise amount. A verdict was found for the plaintiff and the jury agreed upon the sum stated by the court as the damages, but, being uncertain as to the exact figures, they did not include it or any amount in the verdict, which, pursuant to a stipulation, was returned sealed; the jury were excused from appearing on its being opened. Three days later affidavits of the jurors were presented to show that they all agreed upon a verdict for the full amount, and an amendment was made accordingly. This practice was sus-

¹ *Weston v. Gilmore*, 63 Me. 493; *Thompson*, 1 Taunt. 121; *Ernest v. Little v. Larrabee*, 2 id. 37; *Wood-Brown*, 4 Bing. N. C. 162; *Queen v. ruff v. Webb*, 82 Ark. 612; *Rock-Fall*, 10 L. J. (Q. B.) 145; *Cunning-*

feller v. Donnelly, 8 Cow. 623, 652; *ham v. Ware*, Cro. Jac. 289.

Beekman v. Bemas, 7 id. 29; *Petrie* ²*Dalrymple v. Williams*, 63 N. Y. 361.

v. Hannay, 3 T. R. 659; *Eddowes v. Hopkins*, 1 Doug. 376; *Feize v.*

tained.¹ A case quite similar in its facts, except as to the jurors' affidavits, has recently been otherwise decided in Maryland.²

§ 458. Same subject. At a subsequent term an amendment of a general verdict was allowed by the judge's minutes, where there were several counts for the same cause of action, one of which was bad, so as to take the verdict on the good counts only.³ Where the jury returned a verdict in an action of trover that "the defendant did promise in manner and form as the plaintiff has declared against him," with an assessment of damages, the court at a subsequent term, and after a motion for a new trial, corrected the verdict on the plaintiff's motion by striking out "did promise," and insert-[809] ing "is guilty," and it was held right.⁴ So, in Vermont, where a jury in an action of *assumpsit* rendered a verdict that the defendant is guilty, the court, after their discharge permitted the verdict to be amended by striking out the words "is guilty," and inserting "did promise."⁵

If a jury return a verdict which is not such as the issue requires to be found, the court may send them back to reconsider it with appropriate instructions, at any time before the verdict has been recorded and they discharged.⁶ Before a verdict has been recorded the jury may be required to reconsider it, if there appears to be a mistake; and may be sent out for that purpose or to perfect their finding.⁷ But if the verdict, when returned, settles the rights of the parties, and will

¹ *Hodgkins v. Mead*, 119 N. Y. 166; *Redmond v. Weismann*, 77 Cal. 423.

² *Gaither v. Wilmer*, 71 Md. 361.

³ *Barnard v. Whiting*, 7 Mass. 358.

⁴ *Hoey v. Candage*, 61 Me. 257.

⁵ *Foster v. Caldwell's Estate*, 18 Vt. 176.

⁶ *State v. Clementson*, 69 Wis. 628; *Hatch v. Attrill*, 118 N. Y. 383; *Johnson v. Oakes*, 80 Ga. 722; *Higginbotham v. Clayton*, 80 Ala. 194; *Strobridge Lith. Co. v. Randall*, 78 Mich. 195; *Goodwin v. Appleton*, 22 Me. 453.

In *Woodruff v. Richardson*, 20 Conn. 238, the jury brought in a verdict for \$1,100 as damages for slan-

der; the amount was thought by the presiding judge to be too high, and, after expressing his views, sent the jury out to consider the case again, the result of which was a verdict of \$800. This verdict was retained.

⁷ *Brown v. Dean*, 123 Mass. 254; *Root v. Sherwood*, 6 Johns. 68; *Wolfson v. Eyster*, 7 Watts, 88; *Blackley v. Sheldon*, 7 Johns. 82; *Chapman v. Coffin*, 14 Gray, 454; *Warner v. New York C. R. Co.*, 52 N. Y. 437; *Mason v. Massa*, 122 Mass. 477; *Pritchard v. Hennessey*, 1 Gray, 294; *Sutliff v. Gilbert*, 8 Ohio, 405.

sustain a judgment, it is improper for the judge to send the jury out again for further consideration.¹ It is in the discretion of the trial judge to interrogate the jury on their bringing in a verdict to ascertain upon what principle they have found it, when there is reason to suspect they have made some mistake.² The court will not alter a verdict unless it appears on its face that the alteration is according to the intention of the jury.³ It has no authority to supply substantial omissions in a verdict; nor to reconcile incongruities; but when it is informally expressed the court may and should mould it into form and give it legal effect.⁴

§ 459. **Excessive or insufficient verdict.** If there is [810] a legal measure of damages which the jury have deviated from, by finding either less or more than the plaintiff is entitled to by a preponderance of evidence, the trial court, in the exercise of judicial discretion, will entertain a motion for a new trial on behalf of the party injured by the finding.⁵ So if the jury assess damages not warranted by the declaration, the verdict will be set aside, and the court may do it *ex officio*.⁶ Where there is not a legal measure of damages, and where they are unliquidated, and the amount thereof is referred to the discretion of the jury, the court will not, ordinarily, interfere with the verdict. It is the peculiar province of the jury to decide such cases under appropriate instructions from the court; and the law does not recognize in the latter the power to substitute its own judgment for that of the jury.⁷ Although

¹ Sutliff v. Gilbert, *supra*; Marguard v. Wheeler, 52 Cal. 445.

² Dearborn v. Newhall, 63 N. H. 301; Norris v. Haverhill, 65 id. 89; Jackson v. Dickenson, 15 Johns. 309. See Anderson v. Green, 46 Ga. 361.

³ Spencer v. Gates, 1 H. Bl. 78.

⁴ Stewart v. Fitch, 31 N. J. L. 17; Delaware, etc. R. Co. v. Toffey, 38 id. 525; Woodruff v. Webb, 32 Ark. 612; Hawks v. Crofton, 2 Burr. 698; Foster v. Jackson, Hob. 52; Phillips v. Kent, 23 N. J. L. 155; Thompson v. Button, 14 Johns. 84; Hodges v. Raymond, 9 Mass. 316; Burhans v. Tibbitts, 7 How. Pr. 21; Jones v. Kennedy, 11 Pick. 125; Clarke v.

Lamb, 6 Pick. 512; Porter v. Rummary, 10 Mass. 64; Wilderman v. Sandusky, 15 Ill. 59; Hamm v. Culvey, 84 Ill. 56.

⁵ Walker v. Smith, 1 Wash. C. C. 152; McDonald v. Walker, 40 N. Y. 551; Nutter v. Junction R. Co., 13 Ind. 479; Berry v. Vreeland, 21 N. J. L. 183.

⁶ Stewart v. Tevri, 7 T. B. Mon. 109; Hall v. Hall, 42 Ind. 585.

⁷ Chicago v. Smith, 48 Ill. 107; Bourke v. Bulow, 1 Bay, 49; Waters v. Bristol, 26 Conn. 398; North v. Cates, 2 Bibb, 591; Terre Haute, etc. R. Co. v. Vanetta, 21 Ill. 188; Collins v. Albany, etc. R. Co., 12 Barb. 492.

the verdict may be considerably more or less than in the judgment of the court it ought to have been, still it will decline to interfere unless the amount is so great or small as to indicate that the jury must have found it while under the influence of passion, prejudice or gross mistake; or in other words, that it is the result of accident or perverted judgment, and not of cool and impartial deliberation. When the verdict is thus excessive or deficient the trial court, in its discretion, will interpose and set it aside.¹ But this will not be done at the instance of the defendant on the ground that the damages awarded are insufficient.²

[811] In cases where there is no legal standard of damages, if the appellate court does not find error in the admission or

¹ Goodall v. Thurman, 1 Head, 209; Coleman v. Southwick, 9 Johns. 44; Walker v. Smith, 1 Wash. C. C. 152; Duncan v. Finnyhorn, Sneed (Ky.), 262; M. K. & T. R. Co. v. Weaver, 16 Kan. 456; Simpson v. Pitman, 13 Ohio, 365; Farish v. Reigle, 11 Gratt. 697; Quigley v. Central P. R. Co., 11 Nev. 350; Aldrich v. Palmer, 24 Cal. 513; Shartle v. Minneapolis, 17 Minn. 308; Russell v. Dennison, 45 Cal. 337; Wells v. Sanger, 21 Mo. 354; Terre Haute, etc. R. Co. v. Vanetta, 21 Ill. 188; Beaulieu v. Parsons, 2 Minn. 37; Waters v. Bristol, 26 Conn. 393; Boyers v. Pratt, 1 Humph. 90; Clapo v. Hudson R. Co., 19 Barb. 461; Moore v. Burchfield, 1 Heisk. 203; Union P. R. Co. v. Hand, 7 Kan. 380; Chicago, etc. R. Co. v. Peacock, 48 Ill. 258; North v. Cates, 2 Bibb, 591; Doblin v. Murphy, 3 Sandf. 19; Sherry v. Frecking, 4 Duer, 452; Guard v. Risk, 11 Ind. 156; Harris v. Rupel, 14 Ind. 209; Tater v. Mullen, 23 Ind. 562; Alexander v. Thomas, 25 Ind. 268; Birchard v. Booth, 4 Wis. 67; Bierbauer v. New York, etc. R. Co., 15 Hun, 559; Bass v. Chicago, etc. R. Co., 42 Wis. 654; Plath v. Braunsdorff, 40 Wis. 107; Davis v. Central R. Co., 60 Ga. 329; Cummins v. Crawford, 88 Ill. 312; Solen v. Virginia

City, etc. R. Co., 13 Nev. 106; Illinois C. R. Co. v. Parks, 88 Ill. 373; Hammond v. Mukwa, 40 Wis. 35; Nashville, etc. R. Co. v. Smith, 6 Heisk. 174; Goodno v. Oshkosh, 28 Wis. 300; Nettles v. Harrison, 2 McCord, 230; Armitage v. Haley, 4 Q. B. 917; Price v. Severn, 7 Bing. 402; Tinney v. New Jersey S. B. Co., 5 Lans. 507; Goins v. Western R. Co., 59 Ga. 426; Chicago, etc. R. Co. v. Hughes, 87 Ill. 94; Chicago, etc. R. Co. v. Payzant, 87 Ill. 125; U. P. R. Co. v. House, 1 Wyo. 27; Blunt v. Little, 3 Mason, 102; Whipple v. Cumberland M. Co., 2 Story, 661; Wolford v. Lyon Gravel G. M. Co., 68 Cal. 483; Denver v. Dunsmore, 7 Colo. 328; Sanderson v. Frazier, 8 id. 79; Haight v. Hoyt, 50 Conn. 583; Larson v. Grand Forks, 8 Dak. 307; McMurray v. Basnett, 18 Fla. 609; Central R. v. Roach, 70 Ga. 434; Paul v. Leyenberger, 17 Ill. App. 167; Fairgrieve v. Moberly, 29 Mo. App. 141; Watson v. Harmon, 85 Mo. 443; International, etc. R. Co. v. Telephone & T. Co., 69 Texas, 277; Cottrill v. Cramer, 59 Wis. 231; Whitney v. Milwaukee, 65 id. 409; Clear v. Fox, 26 Fed. Rep. 90.

² Reid v. Houston, 20 Ill. App. 48; Wolf v. Goodhue F. Ins. Co., 43 Barb. 400; Corcoran v. Harran, 55 Wis. 120.

rejection of evidence or in the instructions, the objection that the amount awarded by the jury is excessive or insufficient is not generally available.¹ If, however, on the nature of the case, or on a proper return of all the testimony, the point can be raised in the appellate court, as under the practice in many states it may, it clearly appears that the damages found are excessive, the judgment will be reversed on that ground.² In some jurisdictions the appellate court may reverse in part, and render such judgment as the court below ought to have rendered. There, if the damages are excessive, the court may reverse altogether, or reduce the amount of the judgment, affirming it for a lesser sum where the requisite [812] data are furnished by the record.³ The objection of excessive damages found may in many cases be removed by the plaintiff remitting the excess. This may be done in the trial and also in the appellate court. If the jury have decided, upon the testimony submitted to them, several items or elements of damage, and on review one or more of them are held to be improperly included, a remission of so much as was thus improperly allowed, when the amount can be ascertained, will

¹ *Nelson v. Oregon Ry. & N. Co.*, 13 Ore. 141; *Pritchard v. Hewitt*, 91 Mo. 547; *Lancaster v. Providence & S. S. S. Co.*, 26 Fed. Rep. 233; *Brushaber v. Stegemann*, 22 Mich. 266; *Neal v. Singleton*, 26 Ark. 491.

² *Baker v. Madison*, 62 Wis. 137; *McLimans v. Lancaster*, 63 id. 596; *Cuff v. Dorland*, 57 N. Y. 560; *Metcalf v. Baker*, id. 662; *Hayden v. Florence Sewing M. Co.*, 54 id. 221; *Stickney v. Bronson*, 5 Minn. 215; *Burdick v. Weeden*, 9 R. I. 139; *Wilkins v. Gilmore*, 2 Humph. 140; *Johnson v. Von Kettler*, 66 Ill. 68; *Chicago, etc. R. Co. v. McAra*, 52 Ill. 296; *Decatur v. Fisher*, 53 Ill. 407; *Cassell v. Hays*, 51 Ill. 261; *Chicago v. Kelly*, 69 Ill. 475; *Cochrane v. Tuttle*, 75 Ill. 361; *Goetz v. Amba*, 22 Mo. 170; *Woodson v. Scott*, 20 Mo. 272; *Barth v. Merritt*, 20 Mo. 567; *Ellsworth v. Central R. Co.*, 24 N. J. L. 93; *Patten v. Chicago, etc. R. Co.*, 32 Wis. 524;

Mentz v. Second Ave. R. Co., 2 Robt. 356; *Union P. R. Co. v. Milliken*, 8 Kan. 647; *Jacksonville v. Lambert*, 62 Ill. 519; *Chicago v. Jones*, 66 Ill. 349; *Chicago, etc. R. Co. v. Garvy*, 58 Ill. 83; *Chicago v. Langlass*, 66 Ill. 361; *Pullman P. C. Co. v. Reed*, 75 Ill. 125; *Huftalin v. Mesner*, 78 Ill. 55; *Dearlove v. Herrington*, 70 Ill. 251; *Newton v. Locklin*, 77 Ill. 103; *Walker v. Martin*, 52 Ill. 847; *Ross v. Ross*, 5 B. Mon. 20; *Holburn v. Neal*, 4 Dana, 121.

³ *Robertson v. Allen*, 36 Ark. 553; *Chesapeake, etc. R. Co. v. Higgins*, 85 Tenn. 620; *Sterrett v. Creed*, 2 Ohio, 442; *Fields v. Moul*, 15 Abb. 6; *Cohea v. State*, 34 Miss. 179; *Overall v. Babson*, 2 Yerg. 71; *Mooney v. Hudson R. R. Co.*, 1 Sweeney, 325; *Baker v. Madison*, 62 Wis. 137 (overruling *Potter v. Chicago, etc. Ry. Co.*, 22 id. 615); *McLimans v. Lancaster*, 63 id. 593.

remove the objection of such excess.¹ But where the erroneous part so allowed cannot be ascertained, and it is impossible to tell what the jury acted upon, or how they made up their verdict under the charge of the court, so as to correct the error, and arrive at the amount they should have given, justice between the parties cannot be done by a *remittitur*.² A plaintiff who has recovered a verdict or judgment which, as rendered, is clearly erroneous, and seeks to avoid a reversal by striking out a part, must satisfy the court, either by material in the record or by fair presumption, that this can be done without injustice to the defendant. If he cannot do this, the defendant is entitled to have the verdict set aside or the judgment reversed.³ In an action for two tracts of land, the judgment of the trial court was given for the plaintiff for both tracts, and for damages. On appeal the judgment as to one tract was affirmed, and reversed as to the other. The court held that, as there were no data in the record for the apportionment of the damages, the entire judgment should be reversed unless all the damages were remitted.⁴ Where the findings on the question of damages are not sustained by the evidence, the court may require the plaintiff to remit the damages or submit to a new trial.⁵ In an action of slander

¹ Kennon v. Gilmer, 181 U. S. 22; Doolittle, 86 Me. 115; Strong v. Hooe, Lambert v. Craig, 12 Pick. 199; King 41 Wis. 659.

v. Howard, 1 Cush. 137; Bank of Kentucky v. Ashley, 2 Pet. 327; Hodges v. Hodges, 5 Met. 205; Sanborn v. Emerson, 12 N. H. 57; Tris- If the action is for a joint tort a *remittitur* cannot be conditioned for different sums in favor of the several defendants according to the proofs against them. Chils v. Gronlund, 41 Fed. Rep. 505.

chet v. Hamilton M. Ins. Co., 14 Gray, 456; Pierce v. Wood, 23 N. H. 519; Willard v. Stevens, 24 id. 271; Odlin v. Gove, 41 id. 465; Cross v. Wilkin, 43 id. 382; Cram v. Hadley, 48 id. 191; Evertson v. Sawyer, 2 Wend. 507; Howard v. Grover, 28 Me. 97; Spackman v. Byers, 6 S. & R. 385; Atwood v. Gillespie, 4 Mo. 423; Pendleton St. R. Co. v. Rahmann, 22 Ohio St. 446; Hury v. Watson, 4 T. R. 659, note; Toledo, etc. R. Co. v. Beals, 50 Ill. 150; Kavanaugh v. Janesville, 24 Wis. 618; Bigelow v.

² Pavey v. American Ins. Co., 56 Wis. 221; Smith v. Dukes, 5 Minn. 373.

³ O. & A. R. Co. v. Fulvey, 17 Gratt. 366.

If the jury are erroneously charged that they may award exemplary damages a *remittitur* will not be permitted. Railway v. Hall, 53 Ark. 7.

⁴ Hodapp v. Sharp, 40 Cal. 69.

⁵ Carpentier v. Gardiner, 29 Cal. 160; Murray v. Buell, 74 Wis. 14; Corcoran v. Harran, 55 id. 120.

the trial court erred in excluding evidence offered in mitigation. The plaintiff was allowed to retain the verdict only on condition that he would consent to have it amended to one for nominal damages.¹ A jury rendered a verdict for the full amount of a plaintiff's claim, notwithstanding he had received a horse, wagon and sundry articles of clothing of considerable value which should have been deducted. Because the amount which should be allowed for this property was not ascertained, the objection of excess could not be removed by a *remittitur*.²

§ 460. Same subject. In those cases in which there is no legal measure of damages, or they are unliquidated; where courts only interfere if there is such an excess as indicates that the jury has been influenced by passion or prejudice, the plaintiff may have the benefit of remitting a part, so that if the amount is not still excessive a new trial will not be granted.³ In many instances in cases of this nature the court, on finding the damages too large, have suggested the amount of reduction and thus given the plaintiff a guide as to the sum to be remitted. Oakley, C. J., said: "We have considered it and find no objection on principle to reducing the verdict to an amount such as, if the jury had found it as damages, we would not interfere with their conclusion. That is, in effect, for the court to say to the plaintiff, if you will enter a *remittitur* so as to reduce the verdict to such a sum as we think would not have been unreasonable, if it had been found by the jury, we will not set it aside." The verdict was \$1,500, and the court gave the plaintiff the option to remit \$1,000 and take judgment for the residue.⁴ There is an apparent

¹ Clark v. Brown, 116 Mass. 504.

² Lambert v. Craig, 12 Pick. 199.

³ Upham v. Dickinson, 50 Ill. 97; Louisville, etc. R. Co. v. Hodge, 6 Bush, 141; Johnson v. Von Kettler, 66 Ill. 68; Collins v. Council Bluffs, 35 Iowa, 482; Duffy v. Dubuque, 63 id. 171.

⁴ Doblin v. Murphy, 8 Sandf. 19; Johnston v. Morrow, 60 Mo. 839; Collins v. Albany, etc. R. Co., 12 Barb. 492; Hegeman v. Western R. Co., 16 Barb. 353; 18 N. Y. 9; White-

head v. Kennedy, 69 id. 462, 470; Spicer v. Chicago, etc. R. Co., 29 Wis. 580; Patten v. Chicago, etc. R. Co., 82 id. 524; Lombard v. Chicago, etc. R. Co., 47 Iowa, 494; Murray v. Hudson R. R. Co., 47 Barb. 196; Bierbauer v. New York, etc. R. Co., 15 Hun, 559; Eliot v. Allen, 1 C. B. 18; Holmes v. Jones, 121 N. Y. 461; Pensacola Gas Co. v. Pebley, 25 Fla. 381; Van Winter v. Henry Co., 61 Iowa, 684; Broquet v. Tripp, 36 Kan. 700; Reddon v. Union P. Ry. Co., 5 Utah,

[814] departure from sound principle in this practice. The court concludes that the jury were influenced by passion or prejudice, or both, because they found such excessive damages; and yet allows their finding, covering the major propositions of the case upon which damages are consequent, to stand. Why should a verdict be in part retained if the jury were really influenced by passion or prejudice? Where their estimate of damages is rejected and another substituted, is the latter a verdict?¹ The supreme court of Georgia strenuously contends that in suits to recover for personal injuries it is not competent for the court to say that the verdict shall stand for any definite sum less than it designates.² It was formerly the rule in Wisconsin where the excess of the judgment was not readily severable from the rest and clearly ascertainable from the record, that the appellate court would not substitute its judgment for that of the jury and allow the plaintiff to remit accordingly, and then affirm the judgment.³ The first case in which the question arose in Minnesota considers it in a conservative manner.⁴ But the tendency of the late decisions, except in Georgia, is in the direction of unqualified support for the practice which allows the appellate and trial courts in cases in which excessive damages have been awarded, and in which the plaintiff is entitled to substantial damages, to indicate the excess and give him the option to remit it and take judgment for the residue or be awarded a new trial. This is held not to be an invasion of the province of the

344; *Corcoran v. Harran*, 55 Wis. 120; *Baker v. Madison*, 62 id. 187; *Massey v. Toronto Printing Co.*, 11 Ontario, 862; *Belt v. Lawes*, 12 Q. B. Div. 356.

A defendant cannot be required to accept an offer of a *remittitur* of the excess of the damages as a finality and so as to bar him of his right to a review of other proceedings in the trial. *Gardner v. Tatum*, 81 Cal. 370.

¹See *Luson v. Smith*, 1 Nev. & Man. 304; *Sherry v. Frecking*, 4 Duer, 452; *Koeltz v. Blackman*, 46 Mo. 820.

If the amount awarded by the jury as damages is grossly excessive and

is not supported by any interpretation which can be given the evidence a *remittitur* will not be allowed. *Doty v. Steinberg*, 25 Mo. App. 328, following *Koeltz v. Blackman*, *supra*. See *Sherman v. Commercial Printing Co.*, 29 Mo. App. 31; *International, etc. R. Co. v. Wilkes*, 68 Texas, 617; *Parsons & P. R. Co. v. Montgomery*, 46 Kan. 120.

²*Savannah, etc. Ry. v. Harper*, 70 Ga. 119; *Carlisle v. Callahan*, 78 id. 320.

³*Potter v. Chicago & N. Ry. Co.*, 22 Wis. 615.

⁴*Craig v. Cook*, 28 Minn. 288.

jury or of the rights of the defendant.¹ In Louisiana if the verdict is clearly less than it should be the supreme court will render judgment for such sum as the evidence indicates to be proper.² In a recent English case³ in which the general question was for the first time passed upon by a court of appeal, it was argued that the power to reduce the verdict without the consent of both parties to the action could not exist without the power to increase it without such consent, which, counsel said, would be an absurd conclusion, because then the court would in that case be giving damages which a jury had not given. The answer was made by Brett, M. R.: "I am, however, by no means prepared to say that the court might not refuse a new trial if a defendant would agree that the damages should be larger. Suppose a case in which a new trial should be moved for on behalf of the plaintiff on the ground that the amount of damages which the jury had given was obviously unreasonably too small, I am far from saying that the court would not have power in favor of the defendant and in his interest to say that the damages given are too small, but if the defendant will agree to their being increased to such a sum as may be stated, a new trial shall be refused."

In the trial court, after a motion for a new trial has been granted on the ground of excessive damages, it is held, in Indiana, to be too late to avoid the objection by remitting the excess;⁴ and in Kentucky, that it is too late after judgment; at all events, after the close of the term.⁵ The remis-

¹ Missouri P. Ry. Co. v. Dwyer, 36 Kan. 58; Baker v. Madison, 62 Wis. 137; Union v. Durkes, 38 N. J. L. 21; Belknap v. Boston & M. R., 49 N. H. 358; Arkansas Valley L. & C. Co. v. Mann, 130 U. S. 69; Hopkins v. Orr, 124 id. 510; Kennon v. Gilmer, 131 id. 22; Pratt v. Pioneer Press Co., 35 Minn. 251; Hutchins v. St. Paul, etc. Ry. Co., 44 id. 5; Belt v. Lawes, 12 Q. B. Div. 356.

² Sullivan v. Shreveport & P. R. Co., 39 La. Ann. 800; Caldwell v. Vicksburg, etc. R. Co., 41 id. 624.

³ Belt v. Lawes, 12 Q. B. Div. (1884) 356.

⁴ Hill v. Newman, 47 Ind. 187.

⁵ Bealle v. Schoal, 1 A. K. Marsh. 475; Holeman v. Coleman, id. 297; James v. Wilson, 7 Tex. 230.

In *Planters' Bank v. Union Bank*, 16 Wall. 483, 497, Strong, J., said: "It is further assigned for error by the defendants that the court allowed the plaintiffs to withdraw a *remittitur* entered by them of part of the verdict obtained on a former trial of the case. The only objection made in the court below to the allowance was that the *remittitur* was an acknowledgment of record that the amount remitted was not due. There had been a former trial, in which the plaintiffs had obtained

sion, to have effect, should be made during the term, and while the judgment is under the control of the court.¹ The appellate court will not listen to an objection from the defendant based on the fact that the plaintiff has voluntarily remitted in the trial court a portion of the damages awarded by the jury.² And it is doubtless the rule that the party who has so remitted will not be heard to claim that the amount which remains is insufficient.

[815] Where it appears that at least nominal damages should have been given, but the jury have found a verdict for the defendant, then whether the court will grant a new trial will depend on whether any other right than that to such damages is involved in the question. If not a new trial will not be granted;³ but if a judgment for the plaintiff would entitle him to costs or is necessary to vindicate any right drawn in ques-

judgment for \$113,296 01, with five per cent. interest from November 25, 1863. This was a larger amount of interest than the petition of the plaintiffs had claimed, and they entered on the judgment a *remittitur* of the excess, expressly reserving their right to the balance of the judgment. Subsequently a new trial was granted, and it is now contended that the *remittitur* had the effect of a *retraxit*. As it was entered after judgment, such perhaps would be the effect if the judgment itself had not been set aside, and a new trial had not been granted. *Bowden v. Horne*, 7 Bing. 716. But such cannot be its operation now. If it takes effect at all, it must in its entirety, and the plaintiffs must hold their first judgment for the balance unremitted. As their judgment no longer exists, there is no reason for holding that the remission of a part of it is equivalent to an adjudication against them."

¹ *Robertson v. Allen*, 36 Ark. 553; *Russell v. Hubbard*, 59 Ill. 335; *Rowan v. People*, 18 Ill. 159; *Buckles v. Northern Bank of Ky.*, 63 Ill. 268; *Fury v. Stone*, 2 Dall. 184. In *Crock-*

ett v. Calvert, 8 Ind. 127, a jury in a justice's court found a verdict of \$100 in favor of the plaintiff, and judgment was rendered thereon; but before the entry on the justice's docket was signed and sealed by him the plaintiff entered a *remittitur* of \$25 of the judgment. The defendant appealed, and the appellate court rendered judgment for \$80; held, a reduction of the judgment so as to carry costs; because the *remittitur* should have been of \$25 of the *verdict* and judgment taken for the remainder.

² *Central R. v. Crosby*, 74 Ga. 737.

³ *Ely v. Parsons*, 55 Conn. 83; *Eaton v. Lyman*, 30 Wis. 41; *Laubenheimer v. Mann*, 19 id. 519; *Hibbard v. Western U. Tel. Co.*, 33 Wis. 558; *Jones v. King*, id. 422; *Chase v. Bassett*, 15 Abb. (N. S.) 293; *Elwell v. Bradham*, 2 Speers, 141; *Sherwood v. Gibson*, 5 Up. Can. Q. B. 205; *Smith v. Weed Sewing M. Co.*, 26 Ohio St. 562; *Mahoney v. Robbins*, 49 Ind. 146; *Hudspeth v. Allen*, 26 id. 165; *Patton v. Hamilton*, 12 id. 256; *Hucker v. Blake*, 17 id. 97. See § 11, *ante*.

tion a new trial will be granted if the jury have erroneously found for the defendant when they should have found nominal damages for the plaintiff.¹ The rule that a new trial will not be granted in favor of a plaintiff who at most is entitled to nominal damages applies only to cases where the trivial nature of the claim is clear and unquestionable.² The smallness of the damages is no objection to a new trial when the verdict is manifestly contrary to the evidence and the judge's charge to the jury.³ If a case is submitted to a court upon an agreed statement of facts in which the damages are not fixed, or an assessment provided for, the judgment, if for the plaintiff, will be for nominal damages only.

§ 461. Verdicts must be certain. The verdict be- [816] sides being responsive to the issues should find with certainty the amount of damages that the jury intend to award to the successful party in money.⁴ It is safest and most prudent to specify the exact amount.⁵ It will, however, be deemed certain if it can be rendered so by reference to the facts established by the record or found by the jury. If the jury find all the necessary data so that by mere arithmetical calculation the amount can be determined, the verdict is certain and will support a judgment for the amount so ascertained.⁶ If [817]

¹ *McCarty v. Leggett*, 8 Hill, 184; *Ga. 99*; *Brannin v. Forees*, 12 B. Mon. 506; *High v. Johnson*, 28 Wis. 72; *Rosenbaum v. McThomas*, 84 Ind. 831. See § 11, *ante*.

² *McCarty v. Leggett*, *supra*; *Plumleigh v. Dawson*, 6 Ill. 544; *Teal v. Russell*, 8 id. 319.

³ *Brooklyn v. Sequa*, Tay. (N. C.) 263.

⁴ *Shell v. Sanders*, 46 Ga. 469.

⁵ *Darden v. Mathews*, 22 Tex. 320.

⁶ *Phillips v. Behn*, 19 Ga. 298; *Beckwith v. Carleton*, 14 Ga. 691; *Burton v. Anderson*, 1 Tex. 93; *James v. Wilson*, 7 id. 230; *Mays v. Lewis*, 4 id. 38; *Sacrest v. Jones*, 30 id. 596; *Miller v. Shackelford*, 4 Dana, 271; *McGregor v. Armill*, 3 Iowa, 30; *Gibson v. Lewis*, 27 Mo. 532; *Gaff v. Hutchinson*, 88 Ind. 841; *Fries v. Mack*, 33 Ohio St. 52; *Jackson v. Jackson*, 47

In *Darden v. Mathews*, 22 Tex. 320, the action was on a note and this was the verdict: "We, the jury, find for the plaintiff a judgment for the amount due on said note, with legal interest, less the sum of \$51, and the interest on the same from January, 1856." The court held that the day of the verdict is fixed by the record; the legal interest defined by the statute and the uncertainty of "January, 1856," was to be resolved most strongly against the party claiming under the verdict; that the ascertainment of the amount was a mere mathematical calculation and could be rendered certain if "said note" refers to the note in the petition. *Roberts, J.*, said: "The object of a verdict is to

the verdict does not find the facts upon which the calculation of damages depends according to the issue, nor the amount of damages themselves, it is fatally defective. Thus in an action for the conversion of personal property the jury found for the

announce to the court the judgment of the jury as to how far the facts established by the evidence conform to those which are alleged and put in issue by the pleadings. As the facts thus declared constitute the basis of a judgment (which is but the legal consequence of the facts thus found), it follows that the verdict must either affirm or negative such of the disputed facts as will, in connection with those admitted, if any, support a legal judgment. A special verdict reiterates the facts alleged, of which the jury have had proof, in such manner as to indicate their judgment upon them. A general verdict is defined to be 'a finding by the jury in the terms of the issue or issues submitted to them; and it is, wholly or in part, for the plaintiff or defendant.' 2 Tidd's Pr. 869. In its most general form it is, 'We, the jury, find for the plaintiff.' That is, they find the issue, the material facts in dispute, as presented in the pleadings, in favor of the plaintiff. It is only by understanding this general expression in connection with, and as a response to, the issue as formed by the pleadings that it can be held to amount to any declaration of facts. The jury, therefore, must be presumed to have expressed their finding with reference to the facts in the pleadings, unless they also state something which shows that such was not their intention. As, for instance, where the jury found for the plaintiff 'the amount of the note adduced,' it was held that the verdict was bad, because by the word 'adduced' they plainly showed that they had reference, not to the facts al-

leged, but to the facts in evidence. *Smith v. Johnson*, 8 Tex. 418. There is no such expression in this case to prevent the usual presumption from being indulged. This general verdict, 'We, the jury, find for the plaintiff,' will often be sufficient. In such cases its import would be that all the material facts alleged by the plaintiff that were put in issue are established. It is difficult to see, on principle, why this general verdict would not be all that was necessary in an action upon a note where the general issue alone was pleaded and where there were no payments, offsets or other facts established, changing the amount to be recovered and making it different from that claimed in the petition. All the facts as to the amount promised, time of payment, etc., must be specifically set forth just as they are in the note; and interest, whether stipulated in the note or not, follows as a legal consequence. Hart. Dig., arts. 1606-8.

"In the English courts a different practice has prevailed, which renders it necessary for the jury to find interest; because they treated interest not as a legal consequence but as damages, to be allowed or not, according to the discretion of the jury. 2 Tidd's Pr. 873. In actions sounding in damages, and in actions where damages may be recovered incidentally, and in all actions of whatsoever character where dates, amounts and the like are not usually intended or understood to be stated accurately, and need not be proved as stated, there should not only be the general finding for the plaintiff, but also a special finding as to the amount. So, too, as in this

plaintiff, and instead of assessing his damages determined the *value* of the property. "to be \$6,308." It was held uncertain because on the language the court could not assume that the jury intended to fix the value at the time of the conversion.¹ If the declaration does not state precisely the plaintiff's demand a verdict for the amount claimed, not stating it, will be insufficient. In such a case the data for computing the amount is not in the record.² A verdict is insufficient to sustain a judgment if it cannot be made certain as to amount without looking out of the record to the evidence given on the trial.³

If the verdict goes beyond the issue raised by the case, where payments, offsets or other matter is pleaded and established, which reduces the amount of recovery below the amount claimed in the petition, the amount of the reduction should, in some way, be indicated by a special finding." But see *Educational Association, etc. v. Hitchcock*, 4 Kan. 86; *Parker v. Fisher*, 89 Ill. 164.

Dozier v. Jarman, 30 Mo. 216, is an instance of the strict construction of a verdict; and probably is more strict than is warranted by the authorities generally. It was an action to recover damages for a wrongful sale caused to be made by the defendant. The jury found a verdict against him for \$5,258, with interest from the day of sale. After discharge of the jury the court caused the interest to be computed and included it in the judgment on the verdict. The court say: "The action is one sounding in damages, and the amount of damages was specifically found by the jury; upon which interest, *eo nomine*, was given in addition. Interest is recoverable, as a matter of law, either by reason of an express contract to pay it, or because it is recoverable as damages which the party is legally bound to pay for the detention of money or property improperly withheld; and

where it is imposed to punish negligent, tortious or fraudulent conduct it rests in the pleasure of the jury and is given as damages. Sedg. on Dam. The general rule undoubtedly is that interest is not recoverable on unliquidated damages or for an uncertain demand; and whenever it is allowable, as in trover or trespass, for converting or taking goods—in which the measure of damages is in general the value of the property at the time of the taking or conversion, with interest—the interest is not recoverable as such in addition to the damages assessed by the jury, but must enter into the estimate of and be found as part of the damage itself."

A verdict in an action for use and occupation which assesses damages at a named sum and legal interest is void for uncertainty and will not support a judgment unless the words "and legal interest" be rejected as surplusage. *Meeker v. Gardella*, 1 Wash. St. 139. See *Western M. & L. Co. v. Blanchard*, id. 230.

¹ *Knickerbocker, etc. M. Co. v. Hall*, 8 Nev. 194.

² *Neville v. Northcutt*, 7 Cold. 294; *Gerhab v. White*, 40 N. J. L. 242.

³ *Fries v. Mack*, 88 Ohio St. 52; *Mays v. Lewis*, 4 Texas, 88; *Claiborne*

pleadings, and passes upon an extraneous fact, or contains any redundant statement, such finding or statement may be rejected as surplusage, and will not vitiate the verdict if it is otherwise sufficient,¹ unless the addition clearly shows that the jury reasoned incorrectly or from false premises.²

v. Tanner, 18 Texas, 68; *Fromme v. Jones*, 18 Iowa, 474; *Smith v. Tucker*, 25 Texas, 594.

In *Fries v. Mack*, *supra*, the action was brought on a judgment. This was the verdict: "We, the jury, do find for the plaintiff \$7,000 and interest from the *maturity* of the seven notes of \$1,000 each, given February 2, 1860, up to March 2, 1874." The question was as to adding interest to the \$7,000. The court say: "The action is not brought upon promissory notes; nor were any such notes referred to in the pleadings; and the verdict neither gives copies of them nor states the times at which they are respectively payable. Was it, then, within the province of the court to identify the notes referred to by the jury, and ascertain the times when they severally matured, by reference to the evidence offered on the trial? We are constrained to answer this question in the negative. The facts found by the court (in thus identifying the notes, computing the interest thereon, and entering judgment accordingly) formed no part of the record, and were found only from the memory or minutes of the judge who tried the case. Without a knowledge of these facts no one could tell from the verdict, considered *per se*, or in connection with the record, from what time the jury intended the computation of interest to commence. The court found from the facts outside of the record that the jury intended by their verdict to refer to certain notes which had been

offered in evidence upon the trial. Perhaps they did so intend, though the verdict does not say so. The facts found in regard to it are neither expressed nor necessarily implied in its language. . . . The judgment should follow as a logical sequence from the issues of fact declared by the pleadings and the findings of the jury thereon. If the judgment is warranted by the pleadings and verdict it should be sustained; but if it has no such basis it cannot be supported." *Wells v. Cox*, 1 Daly, 515, must be doubted on the test of the foregoing case, which undoubtedly lays down the correct rule. On the trial the court charged the jury that if their finding was in favor of the plaintiff the amount due him was \$516.29. The jury found for the plaintiff "for the whole amount claimed and interest." After discharge of the jury the court, on motion, supported by the court's memory of its charge and affidavits of the intention of the jury, corrected the verdict by inserting the sum stated in the charge.

¹*Marguard v. Wheeler*, 52 Cal. 445; *Watson v. San Francisco, etc. R. Co.*, 50 Cal. 523; *Patochi v. Central P. R. Co.*, 52 Cal. 90; *Dunlap v. Hayden*, 29 Ind. 803; *Ranney v. Bader*, 48 Mo. 539.

Where a jury returned a verdict for plaintiff "for \$51.60, subject to an offset of \$26.80, if said offset had not already been paid; but if it had been paid, then for \$51.60 without offset," held proper to render judg-

² *Gregory v. Frothingham*, 1 Nev. 253.

§ 462. **General verdict on several counts.** If there is a distinct and separate cause of action stated in each of several counts, one of which is defective, and a general verdict given upon evidence applicable to all, it cannot be known that the verdict is not based in part on the bad count.¹ For this [820] reason it is the rule that where a general verdict is given upon several counts, and one of them is not good, the judgment will be arrested or reversed on error.² But where it appears that there was but one cause of action stated, or, what comes to the same result, that all the evidence was applicable to the good counts, the verdict may be amended so as to apply only to them.³

A similar question arises where in a single count a demand for \$51.60, and to reject the balance as surplusage. The court say: "It in no way appears from the verdict whether it ('offset') had been paid or not, and therefore it is the same as if the verdict said nothing about it." Surplusage does not vitiate. *Hawkins v. House*, 65 N. C. 614; *Wills v. Garland*, 2 Va. Cas. 471; *Wendham v. Williams*, 27 Miss. 318; *Patterson v. United States*, 2 Wheat. 223; *Duane v. Simmons*, 4 Yeates, 441; *Longacre v. State*, 8 Miss. (2 How.) 637; *Gover v. Turner*, 28 Md. 600; *Baker v. Callender*, 6 Mass. 308.

¹ *Eddowes v. Hopkins*, 1 Doug. 377; *Holt v. Scholefield*, 6 T. R. 691; *Empson v. Griffin*, 11 A. & E. 186.

In *Kline v. Wood*, 9 S. & R. 294, it was held that if a general verdict is given, and some of the counts are for matters without the jurisdiction of the court, the verdict is bad for the whole.

² *Harker v. Orr*, 10 Watts, 245; *Paul v. Harden*, 9 S. & R. 23; *Union T. Co. v. Jenkins*, 1 Caines, 381; *Highland T. Co. v. McKean*, 11 Johns. 98; *Dutchess County M. Co. v. Davis*, 14 id. 238; *Stevenson v. Newman*, 18 C. B. 285; *Trevor v. Wall*, 1 T. R. 151; *Hancock v. Haywood*, 8 id. 433; *Grant v. Astle*, 2

Doug. 723; *Holt v. Scholefield*, 6 T. R. 691; *Sheen v. Rickie*, 5 M. & W. 175; *Chadwick v. Trower*, 6 Bing. N. C. 1.

³ *Union T. Co. v. Jenkins*, *supra*; *Aldrich v. Lyman*, 6 R. L. 98; *Cooper v. Bissell*, 15 Johns. 318; *Grant v. Astle*, 2 Doug. 723; *Stafford v. Green*, 1 Johns. 505; *Sayre v. Jewett*, 12 Wend. 135; *Norris v. Durham*, 9 Cow. 151; *Barnard v. Whiting*, 7 Mass. 358; *Barnes v. Hurd*, 11 id. 57; *Patten v. Gurney*, 17 id. 182; *Smith v. Cleveland*, 6 Met. 382; *Perry v. Boileau*, 10 S. & R. 208; *Smith v. Lattour*, 18 Pa. St. 243; *Cornwall v. Gould*, 4 Pick. 444; *Baker v. Sanderson*, 8 id. 348; *West v. Platt*, 127 Mass. 367; *Emblin v. Dartnell*, 12 M. & W. 830.

In *Clarke v. Lamb*, 6 Pick. 512; S. C., 8 id. 415, it was held that when there are two or more issues, and the verdict is perfect as to some but silent as to others, it is amendable, if by the certificate of the judge it shall appear that there was no other matter in trial except what is embraced in the issues on which the verdict is sufficient; and correction may be made even pending a writ of error. *Petrie v. Hannay*, 3 T. R. 659; *Jones v. Kennedy*, 11 Pick. 125.

is declared to the whole of which the plaintiff is not entitled, or where two or more breaches of a contract are assigned, one of which is insufficient to sustain a claim for damages. On such a count a general verdict cannot be sustained.¹ Where it is positively and expressly averred that the plaintiff has sustained damage from a cause subsequent to the commencement of the action, or previous to the accrual of his right of action, and the jury give entire damages, judgment will be arrested; but where the cause of action is properly laid, and the other matter either comes under a *scilicet*, or is void, insensible or impossible, and, therefore, it cannot be intended that [821] the jury ever had it under their consideration, the plaintiff will be entitled to his judgment.²

Where part of the special damage laid in the declaration did not fall strictly within the covenant alleged to be broken, it was held to be presumed, after verdict, that the jury were directed at the trial not to take that part into consideration.³ In the opinion of the court there is a difference between an affirmative allegation of facts which would exclude a part of the damages declared for, and the absence of an averment necessary to make out title to a part. If a claim of damages is made up of good and bad items, and there is a general verdict for the plaintiff, it will be intended on a motion in arrest of judgment that the verdict was given only for the good ones.⁴

¹ Leach v. Thomas, 2 M. & W. 427; Sherry v. Frecking, 4 Duer, 452; Gordon v. Kennedy, 2 Bin. 287; Paley v. Osborne, 10 Coke, 130b; Lloyd v. Morris, Willes, 443; Talbot v. Hernon, 4 J. J. Marsh. 553; Van Rensselaer v. Platner, 2 Johns. Cas. 17.

² Williams' note to Hamilton v. Vere, 2 Saund. 171b; Secklemore v. Thistleton, 6 M. & S. 9; Gordon v. Kennedy, 2 Bin. 287.

³ Campbell v. Lewis, 2 B. & Ald. 392.

⁴ Edwards v. Reynolds, Hill & D. 53; Lawrie v. Dyeball, 8 B. & C. 70; Kitchenman v. Skeel, 8 Exch. 49; Steele v. Western L. L. N. Co., 2 Johns. 283.

The case of Sheen v. Rickie, 5 M. & W. 175, does not appear to be consistent with the foregoing cases. Trover was brought for the conversion of chattels and *fixtures*. The court, by construction of the declaration, relieved it of the objection that suit was brought for fixtures annexed; but gave opinion of the effect of a general verdict in favor of the plaintiff, had the property indicated by the word "fixtures" been technically such. Parke, B., said: "If it distinctly appeared on the face of the declaration that part of the cause of action was such as could not be recovered in trover, I should be strongly disposed to agree in the objection."

In Connecticut, Ohio, South Carolina, and by statute in several other states, if there is one good count in the declaration a general verdict which is responsive to the issue on it is good, and not vitiated by there being another count [822] which is bad.¹ Where there are several counts or causes of action a verdict may be taken separately on each; and that is a prudent course. Then, if either is bad, the objection may prevail without prejudice to the verdict on the good counts.² If the verdict is general and the declaration contains more than one count, the jury may be asked to inform the court upon which count they based their finding.³

§ 463. Where there are several parties. Where there are several plaintiffs it is not competent for the jury to find against one and in favor of another.⁴ Every action at law must be maintained in favor of all the plaintiffs, or it will fail as to all. A verdict in a tort action against three defendants is good though it makes no mention of one in default.⁵ And it is good if entitled in the name of the plaintiff against one of the defendants by name, the others being designated as

The case would be easily distinguished from that which has been put, of an action for words, some of which are not actionable; there the court would presume that the non-actionable words were not intended to constitute the cause of action, but were used merely as matter of aggravation, or of explanation; although where the words were spoken at different times, and some of them were not actionable, the judgment would be arrested. The law is so laid down in the case of *Penson v. Gooday*, Cro. Car. 327. If, therefore, it had been clear that this declaration contained two distinct causes of action, for one of which trover could not be maintained, then, as general damages have been assessed upon the whole declaration, there must be either an arrest of judgment or a *venire de novo*." *Griffiths v. Lewis*, 8 Q. B. 841; *Alfred v. Farrow*, id. 854.

¹ *Walcott v. Coleman*, 2 Conn. 324; *Smith v. Hawkins*, 6 id. 444; *Graves v. Waller*, 19 id. 90; *Johnson v. Mullen*, 12 Ohio, 10; *Chisom v. School Directors*, 19 id. 289; *Pratt v. Thomas*, 2 Hill (S. C.), 654; *Taylor v. Sturginger*, 2 Mills' Const. 367; *Neal v. Lewis*, 2 Bay, 204; *Neilson v. Emerson*, id. 439; *Anderson v. Simple*, 7 Ill. 455; *Frankfort Bridge Co. v. Williams*, 9 Dana, 403; *Scott v. Peebles*, 2 Sm. & M. 546; *Cowdren v. Gardner*, 1 J. J. Marsh. 589; *Peoria, etc. Ins. Co. v. Whitehill*, 25 Ill. 466; *Newell v. Downs*, 8 Blackf. 523. See *Hudson v. Matthews*, Morris, 94.

² *Hayter v. Moat*, 3 M. & W. 56; *Mooney v. Kennett*, 19 Mo. 551; *Clark v. Hannibal, etc. R. Co.*, 36 Mo. 202.

³ *Cross v. Grant*, 62 N. H. 675.

⁴ *Buckhanan v. Gamble*, Ga. Dec. 156.

⁵ *Golden Gate Mill & M. Co. v. Machine Works*, 82 Cal. 184.

"*et al.*" as against all shown by the record to be defendants.¹ It has already been stated that where there are several defendants, and there is a default as to one, and an issue as to others, there is but one assessment of damages as to all. Under the old practice the jury were called as well to try the issue as to inquire of the damages.² In actions *ex contractu*, if those who plead succeed otherwise than upon grounds of personal discharge, at most only nominal damages can be given against the defaulted party.³

[823] In tort actions a verdict in favor of one defendant does not generally affect the plaintiff's right of action against the co-defendants; one may be found to be liable and another or the others may not have incurred any liability. So where one defendant is defaulted, and others defend, there may be an assessment of damages against the former, though the parties who plead are found not liable, or are otherwise discharged. Thus, in an early case, trespass was brought against six defendants, three of whom suffered judgment by default; the others pleaded not guilty. On the trial, it appearing by the evidence that the trespass was committed after the action was brought, the three who pleaded were acquitted; but damages were assessed against the others.⁴ So if they plead different pleas, one may be found guilty and the others acquitted.⁵ If sued separately, recovery may be had against each. A judgment against one cannot be pleaded in bar of a recovery against another, unless it has been satis-

¹ Knox v. Gregorious, 43 Kan. 26.

² Tidd's Pr. 802-8; 1 Burr. Pr. 872; Hart v. De Lord, 17 Johns. 270; Cudderback v. Fanely, 2 Wend. 624; Van Schaick v. Trotter, 6 Cow. 599; Sluyter v. Smith, 2 Bosw. 678; Catlin v. Latson, 4 Abb. 248.

³ Gerrish v. Cummings, 4 Cush. 391; Ferguson v. State Bank, 11 Ark. 512; Bruton v. Gregory, 8 Ark. 177.

In Williams v. McFall, 2 S. & R. 280, *assumpsit* was brought against two upon a joint contract. One of the defendants confessed judgment for a certain sum, and the other pleaded the general issue, went to

trial, and a verdict passed against him for a smaller sum. It was held that judgment could not be entered on the verdict, nor for such defendant, but that the judgment confessed would stand against the party who confessed it. The entry of judgment, or the confession, precluded the entry of another judgment against the other defendants; for two judgments final could not be entered in the same action on a joint claim.

⁴ Jones v. Harris, 2 Str. 1108.

⁵ Mayler v. Aycliffe, Cro. Jac. 134.

fied.¹ But where the action is against several, and one is defaulted, and the others plead such a defense that on a verdict in their favor the record will show that the plaintiff had no cause of action against any of the defendants, he will not be entitled to judgment against the parties in default; and it will be the same as to one found guilty on a different plea.²

In a joint action against several for trespass or other tort, if all are found guilty, entire or joint damages must be assessed against them.³ All the legal consequences of being jointly guilty must necessarily follow; of which one is that each is liable for all the damages which the plaintiff has sustained, without regard to different degrees or shades of guilt.⁴ The jury are to estimate the damages against all the defendants, if guilty, according to the amount which they think the most culpable of them should pay.⁵ It is irregular, in [824] such a case, on finding those jointly charged jointly guilty to assess damages against them separately even though they severed in pleading.⁶ Notwithstanding this rule, juries [825]

¹ McGee v. Overby, 12 Ark. 164; Ammonett v. Harris, 1 Hen. & Munf. 488.

² Mayler v. Ayliffe, *supra*; Biggs v. Benger, 2 Ld. Raym. 1372; Briggs v. Greinfeild, 1 Str. 610.

³ Halsey v. Woodruff, 9 Pick. 555; Fuller v. Chamberlain, 11 Met. 508; Jones v. Grimmett, 4 W. Va. 104; Crawford v. Morris, 5 Gratt. 90; Bohan v. Taylor, 6 Cow. 818; Wakeley v. Hart, 6 Bin. 316; Bostwick v. Lewis, 1 Day, 84; Mitchell v. Milbank, 6 T. R. 199; Hill v. Goodchild, 5 Burr. 2790.

⁴ Halsey v. Woodruff, *supra*.

⁵ Clark v. Bales, 15 Ark. 452; Hardy v. Broadus, 35 Tex. 666; Crawford v. Morris, *supra*; Hair v. Little, 28 Ala. 286; Beal v. Finch, 11 N. Y. 128.

In Clark v. Newsam, 1 Exch. 181, it was held that where two persons were jointly sued for false imprisonment, one of whom had acted from improper motives, the damages ought not to be assessed with refer-

ence to the act and the motives of the most guilty, or the most innocent party; but the true criterion of damages is the whole injury which the plaintiff has sustained from the joint act. Compare Hair v. Little, *supra*.

⁶ Callison v. Lemons, 2 Port. 145; O'Shea v. Kirker, 8 Abb. 69; St. Louis, etc. R. Co. v. South, 48 Ill. 176; Weakly v. Royer, 8 Watts, 460; Tyrrell v. Lockhart, 3 Blackf. 186; Palmer v. Crosby, 1 id. 189; Ridge v. Wilson, id. 409; Mitchell v. Milbank, 6 T. R. 199; Bohan v. Taylor, 6 Cow. 818; Wakely v. Hart, 6 Bin. 316.

In Hill v. Goodchild, 5 Burr. 2790, Lord Mansfield said: "We hold that as the trespass is jointly charged upon both defendants, and the verdict has found them both jointly guilty, the jury could not afterward assess several damages. We do not think that the present case calls for an opinion upon those cases where the defendants are charged jointly and severally, where the defendants

have frequently severed the damages, aiming, no doubt, to apportion them according to the culpability of the respective defendants; and in South Carolina juries are permitted, in

plead severally, or where the defendants are found guilty of several parts of the same trespass, or at a different time; or where a joint action is brought for two several trespasses, and the damages found severally, as being severally guilty. We don't meddle with any of these cases; there is a variety of opinions in the books relating to them."

The report of Heydon's Case, 11 Coke, 5a, states that "a great question was moved and depended for divers terms, how and against whom, and for what damages, judgment should be entered. And at last upon consideration had of the precedents, and of our books, it was resolved *per totam curiam*: 1. That when in trespass against divers defendants, they plead not guilty, on several pleas, and the jury find for the plaintiff in all, the jurors cannot assess several damages against the defendants, because all is one trespass, and made joint by the plaintiff, by his writ and declaration; and although one of them is more malicious, and *de facto* doth more and greater wrong than the others, yet all coming to do an unlawful act, and of one party, the act of one is the act of all of the same party being present. . . . In trespass against two, if the jury find one at one time, and the other at another time, there several damages may be taxed; but if the plaintiff himself confesses that they committed the trespass severally, there the writ shall abate; and so there is a difference between finding by verdict and confession of the party. Also there is a difference betwixt an express confession and not gainsaying.

"2. In trespass against two, where

one comes and appears, etc., against whom the plaintiff declares *simul cum*, etc., who pleads and is found guilty by the inquest to damages, and afterwards the other comes and pleads and is found guilty, the defendant who pleaded last shall be charged with the damages taxed by the former inquest; for the trespass which the plaintiff has made joint by his writ and declaration, and done at one time, cannot be severed by the jury, if the jury find the trespass to be done by all at one and the same time, as the plaintiff hath supposed. Against which it was objected that it might be mischievous to the defendant who last pleads; for excessive damages, by consent between the plaintiff and the first defendant, may be found, with which the second defendant shall be charged; and he shall have no remedy to relieve himself by attain, inasmuch as he is a mere stranger to the issue, upon the trial whereof the damages were assessed. But it was resolved that in such case he should have attain; for although he is a stranger to the issue, yet, because by the law he is privy to the charge, he shall have attain. . . .

"4. In the case at bar, for as much as in judgment of law the several juries gave a verdict all at one and the same time, the plaintiff may have election to have judgment *de melioribus damnis*, by any of the inquests, and it shall bind all; but *fiat nisi unica executio*. . . .

"5. Where, in trespass, the defendants plead several pleas, all triable by one and the same jury, and both the issues are found for the plaintiff, the jury cannot sever the damages; and

their discretion, to do so;¹ elsewhere it is irregular; but the irregularity may be cured by the plaintiff entering a *nolle prosequi* as to all the defendants but one, and taking judgment against him only; and he may elect to enter judgment for the best damages;² or, according to some cases, the [826] plaintiff may elect to enter judgment, *de melioribus damnis*, against all the defendants found jointly guilty.³

In actions against several, damages against all can be assessed only for acts committed by all jointly; and the rule is the same although all have been defaulted by agreement.⁴ Separate acts, not committed with a common purpose or design, and without concert, will not authorize a joint recovery.⁵ If it be proved that only one was concerned, the plaintiff may recover against him as if he only had been sued. Persons who have not conspired together, or united in committing the wrong, should not be joined in the same action as defendants.⁶

§ 464. **Double and treble damages.** When such penal damages are allowed by statute, and are specially claimed in the declaration, as they must be,⁷ it is appropriate, and according to the general practice, for the jury, if they find the defendant guilty, to find single damages in terms; then the court, on

if they do, the whole verdict is vicious."

In *Player v. Warn*, Cro. Car. 54, it was held in an action of trover against two that the jury might find the defendants severally guilty as to part of the property and not guilty as to the residue.

In *Turner v. McCarthy*, 4 E. D. Smith, 250, it was held this could not be done where it appears that the injury resulted from the joint act of both defendants. The case with a perhaps concedes that if it appeared that each defendant was liable for part of the injury, there might be an apportionment of damages (citing *Austen v. Willward*, Cro. Eliz. 860; *Heydon's Case*, *supra*); but not where the whole injury was jointly done. *Holley v. Mix*, 8 Wend. 350.

¹ *Bevin v. Linguard*, 1 Brev. 503; *White v. McNeily*, 1 Bay, 11; *Boon*

v. Horn, 3 Strobb. L. 159. Such apportionment does not diminish the merit or amount of the plaintiff's recovery. The aggregate of all the damages found is the damage of the plaintiff.

² 1 Saund. 207; *Bulkley v. Smith*, 1 Duer, 643; *Crawford v. Morris*, 5 Gratt. 90; *Allen v. Craig*, 13 N. J. L. 294; *Holley v. Mix*, 8 Wend. 350; *Bohan v. Taylor*, 6 Cow. 313.

³ *Heydon's Case*, 11 Coke, 5a; *Rochester v. Anderson*, 1 Bibb, 489; *O'Shea v. Kirker*, 8 Abb. 69; *Bulkley v. Smith*, 1 Duer, 643. But see *Davis v. Chance*, 2 Yerg. 94.

⁴ *Folger v. Fields*, 12 Cush. 93.

⁵ *Leidig v. Bucher*, 74 Pa. St. 65.

⁶ *Id.*

⁷ *Royse v. May*, 98 Pa. St. 454; *Rees v. Emrick*, 6 S. & R. 286; *Chipman v. Emeric*, 5 Cal. 239; *Palmer v. York Bank*, 18 Me. 166.

motion, will direct judgment for the increased damages provided for.¹ But if the statute contains no express or implied directions on the subject, it is immaterial whether the court or the jury doubles or trebles the damages.²

To authorize judgment for such statutory damages, a verdict should be found for the plaintiff, separately, upon a count framed under the statute. When the declaration contains several counts, some for common-law causes, and others upon a statute giving double or treble damages, and a general verdict is found, a judgment for only single damages can be rendered; for it cannot be judicially known but that the verdict includes damages for all the causes stated in the declaration.³

[827] § 465. **Judgment.** The judgment is the legal conclusion upon the facts established by the pleadings and verdict.⁴ If there is no plea, and the subject of the action is of such a nature that, the declaration being confessed, the amount of the recovery can be ascertained by mere computation and the record affords the data for determining the amount for which judgment may be rendered, then the assessment may be made by the clerk — unless the practice is otherwise by statute; in other cases, as we have seen, a jury must be called. If witnesses have to be examined, and the damages are unliquidated, a failure to answer the declaration does not authorize the entry of final judgment in some states,⁵ while in others it

¹ *Cross v. United States*, 1 Gall. 26; *Quimby v. Carter*, 20 Me. 218; *Beekman v. Chalmers*, 1 Cow. 584; *Swift v. Applebone*, 23 Mich. 252; *Warren v. Doolittle*, 5 Cow. 678; *Livingston v. Platner*, 1 Cow. 175.

² *Quimby v. Carter*, 20 Me. 218; *Memphis, etc. R. Co. v. Carley*, 39 Ark. 246.

³ *Ewing v. Leaton*, 17 Mo. 465; *Labeaume v. Woolfolk*, 18 id. 514; *Lowe v. Harrison*, 8 id. 350; *Shrewsbury v. Bawtlitz*, 57 id. 414; *Thayer v. Sherlock*, 4 Mich. 173; *Osborn v. Lovell*, 36 id. 246; *Benton v. Dale*, 1 Cow. 160.

⁴ *Lamphear v. Buckingham*, 38 Conn. 237.

⁵ *Martin v. Price, Minor* (Ala.), 68; *Phillips v. Malone*, id. 110; *Beam v. Hayden*, 5 Bush, 426; *Kenum v. Henderson*, 6 Ala. 132; *Arrington v. Mobile, etc. R. Co.*, 30 Miss. 470; *Clarke v. Seaton*, 18 B. Mon. 226; *Shirley v. Landram*, 3 Bush, 552.

Ballard v. Purcell, 1 Nev. 342, was decided under a code which provided the manner of entering the judgment by default in two different classes of actions: first, where the action is on a contract for the recovery of money or damages only, and there is a failure to answer, when it is made the duty of the clerk to enter the default, and immediately thereafter to enter a judgment; in the second class, de-

does.¹ Where a case is tried by a jury, and they return a verdict for the plaintiff, but without any finding of damages, the court may amend it in this respect by adding nominal damages, as it is a legal consequence of the finding, and enter judgment accordingly; and this correction is necessary to give the plaintiff a judgment for costs.²

§ 466. Judgment must follow verdict.³ The ver- [828]dict is good if it contains the data for ascertaining the amount with certainty by calculation. The judgment is warranted by the verdict when rendered for the amount so ascertained.⁴ Thus, where the suit was on a note for \$100, and the jury returned a verdict "for the plaintiff for the amount of the note, \$100," and a judgment was rendered for \$105.66, principal debt and interest, the court, holding that the interest followed the debt as an incident, affirmed the judgment.⁵ When the verdict is excessive, and the excess is remitted, the judgment is properly rendered for the residue.⁶ If a verdict exceed the penalty of a bond the court may enter judgment for the proper

fault is entered in the same manner, but the plaintiff must apply to the court for the relief demanded in his complaint; and it is also provided that if the taking of an account, or the proof of any fact be necessary to enable the court to give judgment, the court may take the account, or hear the proof, or may in its discretion order a reference or a jury trial for that purpose. It was held, if the suit be for unliquidated damages, they must be shown by proof in one of these modes.

By the code of Kentucky, allegations of value or amount of damages cannot be taken as true by failure to answer. *Daniel v. Judy*, 14 B. Mon. 393; *Clarke v. Seaton*, 18 id. 226.

¹ *Ante*, § 416.

² *Von Schoening v. Buchanan*, 14 Abb. Pr. 185; *Pickens v. Hayden*, 2 Stew. 10; *Stevens v. Briggs*, 14 Vt. 44; *Loomis v. Tyler*, 4 Day, 141; *Thomas v. Commonwealth*, 3 J. J. Marsh. 121.

The omission of the word "dollars" in a verdict for plaintiff in *assumpsit* does not affect the validity of the judgment rendered thereon though no amendment was made. *Hopkins v. Orr*, 124 U. S. 510.

³ *Colonization Society v. Reed*, 25 Tex. Sup. 343; *Diedrich v. Northwestern R. Co.*, 47 Wis. 662; *Mitchell v. Giessendorff*, 44 Ind. 358; *Reid v. Dunklin*, 5 Ala. 205; *Martin v. Commonwealth*, 6 J. J. Marsh. 549.

⁴ See *ante*, § 464; *Dawson v. Shirk*, 102 Ind. 184.

⁵ *Fisk v. Holden*, 17 Tex. 408. See *West v. Milwaukee, etc. Ry. Co.*, 56 Wis. 318.

Under a statute which provides that "when, by the verdict, either party is entitled to recover money of the adverse party, the jury, in their verdict, must assess the amount of the recovery," the court has no power to add interest to the amount named in the verdict. *Hallum v. Dickinson*, 47 Ark. 120.

⁶ *Linder v. Monroe*, 83 Ill. 388.

amount.¹ Where the jury have assessed the damages for a tort at an entire sum no court of law, upon a motion for a new trial because the amount awarded is excessive and for the insufficiency of the evidence to support the verdict, is authorized, according to its own estimate of the amount of damages the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury. If this is done either party may complain of the judgment.² If the statute prescribes the rule of damages and upon the admitted facts the court might properly have directed a verdict for a certain sum, it may increase the amount included therein, the finding being in disregard of the instructions.³

§ 467. Judgment must be certain. And must state the amount adjudged in the lawful money of the forum. The entry ought to contain in itself such precision and certainty as to enable the clerk to issue execution by inspection of it without reference to other entries.⁴ A verdict in *assumpsit* was found in favor of the plaintiff for \$90 with interest from a day stated; a judgment was entered on it for \$90 with interest from the same day. This judgment was reversed and then entered up for the aggregate amount, the verdict being good. The judgment was uncertain. "The date," say the court, "from which interest is to be calculated is given by the verdict, but the time to which it was to run cannot be ascertained without reference to the whole record; it would run till the rendition of the judgment, from which time the principal and interest, as a gross amount of damages, would carry interest. The rendition of the judgment is the act of the court, and a defect in the judgment cannot be amended by the clerk in issuing execution."⁵

¹ Cohea v. State, 34 Miss. 179.

² Kennon v. Gilmer, 131 U. S. 22, 29; Brown v. McLeish, 71 Iowa, 381.

³ Schweitzer v. Connor, 57 Wis. 177. It was held in Rafferty v. Missouri Ry. Co., 15 Mo. App. 559, that a judgment cannot be rendered upon a verdict which awards a less sum as damages than the statute fixes.

⁴ Boyken v. State, 3 Yerg. 426; Peet v. Whitmore, 14 La. Ann. 408; Harmon v. Childress, 3 Yerg. 327;

Spiva v. Williams, 20 Texas, 442; Roberts v. Landram, id. 471; Early v. Moore, 4 Munf. 262; Berry v. Anderson, 2 How. (Miss.) 649; Claughton v. Black, 24 Miss. 185; Downing v. Dean, 3 J. J. Marsh. 378; Mitchell v. Gibson, 14 Ark. 224; Bartlett v. Blanton, 4 J. J. Marsh. 426.

⁵ Tankersley v. Silburn, Minor (Ala.), 185.

A judgment cannot be rendered to draw interest prior to its rendition.

In rendering judgments for money, and all judgments [829] for debts or damages must be so rendered, and in lawful currency,¹ the denominations of the money must be specified.² A judgment for an amount expressed in barren figures, as "for four hundred and sixty-one $\frac{43}{100}$ damages," is a nullity; it does not express a sum of money.³ Expressing the amount in fig-

Simmons v. Garrett, McCahon (Kan.), 82.

The judgment entry in Barnett v. Caruth, 22 Texas, 173, recited the trial and set out the verdict: "We, the jury, find for the plaintiffs one thousand two hundred and nineteen 55-100 dollars principal; and the further sum of one hundred and seventy-seven 89-100 dollars interest; making in the aggregate \$1,347.44." After the recitals the entry contained judgment: "It is ordered, adjudged and decreed by the court that the plaintiffs do recover of the defendant for their debt, damages and costs," etc. This judgment was held erroneous for being uncertain as to the amount of recovery. See Martin v. Commonwealth, 6 J. J. Marsh. 549; Hann v. Gosling, 9 N. J. L. 248; Blane v. Sansum, 2 Call, 495; Codwise v. Taylor, 4 Sneed, 346; Brown v. Horless, 22 Texas, 645.

A more liberal rule was laid down in Pennsylvania, in Lewis v. Smith, 2 S. & R. 142. The judgment in that case is thus referred to and maintained by Tilghman, C. J.: "The judgment was entered in the way very usual in this court in actions on the case; that is to say, the prothonotary entered in the docket *judgment*, without mentioning for what sum. Inconveniences frequently arise from our loose practice; but the practice of every court is justly said to be the law of the court; and we should produce much greater evils than those we wished to prevent should we attempt now to destroy past judgments because

they were not entered in a manner so accurate as they might have been.

. . . I take it, that where judgments are confessed, if the plaintiff's demand is of the nature of a debt, which may be ascertained by calculation, whether it arise on a note or other writing, or on an account, it is sufficient to enter *judgment generally*. The judgment is supposed to be for the amount laid in the declaration, and the execution issues accordingly. But the plaintiff indorses on the execution the amount of the actual debt, and if the defendant complains that injustice has been done the court are always ready to give immediate and liberal relief on motion."

¹ Duerson v. Bellows, 1 Blackf. 217; Maynard v. Newman, 1 Nev. 271; Sibert v. Kelly, 6 T. B. Mon. 669; Whetstone v. Colley, 36 Ill. 328; Stockton v. Scobie, 1 J. J. Marsh. 6; Carson v. Pearl, 4 id. 92; Griffith v. Miller, 6 id. 329; Randolph v. Metcalf, 6 Cold. 400; Erlanger v. Avegno, 24 La. Ann. 77; Buchegger v. Schultz, 13 Mich. 420; Henderson v. McPike, 35 Mo. 255; Bank of P. E. I. v. Trumbull, 53 Barb. 459; Mitchell v. Henderson, 63 N. C. 643; Chamberlin v. Vance, 51 Cal. 75; Munter v. Rogers, 50 Ala. 288.

² Carr v. Anderson, 24 Miss. 188.

³ Carpenter v. Sherfy, 71 Ill. 427; Lawrence v. Fast, 20 Ill. 338; Pittsburg, etc. R. Co. v. Chicago, 53 Ill. 80; Randolph v. Metcalf, 6 Cold. 400. See Field v. Rines, 26 Minn. 201; Gutzwiller v. Crowe, 32 id. 70.

[830] ures is not, probably, an infraction of the statutes requiring judicial proceedings to be recorded in the English language,¹ but it is deemed too unsafe, and therefore has been held not to be tolerated.² In New Jersey, such proceedings being required to be recorded "in words at length," stating the amount of a judgment in figures has been held to be good cause for reversal.³

SECTION 6.

RESTITUTION AFTER REVERSAL OF JUDGMENT.

§ 468. **How made.** When it happens that a judgment is collected or paid pending a writ of error, appeal, or *certiorari*, the defendant is entitled, on its reversal, to restitution of what he has lost by the erroneous judgment. If money has been collected or received upon a judgment valid at the time and binding between the parties, and that judgment is subsequently reversed, it may be recovered, although payment may not have been coerced by actual duress.⁴ It may be recovered by suit.⁵ Other common-law remedies are cumulative.⁶ A court of equity is possessed of power to order the restitution of money collected under its decree after a reversal thereof, if the decree of reversal extends to a dismissal of the bill for want of equity. Such restitution may be ordered by rule.⁷ The court which rendered the erroneous judgment may cause restitution to be made, and the appellate court after reversing it, if informed by the record or otherwise that the judgment has been collected, may require restitution to be made by process from the court below, and enforce compliance by *mandamus*.⁸ The mode of proceeding to procure such restitution must be regulated according to circumstances. Sometimes it is done by a writ of restitution without a *scire facias*, when the record shows that the money has been paid,

¹ Fullerton v. Kelliher, 48 Mo. 542; 854; Clark v. Pinney, 6 Cow. 297; Tankersley v. Silburn, Minor (Ala.), Green v. Stone, 1 Har. & J. 405; 185. Langley v. Warner, 8 N. Y. 827.

² Linder v. Monroe, 33 Ill. 388.

⁶ Id.

³ Cole v. Petty, 2 N. J. L. 60; Walter v. Vanderhoof, id. 73.

⁷ Morgan v. Hart, 9 B. Mon. 79.

⁴ Lott v. Swezey, 29 Barb. 87.

⁸ Ex parte Morris, 9 Wall. 605; Hall v. Emmons, 11 Abb. (N. S.) 435.

⁵ Id.; Sturgis v. Allis, 10 Wend.

and there is a certainty as to what has been lost. In other cases a *scire facias* may be necessary to ascertain what is to be restored.¹

§ 469. Third parties not liable. What is done under [831] the execution pursuant to its precept is valid; and, so far as strangers and third persons are concerned, final.² Where the property taken under the erroneous judgment, in the absence of a *supersedeas* bond on an appeal, has, by voluntary sale, or by seizure and sale under process, passed to innocent purchasers pending the appeal; or where money collected under such judgment is received by one in a fiduciary character, as by an administrator, and he has pursuant to an order of court paid it over to another, the summary remedy provided by the statute for ordering restitution cannot properly be administered; and the party must pursue a different remedy by which all necessary parties may be brought before the court.³ The court

¹ Id.; 2 Salk. 588; Tidd's Pr. 1038; Hunt v. Westervelt, 4 E. D. Smith, 225.

In Safford v. Stevens, 2 Wend. 158, a judgment of nonsuit, rendered in the common pleas, was reversed with costs, and a new trial granted. The record of the supreme court contained a suggestion that the plaintiff had obtained satisfaction of the judgment for costs in the common pleas, whereby the defendant had lost \$78.83, "as was suggested, shown to, and manifestly appeared" to the court; whereupon the court awarded restitution. In the court of errors, referring to this practice, the chancellor said: "It was undoubtedly the former practice to award restitution on the reversal of the judgment, only where it appeared by the return of the execution that the damages or costs erroneously awarded by the court below had been actually levied and paid over. And if the fact did not appear upon the record, the party was put to his *scire facit* inquiry to ascertain the fact, upon the return

of which restitution was awarded. But I believe the modern practice has been to apply to the court on affidavit for leave to suggest the fact on the record, and upon which the judgment of restitution is awarded. I see no objection to this course, as the court would undoubtedly permit the defendant to traverse the suggestion, if there was any doubt of its truth." See Sheridan v. Mann, 5 How. Pr. 201; Arrowsmith v. Van Arsdale, 21 N. J. L. 471.

In New Jersey the amount to be restored is settled by an assessment signed by one of the judges. Id.; Harm v. McCormick, 4 N. J. L. 109; Randolph v. Bayles, 2 id. 52; McChesney v. Rogers, 8 id. 272. The practice is now very generally regulated by statute.

² Langley v. Warner, 8 N. Y. 827; South Fork Canal Co. v. Gordon, 2 Abb. (U. S.) 479; Bank of U. S. v. Bank of Washington, 6 Pet. 8. See Reynolds v. Hosmer, 45 Cal. 616.

³ Polk County v. Syphen, 17 Iowa, 858.

can by such summary remedy reach what is still in the possession of the adversary party.¹ If suit is brought against an officer who has sold property to satisfy a judgment, afterwards reversed, and who still holds the proceeds, the recovery or restitution will be limited to the amount realized; but where the action is against the person who occasioned the injury recovery [832] may be had for the whole damage the injured party has sustained by reason of the erroneous judgment and execution,—he may recover the full value of property sold;² such value to be estimated as of the time the sale was made, with interest, or if the property was wrongfully placed in the hands of a receiver prior to sale, reasonable rents may be recovered up to the time the purchaser obtained possession, with interest from that time and the usual costs.³ The assignee of an erroneous judgment who procures an execution under it and becomes a purchaser of the property pursuant to a sale is not a stranger to the proceedings and cannot claim protection as a *bona fide* purchaser.⁴ But creditors who do nothing more than file their claims against their debtor after judgment has been rendered against him in a suit instituted by other creditors are not liable for the damages resulting from such erroneous judgment, nor can they be compelled to restore the sum received by them in satisfaction of their claims. The defendant's remedy is solely against those who were parties to the original proceeding.⁵

Restitution may be had of land sold under a decree of foreclosure to the plaintiff pending an appeal after reversal, and in such case the restoration will include an accounting for rents and profits less the value of improvements and additions.⁶ It includes the right to costs which the party should have recovered when the erroneous judgment was rendered. Thus after a judgment in favor of a plaintiff had been affirmed by a county court and reversed by the supreme court, it was held that restitution entitled the defendant to the costs of defend-

¹ Lovell v. German R. Church, 12 Barb. 67.

² Reynolds v. Hosmer, 45 Cal. 616; Bac. Abr., tit. Execution; Thompson v. Thompson, 1 N. J. L. 159; Grayson v. Lilly, 7 T. B. Mon. 6.

³ Hays v. Griffith, 85 Ky. 375.

⁴ Reynolds v. Hosmer, 45 Cal. 616; McJilton v. Love, 13 Ill. 486.

⁵ Hays v. Griffith, 85 Ky. 375.

⁶ Raun v. Reynolds, 15 Cal. 459; S. C., 18 Cal. 275.

ing before the justice and of prosecuting the appeal before the county court.¹

Payment or collection of the erroneous judgment is not regarded as a payment of or upon the debt or demand upon which it was rendered, and if a new trial is ordered such payment or collection will only avail by way of set-off.² Restitution in such cases, that is where on reversal a new trial is granted, is held to be discretionary in New York under the code, and the court may therefore impose conditions for the safe keeping of the funds to answer any eventual recovery.³ It was discretionary before the statute.⁴ In determining the

¹ *Estus v. Baldwin*, 9 How. Pr. 80; *Jacks v. Darrin*, 1 Abb. 282.

² *Ringgold v. Randolph*, 13 Ark. 328; *Close v. Stuart*, 4 Wend. 95.

³ *Marvin v. Brewster*, 56 N. Y. 671; *Young v. Brush*, 18 Abb. 171; *Britton v. Phillips*, 24 How. Pr. 111.

⁴ In *Kirk v. Eaton*, 10 S. & R. 103, a judgment confessed was, after a year and a day, sought to be revived by *scire facias*; there was an issue of payment. Judgment for the plaintiff having been rendered, land was sold on execution to third persons to satisfy it. Part of the money was paid to prior incumbrancers or creditors, and the residue to the plaintiff. The judgment was afterwards reversed for irregularity and the defendant asked restitution. On this question the court say, by Tilghman, C. J.: "Under the circumstances of this case that is a very important question. The plaintiff's original judgment, which was a lien on the defendant's land, is in force. But the lien is gone by the sale of the land, because the purchaser will hold it, notwithstanding the judgment be reversed. Then if the money is put in the hands of the defendant all security is gone. It appears that the defendant is in bad circumstances. The proceeds of sale did not pay the whole of the plaintiff's

debt. The plaintiff ought not to hold the money after the reversal of the judgment. But he has a right to ask of the court that they will place it where it may be found if it shall be proved that he has not received satisfaction for the original judgment. We cannot presume that the judgment has been satisfied. Its strength is not at all impaired by the reversal of the proceedings on the *scire facias*. I do not recollect that a case so circumstanced has hitherto been before the court. We have said that, in general, restitution is matter of course. But it will be found that in the cases which have been decided the original judgment has been reversed, and that there is no room for presumption that there is anything due to the plaintiff; or, if the original judgment has not been reversed there has been no suggestion that the security of the plaintiff would be endangered by the restitution. The defendant will obtain substantial justice, and he ought to be satisfied if the money in the hands of the plaintiff be deposited in court, subject to the event of a trial on the issue of payment in another *scire facias* to be sued out by the plaintiff. If, indeed, the defendant had a right to an award of restitution *ex debito iustitia*, then this court would be

rights of the parties on an application for restitution, demands between them not embraced in the original suit and not disposed of on the final judgment or decree will not be considered.¹ But when the rule has been made absolute and a money judgment has been rendered, it stands like any other judgment between the same parties and is subject to be set off by another judgment held against the party in whose favor the restitution is ordered.²

forced to give it, be the consequence what it may. But that I do not take to be the case. In *Baker v. Smith*, 4 Yeates, 185, the court quashed the execution but refused to award restitution. In regard to executions levied on land, our situation is different from England. There the land is not sold, and therefore the judgment retains its lien, although restitution be made of the land. I mean in a case like the present, where the judgment on a *scire facias* is reversed without touching the original judgment. But with us the lien is destroyed by the sheriff's sale, which stands good, though the judgment be reversed. Suppose judgment on a *scire facias* on a mortgage should be reversed for some defect in form after the mortgaged property had been sold. Would it not be a bad administration of justice if the mortgagee should be compelled to place the money in the hands of the mort-

gagor in insolvent circumstances and thus lose all security for his debt? And how, in principle, is that to be distinguished from the case before us? Courts of justice are studious to preserve to the parties all the security in their power. And in this they look to the defendant as well as the plaintiff. A writ of error is no *supersedeas* to an execution whose operation has commenced before notice to the plaintiff. Yet, if the case require it, the money levied by the execution will be retained in court till the event of the writ of error be known. 2 Saund. 101, note b; Willes, 271. There the court ties the hands of the plaintiff for the security of the defendant. Here we ought not to shut our eyes to the consequences of giving the money to the defendant."

¹ *Morgan v. Hart*, 9 B. Mon. 78.

² *Smith v. Bohon*, 12 Bush, 448.

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